From Reparation to Restoration: Moving Beyond Restoring Property Rights to Restoring Political and Economic Visibility

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FROM REPARATION TO RESTORATION: MOVING BEYOND RESTORING PROPERTY RIGHTS TO RESTORING POLITICAL AND ECONOMIC VISIBILITY

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I. INTRODUCTION

In South Africa, whites own about 87% of the country’s agricultural land, though they make up less than 2% of the population. The dominant belief among South Africa’s Black majority is that whites obtained this property not through their hard work, but instead through systematic land dispossession and other forms of unyielding oppression that began at colonial conquest and intensified with Apartheid. There are several other countries where past theft rather than hard work is widely believed to explain the status quo of property ownership. Bolivia’s indigenous majority—primarily the Aymara, Quechua, Chiquitano, and Guarani peoples—constitutes about 62% of the total population. Yet, the minority—the Europeans and mixed-race peoples—owns the lion’s share of the country’s wealth. In the minds of Bolivia’s indigenous majority, the present distribution of land is the result of colonial-era theft, and is thus illegitimate. In 1992, Bolivia embarked on a privatization program that established the post-Communism status quo of property ownership. This program was so riddled with corruption that significant amount of state resources ended up in the hands of a few of Russia’s powerful oligarchs. As a result, the status quo of property ownership in Russia is widely perceived to be illegitimate. These three examples are merely the tip of the iceberg; history is replete with similar examples.

Despite the fact that in certain countries the majority of citizens believe that the property status quo is illegitimate, under the neoliberal paradigm for economic development, property rights are nonetheless given sanctity and enshrined in their constitutions because people have an incentive to work hard and produce if they know that the fruits of their labor are secure and not subject to capricious takings. The underlying

1. Johan van Rooyen & Bongwi Njoe-Mbuli, Access to land: selecting the beneficiaries, in AGRICULTURAL LAND REFORM IN SOUTH AFRICA; POLICIES, MARKETS AND MECHANISMS 461 (Johan van Zyl et al. eds., 1996) (“Land distribution in South Africa is highly skewed. Approximately 87% of agricultural land is held by almost 67,000 white farmers and accommodates a total population of 5.3 million. The remaining 71% of the population, which is predominantly black, live on 13% of the land in high density areas—his former homelands.”). 2. When I refer to Blacks (with a capital “B”) in the South African context, I am talking about those classified as Coloureds, Indians, and Africans under Apartheid. 3. Indigenous groups constitute 56-70% of the population, and two-thirds of indigenous people, who are mostly subsistence farmers, live in poverty. U.S. DEP’T OF STATE, BACKGROUND NOTE: BOLIVIA (Mar. 2007), http://www.state.gov/r/pa/ei/bgn/25751.htm. 4. See Joso de Cordero, Class Struggle: Along the Andes, Indians Agitate for Political Gain; Radicals Topple Governments, Test U.S. Regional Policy; Rising Clout in Bolivia: Longing for the Inca Empire WALL ST. J., Jan. 8, 2004, at A1. 5. Land dispossession is one source of the indigenous people’s recent unrest, which united Evo Morales to the presidency. Id. 6. See generally Andrei Baev, The Privatization of Land in Russia: Reforms and Impediments, 17 LOW. L.A. INT’L & COMP. L. REV. 1, 9 (1994) (discussing the history of Russian land privatization programs and existing land legislation and land reforms); Vernon Peck, Russian Privatization: What Basis Does it Provide for a Market Economy, Transnat’l L. & Contemp. Probs. 21, 22, 27 (1995) (noting the rapid pace of privatization: “there were only thirty-nine private enterprises as of January 1992; by February 1994 there were about 95,000 such firms.”).
assumption behind the sanctity given to property is the notion of desert: People generally deserve what they own because they labored for it or received it through the hard work of someone else who bequeathed that property as a gift or in a will. The "sanctity of property" principle becomes obfuscated when sanctity is given to property arrangements widely perceived to be defined by pervasive theft. In such cases, the principle merely serves to ossify ill-gotten gains.

It is an injustice when the law provides sanctuary to past theft instead of reversing it. More importantly, this injustice can lead to disrespect for property rights, which can substantially disrupt market economies. Nevertheless, the neoliberal solution for developing successful, stable markets is to deregulate trade and markets, reduce restrictions on capital, reduce government spending, and privatize government enterprises. In the effort to promote stable, successful markets, the neoliberal agenda often discounts the importance of transforming, and thus legitimizing, the property status quo.12

Transforming the property status quo is especially necessary when an ethnically distinct minority acquired significant amounts of property through some form of past theft and today continues to enjoy the benefits of their illicit or immoral act at the expense of the majority. At the very least, the majority would resist strong property rights that ossified these illicit gains; at worst, they would be more inclined to capricious and arbitrary takings of land, as witnessed in Zimbabwe beginning in 2000.13

In her book, World on Fire, Amy Chua argues that the calamitous situation in Zimbabwe, and other similarly situated nations, is caused by the fact that

ed., R. Hildreth trans., London, Truthbr & Co. 4th ed. 1882) (1843) ("Law does not say to man, Labour, and I will reward you; but it says, Labour, and you shall possess the enjoyment of your labour—that natural and sufficient recompense which without me you cannot preserve; I will assure you by the hand which may seek to ravish it from you. If industry creates, it is law which preserves; if at the first moment we owe all to labour, at the second moment, and at every other, we are indebted for everything to law.") (emphasis original). For a critique of Bentham, see Stephen R. Munzer, A Theory of Restorative Legislation, 61 Tex. L. Rev. 425, 473 (1982) (arguing that Bentham "exaggerates the need to uphold existing expectations" with regard to property arrangements).

12. Geoffrey E. Schneider, Neoliberalism and Economic Justice in South Africa: Revisiting the Debate on Economic Apartheid, 61 Rev. Soc. Econ. 23, 25 (2003) (arguing that neoliberal economists have a "penchant to ignore the problems created by inequality and their pursuit of narrowly defined economic goals and criteria," causing them to "abstract from reality and ignore the economic benefits that could stem from developing an economy from the bottom up."). If the property status quo is successfully transformed and chaos averted, an ancillary effect of this project will be to buttress the economic system—neoliberalism. Inasmuch as neoliberalism systematically concentrates economic and decision-making power in an elite group, this is a temporary evil. The larger, long-term project is to enhance democracy by democratizing decision-making power to the greatest extent. Invisible people, however, do not have the power to overcome economic forces that tend to undermine the devolution of decision-making power, whereas visible people do. Reversing invisibility and creating an empowered citizenry is a necessary first step in the long-term project to create an economic system that does not systematically favor the elite. 13. See generally Donald S. Moore, Suffering for Territory: Race, Place, and Power in Zimbabwe (2005).

14. CHUA, supra note 7, at 6. See also Amy Chua, The Paradox of Free Market Democracy: Rethinking Development Policy, 41 Harv. Int'l L.J. 287, 287–92 (2000); Amy Chua, Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development, 108 Yale L.J. 1, 6 (1998); Amy Chua, The Privatization-Nationalization Cycle: The Link Between Markets and Ethnicity in Developing Countries, 95 Colum. L. Rev. 223, 226 (1995). Also, it is important to note that Chua recognizes that the introduction of democracy does not necessarily mean that the majority will gain any significant political power because the will of the majority is still often subordinated via vote rigging and corruption of various hues. Chua, Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development, supra, at 6–16.

15. CHUA, supra note 7, at 6.

16. There is property-induced invisibility, which results from the dispossession of one's property, and invisibility that occurs through other means, such as torture, incarceration, loss of employment, loss of educational opportunity, etc. Restoration and redistribution, which is not based primarily upon returning a lost right in property, must be implemented in tandem to address the needs of both populations simultaneously. See infra Part II and accompanying discussion of invisibility.

[markets concentrate wealth, often spectacular wealth, in the hands of the market-dominant minority, while democracy increases the political power of the impoverished majority. In these circumstances the pursuit of free market democracy becomes an engine of potentially catastrophic ethnonationalism, pitting a frustrated "indigenous" majority, easily aroused by opportunistic vote-seeking politicians, against a resented, wealthy ethnic minority.14

She argues that this volatile dynamic of inequality produces social instability in the form of a backlash against market-dominant minorities, democracy, and markets.15 To avoid a backlash, I argue that states with this dynamic must change the actual distribution of property. Countries can achieve this end through various means.

There are several countries that have decided to change the property status quo by restoring past rights in property. This has happened post-communism in countries such as Germany, Czech Republic, Slovakia, Hungary, Albania, Bulgaria, Croatia, Estonia, Lithuania, and Romania; post-World War II in the former Federal Republic of Germany; post-Apartheid in South Africa; and post-conflict in Kosovo. Native people in Canada, Australia, New Zealand, and the United States have also received compensation for property that was improperly confiscated in the past. This Article will explore two important questions facing countries that decide to restore past rights in property: Who, at a minimum, should receive restoration of property rights, and how should the restorative process transpire?

Part II explores who, at a minimum, should receive restoration of property rights. I argue that, under certain circumstances, confiscating property removes people from the social contract and renders them invisible. I call this property-induced invisibility. Widespread property-induced invisibility is of particular concern because it can place the legitimacy of existing property arrangements in serious doubt. As a baseline, therefore, states must rectify property-induced invisibility in the restorative process.16
Part III investigates how the restorative process can address property-induced invisibility. I argue that societies must change the focus from the limited concept of reparations-return of the actual property confiscated-to restoration, which is the larger project of restoring a dispossessed group or individual’s relationship to society. In the context of property-induced invisibility, the confiscation of property is part of a larger strategy of dehumanization, resulting in the removal of that person or community from the social contract. The consequence is more than just the taking of real property, but also the destruction of their relationship to society. Hence, the restorative process must do more than just give people their property back; its aim must be to repair this relationship to society (that is, restore political and economic visibility). I argue that a substantial amount of work towards restoring a relationship to society and correcting property-induced invisibility will occur if the dispossessed are included in the social contract through a bottom-up process that provides asset-based choices, which both allow people to choose how they are made whole and give them viable options from which to choose.

Lastly, in Part IV, I evaluate South Africa’s Land Restitution Program (“LRP”) to test the theoretical concepts of property-induced invisibility and restoration that I have constructed. More specifically, I investigate whether, as a baseline, South Africans subject to property-induced invisibility benefit from the LRP. I also analyze how the government can transform the LRP from a reparations program to a restoration program.

For the purposes of this Article, legitimacy is construed in both empirical and moral terms. Empirically, legitimacy is determined by the number of citizens who believe that land arrangements are legitimate. Under the Weberian view, legitimacy “is meant to designate the beliefs and attitudes that members have toward the society they make up. The society has legitimacy when members so understand and value it that they are willing to assume the disciplines and burdens which membership entails. Legitimacy declines when this willingness flags or falt.”

17. The following definitions will be used throughout the Article: Compensation is a generic term for any action taken to remedy a violation of a right, specifically a right in property; Monetary compensation—money is given to remedy the harm; Restitution—compensation is the return of the exact property taken or property that is similar; Reparations—compensation for the loss of a past right, which does not allow the dispossessed person to take an active role in shaping her remedy.

18. The legislature can construct a broad set of choices that make sense given the historical, political, economic, and social context of the country and the nature of the expropriations. The remedies may include restoration of property and cash or in-kind payments. In-kind payments can entail, *inter alia*, the establishment of a trust fund that can be used for education and health expenses, a voucher to purchase any government services or properties, or preferential access to credit. See infra Part III and accompanying text.


20. Charles Taylor, *Alternative Futures: Legitimacy, Identity, and Alienation in Late Twentieth Century Canada, in COMMUNITARIANISM: A NEW PUBLIC ETHICS* 58 (Markale Daly ed., 1994). See also JEREMY BENTHAM, *THEORY OF LEGISLATION* XIV (Oceana Publications 1975) (“Bentham grasps, thus, that public opinion is an important supportive structure both for the legitimacy of the law (as well as the legal system) and for its effective implementation”). Legitimacy can be based on perceptions. See Simmons, supra note 19, at 749. In contrast, it can be based on rights derived from either written documents (for example, a constitution) or unwritten conceptions of morality. There is substantial literature in psychology and political science about legitimacy. For a thorough literature review of legitimacy as discussed in psychology, see Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375, 375 (2006) (“[L]egitimacy is a psychological property of an authority, institution, or social arrangement that leads those connected to it to believe that it is appropriate, proper, and just. Because of legitimacy, people feel that they ought to defer to decision and rules, following them voluntarily out of obligation rather than out of fear of punishment or anticipation of reward. Being legitimate is important to the success of authorities, institutions, and institutional arrangements since it is difficult to exert influence over others based solely upon the possession and use of power.”). For a thorough literature review of legitimacy as discussed in political institutions, see James L. Gibson et al., *Why Do People Accept Public Policies They Oppose? Testing Legitimacy Theory with a Survey-Based Experiment*, 58 POLICI. Q. 187, 187 (2005).

21. A. Taylor, supra note 20, at 58.

22. Weber’s conception of legitimacy is most vulnerable when the majority of a society’s citizens are manipulated or manipulated by the state. Weber died in 1920 and did not live through World War II to witness how Hitler and the Nazis manipulated the fears of many Eastern Europeans and provided the average citizen to hate and kill millions of Jews, Roma, and Sinti. Post-WWII, it is painfully obvious that a purely empirical definition of legitimacy is inadequate.

The use of invisibility as a metaphor for a person’s political place in society is not new. This Article echoes many of the characteristics of invisibility developed by legal scholars who have written about the plight of blacks,24 Latinos,25 gays,26 and women.27 The metaphor is often used as a conduit to explore concepts such as exclusion, subjugation, identity suppression, assimilation, nominal political representation, and, in the case of gays, lack of physical recognizability.

The metaphor of invisibility gained widespread recognition in 1952 with the publication of Ralph Ellison’s classic novel, Invisible Man.28 In the novel, invisibility is a symptom of a societal disease in which the

24. See T. Alexander Aleinikoff, A Case For Race-Consciousness, 91 Colum. L. Rev. 1060, 1070 (1991) (“Blacks are ‘invisible’ not in the sense that whites do not see them; they see whites primarily what a white dominant culture has trained them to see.”); D. Marvin Jones, “We’re All Stuck Here For A While”: Law and the Social Construction of the Black Male, 24 J. Contemp. L. 35, 52–54 (1998) (arguing that black men are unable to separate themselves from white perceptions and stereotypes of who they are as a group and that deeply embedded stereotypes and myths about black men have eclipsed their true identity and caused their invisibility).


28. See generally RALPH ELLISON, INVISIBLE MAN (1947).

29. Id. at 3.


31. Id. at 1 (“All human relationships are structured and defined by the relative power of the interacting persons.”). A socially dead person is powerless and has “no societally recognizable existence outside of his [powerful] master.” Id. at 4–5.

32. In democracies, the terms are set by a constitution or other federal and local laws as well as informal or customary laws. For more on how the social contract establishes moral and political obligations between the state and individuals, see, for example, P.F. Browne, Home and the Social Contract, 28 Pub. Q. 133, 132 (1978) (“While the details of the social contract varied from theorist to theorist, it was common to all forms of social contract theory that no one has rightful political authority and no one is morally obliged to yield political obedience except in consequence of a social contract.”); Edward A. Harris, Notes From Social Contract to Hypothetical Consent: Genealogies of the Obligation to Obey the Law, 92 Colum. L. Rev. 651, 657 (1992) (“Social contract theory appeals to the principle of rational voluntarism in explaining the origin of moral and political obligations, and to the principle of consent in explaining how the autonomous individual voluntarily relinquishes her natural liberty to the state, thereby incurring moral and political obligations.”). Many scholars also question whether the social contract is the source of moral and political obligation. See, e.g., A. JOHN SIMMONS, MORAL PRINCIPLES AND POLITICAL OBLIGATIONS 3–4 (1979); SOCIAL CONTRACT THEORY 83–90, 97–123 (Michael Leslau ed., 1986).
Their work provides the foundation for my understanding of the circumstances under which a relationship between the state and an individual breaks down, such that a person or community is taken out of the social contract and made invisible.

According to Locke, in the state of nature, all individuals are equal and "much better that they are not bound to submit to the unjust will of another." When an aggressor threatens to take away an individual's life, liberty, or estate (that is, their Property), that individual has the right to resort to violence in self-defense. Consequently, a state of war ensues and is fueled by the need for every person to constantly and individually defend their Property against interlopers and thieves. To avoid this calamitous fate and to secure protection of their Property, people cede their individual God-given sovereignty and vested it in the state as fiduciary. For Locke, this bargain-for-exchange is the essence of the social contract.

An individual's consent to be part of a particular society is a binding obligation that forbids him from returning to the state of nature, unless the government is dissolved or an unjust state action terminates his participation in the contract. The state was given its sovereignty in a fiduciary capacity, and if the state fails to fulfill its fiduciary duties, then sovereignty is returned to its source—the people. Since the protection of Property is the central reason for entering into a social contract in the first place, the systematic and arbitrary confiscation of Property by the state is one of the primary reasons that an individual would be removed from the social contract and once again become sovereign in her own right. This is especially true when the arbitrary confiscation leads to the individual's total dependence on the state, such that she is in the state's absolute power. At this point, individuals have a right to revolution which those who are still in the social contract do not have.

Carole Pateman and Charles Mills give another perspective on how people are excluded from the social contract. Their concept of exclusion is more extensive than Locke's, in that it describes how some people are never initially included, or are included but relegated to a subordinate position, in the social contract. Also, while Locke's analysis is at the level of the individual, Pateman and Mills analyze how groups are excluded from the social contract.

In her groundbreaking book The Sexual Contract, Pateman argues that alongside the social contract exists a concomitant sexual contract. The sexual contract ensures and solidifies men's political right over women. She argues that while social contracts are supposed to enhance and secure freedom, this freedom is reserved for certain classes of individuals, excluding women. Pateman claims that contracts are one of the most important ways social relationships are formed, and women are subordinated in these relationships due to social fictions surrounding who

33. John Locke, Two Treatises of Government 276 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690). Locke's state of nature explanation of moral obligation to the state is still relevant today because State-of-nature explanations of the political realm are fundamental potential explanations of this realm and pack explanatory punch and illumination, even if incorrect. We learn much by seeing how the state could have arisen, even if it didn't arise that way. If it didn't arise that way, we also would learn much by determining why it didn't; by trying to explain why the particular bit of real world that diverges from the state-of-nature model is as it is.

34. Id. at 368-69. Life, liberty and estates are what Locke defines as property, and this is what I mean when I use the capitalized term "property" in this portion of the article discussing Locke. When I use the un-capitalized term "property" throughout the article, it refers to real property. I limit the discussion in this Article to the confiscation of real property and do not include other types of property, including cultural, intellectual, or property in one's person.

35. Id. at 308-09.

36. Id. at 368-69. (“The great and chief end therefore, of Mens uniting into Commonweals, and putting themselves under Government, is the Preservation of their Property, To which in the state of Nature there are many things wanting”) (emphasis in original).

37. Id., but cf. Bentham, supra note 11, at 72-74, 81-82 (discussing Locke's social contract theory).

38. Locke, supra note 33, at 367 (“Whereas he, that has once, by actual Agreement, and any express Declaration given his Consent to be of any Commonweal, is perpetually and indispensably obliged to be and remain unalterably a Subject to it, and can never be again in the liberty of the state of Nature; unless by any Calamiety, the Government, he was under, comes to be dissolved; or else by some publick Act cuts him off from being any longer a Member of it.”) (emphasis in original).

39. Celeste Friend, Social Contract Theory [Internet Encyclopedia of Philosophy] (2001), http://www.iep.utm.edu/soc-cont.htm (“The justification of the authority of the executive component of government is the protection of the people's property and wellbeing, so when such protection is no longer present, or when the king becomes a tyrant and acts against the interests of the people, they have a right, if not an outright obligation, to resist his authority. The social compact can be dissolved and the process to create political society begun anew.”).

40. Locke, supra note 33, at 297 (emphasis original) (“He who attempts to get another Man into his Absolute Power, does thereby put himself into a State of War with him: It being to be understood as a Declaration of a Design upon his Life.”).

41. Locke bases his justification for private ownership on the individual. See Christopher Berry, Property and Possession: Two Replies to Locke—Hume and Hegel, in NOMOS XXII: Property 89 (J. Roland Pennock & John W. Chapman eds., 1968) (“The most distinctive element in Locke's theory of property in his two Treatises of Government is his justification of private ownership in purely individual terms.”).

42. See Carole Pateman, The Sexual Contract 1-3 (1988). See also Friend, supra note 39 (citing Pateman) (“The 'original pact' that precedes the social contract entered into by equals is the agreement by men to dominate and control women. This 'original pact' is made by brothers, literally or metaphorically, who, after overthrowing the rule of the father, then agree to share their domination of the women who were previously under the exclusive control of one man, the father. The change from 'classical patriarchism' to modern patriarchy is a shift, then, in who has power over women. It is not, however, a fundamental change in whether women are dominated by men. Men's relationships of power to one another change, but women's relationship to men's power does not. Modern patriarchy is characterized by a contractual relationship between men, and part of that contract involves power over women.”).

43. Pateman, supra note 42, at 2 (“The social contract is a story of freedom; the sexual contract is a story of subjection. The original contract constitutes both freedom and domination. Men's freedom and women's subjection are created through the original contract—and the character of civil freedom cannot be understood without the missing half of the story that reveals how men's patriarchal right over women is established through contract.”).

44. Id. at 62.

45. Id. at 5.
has the capacity to enter into contracts.46

The imaginations of Hobbes, Locke, Rousseau, Kant, and other social contract theorists were arrested by the prevailing myths of female inferiority that reigned unchallenged in their respective time periods. One factor that harmonizes the writings of these men is the transformation of social or anatomical differences between women and men into political differences.47 Thus, women were perceived as not being full-fledged persons who possessed the mental acumen necessary to enter into the social contract on the same terms as their male counterparts.48 This variant of dehumanization led to their exclusion from society as full and equal members.

Charles Mills also makes an important contribution to the body of literature on social contract theory that examines the politics of dehumanization and exclusion. In his influential book, The Racial Contract, he builds upon Pateman’s work on gender to elicit the role of social contract in racial subordination.49 The racial contract is intended to be an actual historical account of the origins of racial oppression and white supremacy rather than a political metaphor.50 Mills argues that the racial contract underwrites the social contract and ensures that non-whites are excluded or marginalized.51

One fundamental premise of contract theory is that all men are born free and live as such in the state of nature. Mills argues that European powers considered non-white people to be savages born “unfree and unequal.”52 This subordinate ontological status was then legally codified and perpetuated by both individuals and institutions. Despite the strands of enlightened thought and egalitarianism that pervaded Europe at different points in history, Mills posits that “European humanism usually meant that only Europeans were human . . . [and] nonwhite subpersonhood is enshrined simultaneously with white personhood.”53 Like Pateman, Mills argues that when certain people are considered sub-persons, this conceptual dehumanization becomes the yeast in the leaven bread of oppression and exclusion.54

In sum, Locke, Pateman, and Mills lay the groundwork for a robust understanding of how people are excluded from the social contract and thus made invisible. Both Pateman and Mills stress the fact that exclusion, or lack of initial inclusion, from the social contract is premised upon the idea that those excluded are not full persons. In a Lockeian analysis, when the state systematically and arbitrarily deprives a person of life, liberty, or estate and places an individual in its absolute power, creating a situation of dependency, then the individual has effectively been removed from the social contract and returned to the State of Nature, where the state no longer has any legitimate authority over him.55

While I realize that invisibility is a broad concept that can result from, inter alia, confiscation of property, severe restrictions on liberty, disappearance, incarceration, torture, loss of employment, educational disruption, psychological scars, and sexual violence, in this Article, I concentrate on the property-related avenues to invisibility.56 Using the work of Locke, Pateman, and Mills, I have constructed a definition of property-induced invisibility that enumerates the circumstances in which real property is confiscated from individuals or communities based on the understanding that they are subhuman,57 and as such, victims are excluded from the social contract and therefore become invisible. Property-induced invisibility is the confiscation or destruction of real property with no payment of just compensation, executed such that dehumanization occurs. The act is perpetrated by the state or other prevailing power structure(s) and adversely affects powerless people or people made powerless

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46. Id.
47. Id. at 6.
48. In the work of Hobbes, women are excluded from becoming civil individuals with the capacity to enter into the original pact. Id. at 50. For Locke, women have not risen to the status of individual in the State of Nature, and only individuals can enter into the social contract. Id. at 52. Pateman highlights, however, that women’s capacity with regard to entering into the marriage contract was never questioned. Id. “Women are held both to possess and to lack the capacities required for contract—and contract demands that their womanhood be both denied and affirmed.” Id. at 60.
50. Id. at 18–19. The social contract story recounted by Hobbes, Locke and other philosophers is a political fiction and thus does not explain the actual and historical origins of society. Id. at 19. Although the sexual contract explains actual conditions, it does not give an historical exposition of how things come to be. Id.
51. Id. at 72–73.
52. Id. at 16 (emphasis in original).
53. Id. at 27, 56 (emphasis in original).
54. Friend, supra note 39 (“This racial contract determines in the first place who counts as full moral and political persons, and therefore sets the parameters of who can ‘contract in’ to the freedom that the social contract promises. Some persons, in particular white men, are full persons according to the racial contract. As such they are accorded the right to enter into the social contract, and into particular legal contracts. They are seen as fully human and therefore as deserving of equality and freedom. Their status as full persons accords them greater social power. In particular, it accords them the power to make contracts, to be the subjects of the contract, whereas other persons are denied such privilege and are relegated to the status of objects of contracts.”).
55. LOCKE, supra note 23, at 350–51.
56. Invisibility and property-induced invisibility are highly interrelated concepts. Property confiscation can cause invisibility or, alternatively, property confiscation can be a consequence of the fact that people were made invisible through other means.
57. In the language of Carol Rose, the nature of the property disruption I speak of can be classified as a “Type III disruption.” Carol Rose, Property and Expropriation: Themes and Variations in American Law, 2000 UTAH L. REV. 1, 6 (“Type III disruptions are what I will call ‘extraordinary.’ These are the rights alterations that accompany revolutions and warfare or other upheavals that create massive overthrows of existing property rights and resource uses.”). This is in contrast to property disruptions classified as Type I and Type II, which are of the “housekeeping” and “regulatory” varieties, respectively. Id. at 5–6.
by the act, such that they are effectively left economically vulnerable and dependent on the state to satisfy their basic needs.59 Individuals and communities subject to property-induced invisibility have a moral right to compensation.

Using historical examples, the chart below portrays the nuances of the five criteria for property-induced invisibility. My claim is that all five criteria must be satisfied in order for property-induced invisibility to result. The answers I have provided below are not intended to be definitive, and I encourage debate as to whether the historical examples used actually do or do not satisfy the five criteria. My primary objective is to give readers a sense of how to apply the criteria and establish an understanding of both the expansiveness and the limits of property-induced invisibility.

### Contours of Property-Induced Invisibility

<table>
<thead>
<tr>
<th>Property confiscations with no payment of just compensation</th>
<th>Executed such that dehumanization occurs</th>
<th>Perpetrated by the state or other prevailing power structure(s)</th>
<th>Adversely affecting powerless people(s) or people(s) made powerless by the act</th>
<th>Such that communities, individuals or their heirs are effectively left economically vulnerable and dependent on the state to satisfy their basic needs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Black farmers in South Africa under colonialism and Apartheid</td>
<td>Yes. Most times payment was not made, but in rare instances</td>
<td>Yes. Colonialist and Apartheid government officials conspicuous</td>
<td>Yes. The fact that victims owned land signified they were inferiors</td>
<td>Yes. Forced to move to Bantu strata, where land was inferior</td>
</tr>
<tr>
<td>Property confiscated during slavery, colonization and/or Apartheid</td>
<td>Yes. There was a massive exchange of land from Tutsi to Hutu hands and, for the most part, compensation was never paid</td>
<td>Yes. Hutus were widely referred to as racialized in need of extermination</td>
<td>Yes. The state broke after Habyarimana was killed; consequently, the Hutus were made powerless by the prevailing power structure at the time</td>
<td>Yes. Both Hutus and Tutsis were poor, most living on less than $1 per day. Hutus were made especially powerless in the face of the Hutus who committed genocide</td>
</tr>
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</table>

58. Defined in this manner, property-induced invisibility is always a violation of human rights because “human rights ‘derive from the inherent dignity of the human person’ . . . and are, by definition, the rights one has simply because one is a human being.” INTERNATIONAL HANDBOOK OF HUMAN RIGHTS 1 (Jack Donnelly & Rhoda E. Howard eds., 1987) (citations omitted). Therefore, any action that causes dehumanization is a violation of these rights. Due to the dehumanization component, invisibility always involves a violation of human rights, but a violation of human rights does not always result in invisibility.

The human right that most directly deals with the confiscation of property is found in the Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 10, 1948). It asserts that a person arbitrarily deprived of her property with no just compensation is entitled to an effective remedy. Id. at 74 (“No one shall be arbitrarily deprived of his property.”). See also id. at 73 (“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”). It is important to further note that the realization of certain economic and social rights (for example, the right to housing) requires citizens to have a basic level of property.

<table>
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<tr>
<th>Property conditions with no payment of just compensation</th>
<th>Executed such that dehumanization occurs</th>
<th>Perpetrated by the state or other prevailing power structures</th>
<th>Adversely affecting powerless people(s) or people(s) made powerless by the act</th>
<th>Such that communities, individuals, or their adherents effectively left economically vulnerable and dependent on the state to sustain their basic needs</th>
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<tr>
<td>Japanese in American internment camps during World War II</td>
<td>Yes. Some property was restored or compensated through symbolic reparations, but most of it was not.</td>
<td>Yes. Their equal standing as law-abiding citizens was revoked, and they were dehumanized and forced to live in segregated internment camps based on their ethnicity and not any wrongdoing.</td>
<td>Yes. Internment was inaugurated by the US government. All three government branches were involved in authorizing the internment.</td>
<td>Yes. Many were robbed of their jobs and property, and thus were forced to rely on welfare for their basic sustenance and left economically vulnerable.</td>
</tr>
<tr>
<td>British Crown after the American Revolution</td>
<td>Yes. Lands that once belonged to the British Crown were transferred to the administrators of the colonies after the Revolution and no compensation was paid for the lands.</td>
<td>Yes. Although American revolutionaries were fighting against a more powerful adversary that they respected and often tried to emulate, war is per se an attempt to dehumanize or kill the enemy.</td>
<td>No. The British Crown was far from powerless before and after the American Revolution.</td>
<td>No. The loss of the American colonies did not render Britain a poor nation.</td>
</tr>
</tbody>
</table>

61. See generally Peter Irons, Justice at War: The Story of the Japanese American Internment Cases (1983); Eric K. Yamamoto et al., Race, Rights, and Reparation: Law and the Japanese American Internment (2001); Jerry Kang, Denying Prejudice: Internment, Redress, and Denial, 51 UCLA L. Rev. 933 (2004). See also Lika C. Miyake, ForSAKEN and Forgotten: The U.S. Internment of Japanese Peruvians During World War II, 9 Asian L.J. 163, 163-64 (2002) (describing the experiences of Japanese Peruvians during the War, their deportation following the war, and lack of reparations provided to them). Property-induced invisibility is not applicable to the British Crown, but would be applicable to the Loyalists who fought in the war and, after their property was confiscated, were left powerless, poor, and dependent on the state for their basic needs. Confiscation of Loyalist property during the American Revolution began with the seizure of Tory assets in 1775, and later came to include confiscation of Loyalist lands. While some Loyalists were able to recover confiscated property through American courts following the war, most Loyalists “never attempted to recover any of their losses…” David E. Mads, The Massachusetts Loyalists and the Problem of Amenity, 1775-1790, in Loyalists and Community in North America 72 (Robert M. Calhoun et al. eds., 1984). See also Adele Hant, Loy- alism in Revolutionary Virginia: The Norfolk Area and the Eastern Shore 181 (1982) (noting that as a result of a 1779 Act, British property became “vested in the commonwealth [of Virginia]”); Robert Stansbury Lambert, South Carolina Loyalists in the American Revolution 239 (1987) (noting that the South Carolina law permitting the confiscation of British property stated that “the state could no longer protect the public property of persons who had supported the Crown” because of prior British confiscation and destruction of South Carolina property).
1. Confiscation or destruction of property from owner(s) with no payment of just compensation:

Property-induced invisibility is relevant when compensation is not paid at all, or if it is not just (that is, inadequate or accepted under conditions of duress, fraud, or extreme asymmetrical information). The form and amount of just compensation should be contextual. Just compensation can be the fair market value of property at the time of confiscation or destruction. Alternatively, it could entail a settlement reached in negotiations free from significant duress or asymmetries of information that would capture a property's non-market and market value.

65. See generally Richard W. Crowder, Restitution in the Czech Republic: Problems and Prague-Notia, 5 Isra. L. Rev. 237, 238 (1994) (noting that outside of the Soviet Union itself, the greatest magnitude of property confiscation and nationalization occurred in the Czech Republic); Frances H. Foster, Restitution of Expropriated Property: Post-Soviet Lessons for Cuba, 34 Colum. J. Transnat'l L. 621 (1996); Rainer Frank, Privatization in Eastern Germany: A Comprehensive Study, 27 Vand. J. Transnat'L L. 809, 813–15 (1994) (noting that Communist expropriations in East Germany occurred both under the Soviet occupation from 1945–1948, and under the East German Government from 1949–1989). The Communist examples are unique because land was confiscated in order to give effect to a drastically different conception of property: Individual ownership was widely prohibited, while collective ownership became the norm. This is in contrast to the vast majority of situations, where the status of property in society did not change, only the owners did. Under Communism, the purported reason for the shift from individual to collective ownership was to create a more egalitarian society, where humanity was valued above property. In this context, it is important to note that dehumanization only results from the actual violent taking of property or a credible threat to do so, rather than the Communist reordering or property arrangements taken alone.

66. In the debates leading to the ratification of the Thirteenth Amendment, Republicans were divided on the question of whether the writers of the Constitution viewed slaves as property. This question was closely linked to the debate on whether slave owners should receive compensation for the emancipation of slaves. Some Republicans felt that no slave owners should be compensated, but most Republicans believed slave owners in loyal states should be compensated. In the end, in part due to the growing hostility toward slave owners as the Civil War continued, Republicans "backed a constitutional amendment that said nothing about compensation." However, the Congress "refused to deny explicitly that loyal slave owners should be reimbursed for their loss, thus leaving open the possibility of further legislation granting compensation." See Michael Vorenberg, Final Freedom: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT 109 (2001). In contrast, the British Emancipation Act gave slave owners compensation of twenty million pounds and the option of keeping slaves on as paid apprentices for up to six years. See Seymour Drescher, Abolitionist Expectations: Britain, in AFTER SLAVERY: EMANCIPATION AND ITS DISCONTENTS 54 (Howard Temperley ed., 2000).
2. Executed such that dehumanization occurs:

Pateinan and Mills convincingly argue that removal from the social contract is predicated upon various forms of dehumanization. At its core, [D]ehumanization involves denying a person “identity”—a perception of the person “as an individual, independent and distinguishable from others, capable of making choices”—and “community”—a perception of the other as “part of an interconnected network of individuals who care for each other.” When people are divested of these agentic and communal aspects of humanness they are deindividuated, lose the capacity to evoke compassion and moral emotions, and may be treated as means toward vicious ends.67

For example, the South African Apartheid-era government’s overt belief that Blacks were sub-human, the militant Hutus’ belief that Tutsis’ lives were worth no more than cockroaches’, and the subsequent property confiscations or destruction based on these beliefs are strong forms of dehumanization. Dehumanization will also result insofar as property is confiscated in the context of a deadly war or rebellion (death is the most extreme form of dehumanization).

There is a spectrum of offenses that do not reach the point of dehumanization but do reduce an individual or community’s dignity.68 For instance, if a modern day Robin Hood steals someone’s property because she is exorbitantly wealthy while others have too little, this will not necessarily lead to the dispossession’s dehumanization. The theft may result, however, in a blow to her dignity.

3. Perpetrated by the state or other prevailing power structure(s):

The social contract is an agreement between a state and its citizens, so only state action or inaction (often in the form of structural inequality that it tolerates) can forcibly remove citizens and make them invisible. The state’s responsibility for a person or community’s invisibility is contingent upon its level of culpability. For example, during Hurricane Katrina, United States shores along the Gulf of Mexico were ravished, people were displaced or died, and billions of dollars worth of property was destroyed.69 Hurricanes are an uncontrollable act of nature, but the damage was deeply intensified by the fact that the state (both federal and local governments) knew the levees were faulty and furthermore, failed to respond adequately once the scale of the devastation became apparent.70 Watching the post-hurricane chaos that erupted in the Superdome, it was evident that scores of people were dehumanized by the effect of state inaction. To the extent that the state had a duty to keep the levees in good condition and respond adequately but failed to do so, it is responsible for the invisibility although the hurricane was an act of God.

There may be situations in which the state is not complicit, but is nonexistent or simply too weak to stop the dispossession. In this case, it is a non-state actor that becomes the prevailing power structure, steps into the shoes of the state, and renders people invisible. This occurred, for example, in Nazi-occupied territories during World War II. Although many of the governments in the occupied territories were still nominally in power, the Nazis were the true prevailing power structure that dictated the new terms of the social contract and caused widespread death and invisibility among the Roma, Sinti, Jews, and other groups.

4. Adversely affects powerless people or people made powerless by the act:

Throughout history, certain people have been targets of confiscations because they were economically powerless and thus vulnerable. The scapegoating of Roma and Sinti people—an economically powerless and vulnerable group—during World War II is an example of this. On the other hand, Jews were not an economically vulnerable group, but were nevertheless targeted as a reviled ethnic group. In fact, Nazi confiscations were fueled, in part, by anger and envy concerning the perceived economic prosperity of Jews.71 The expropriation of their property was all part of a larger attempt to make this allegedly economically powerful group not just powerless, but extinct.

5. Such that individuals, communities, or their heirs are effectively left economically vulnerable and dependent on the state to satiate their basic needs:

Locke argued that any act by the state that places a man in the state’s absolute power is grounds for dissolution of the social contract.72 Follow-


68. For example, when property is a constitutive part of someone’s personhood, its confiscation may adversely affect their dignity, but does not necessarily result in dehumanization. For a longer discussion of the property as personhood idea, see Margaret Jane Radin, Property and Personhood, 34 STAN. L. REV. 591, 591–678 (1982). Locke also had a conception of property as personhood. He believed that property in things was based upon property in/ownership of one’s self (that is, one’s labor and work). Consequently, when a person mixes their labor with a thing, it becomes his. See Locke, supra note 33, at 101.

69. See generally Michael E. Dyson, Come Hell or High Water: Hurricane Katrina and The Color of Disaster (2006).

70. FAILURE OF INITIATIVE: THE FINAL REPORT OF THE SELECT Bipartisan COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, H. R. REP. No. 109-377, pts. 6, 15, at 90, 313 (2006) (“Potential for Katrina to breach levees was well-known...”); id. at 313 (“There was inappropriate delay in getting people out of shelters and into temporary housing—delays that officials should have foreseen due to manufacturing limitations.”).


72. See Locke, supra note 33, at 278-84.
ing the same logic, when a state confiscates or destroys property, and leaves a person or community economically vulnerable and dependent on the state to meet her basic needs, the act of confiscation or destruction can effectively remove that person from the social contract, causing property-induced invisibility. There are many acts of property confiscation or destruction that will not leave a person economically vulnerable or dependent on the state. These occur when the person or community is able to use various economic buffers to avoid property-induced invisibility.73

For example, the Apartheid government could have confiscated the land of a Black farmer who maintained other assets apart from the land; for example, a profitable store. If the confiscation did not leave her or her descendants economically dependent on the government, it was unjust, but did not cause property-induced invisibility.74 The farmer and her descendants should receive compensation, but in a world of limited resources, she should not be given priority over those who have had no economic buffer.

Although the presence of an economic buffer prevents property-induced invisibility from occurring, other types of invisibility could result. To address other forms of invisibility, it is crucial for any program designed to restore past rights in land to be accompanied by redistributive measures not based on past rights, but rather on need.

My central argument in this subpart has been that, as a baseline, those subject to property-induced invisibility should be restored; though, in certain situations the magnitude of property confiscations renders irrelevant the considerations of who, at a minimum, should be restored. For example, after the Rwandan genocide of 1994, thousands of people suffered from property-induced invisibility. Estimates suggest that half of Rwanda’s population was somehow displaced, which means significant amounts of property were confiscated or unwillingly abandoned as a consequence of the genocide.75 If the national government decides to return property to those dispossessed, it does not have sufficient resources to restore all those subject to property-induced invisibility. Nonetheless, in these types of cases, international donor funds should help indigent countries to compensate individuals and communities subject to property-induced invisibility.

**B. WIDESPREAD PROPERTY-INDUCED INVISIBILITY CAN LEAD TO INCREASED ENFORCEMENT COSTS AND POLITICAL AND ECONOMIC INSTABILITY**

The probability of violent backlashes is determined by an oppressed group’s numbers, their reaction to their invisibility, their coalition-build-

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73. Invisibility of other types could result, although the presence of an economic buffer prevents property-induced invisibility from occurring.
74. Property-induced invisibility occurs at the time of expropriation, but can persist over generations if the dispossessed’s descendants never recover from the initial taking.
75. See Prunier, supra note 60, at 312–13.
A positive freedom results when people are not morally attached to a legal regime that renders them invisible, and they then use this freedom to violate laws in an attempt to inject a dose of morality into an ignoble society. Through his protagonist in *Invisible Man*, Ralph Ellison articulates a possible reason one would engage in negative freedoms as follows: "Irresponsibility is part of my invisibility. To whom can I be responsible, and why should I be, when you refuse to see me?" Gangsters that terrorized South Africa's townships during Apartheid are a perfect example. The gangsters robbed people and engaged in a plethora of illegal activities. These young men lived under a system that sought to dehumanize them and hence had no moral imperative to abide by the immoral legal framework. However, they used this freedom as a license to escape all standards of comportment, even the morally legitimate, customary traditions that prevailed in the townships.

When either positive or negative freedoms arise, people are driven to the point at which they sincerely feel that they have to lose in opposing the government and its laws. Invisibility is most likely to result in increased enforcement costs or disorder when those made invisible either constitute a substantial portion of the population or are able to form coalitions and inspire others to take part in their protest actions. Society functions under the status quo only so long as the majority of people adhere to the established rules and those who do not can be contained. Containment depends upon the state's ability to meet the expectations of the majority. Bentham rightly argued that,

To the extent laws are concordant with expectations, one may hypothesize that they will be willingly complied with by a substantial number of people. The fact that laws are rooted in common expectations thus facilitates willing compliance; the latter in turn, fosters respect for the law and law-makers. Compliance on a large scale helps legitimation of law and the authority of the law-makers.

To the extent that the state is unable to meet the majority's expectations and secure their willing compliance with the law, it can use its police power to force those exercising negative and positive freedoms to comply. The cost of enforcing property rights will increase in proportion to the extent the police power must be invoked. There may come a point, however, at which the state's military prowess and social institutions cannot contain disobedient populations, and disorder will prevail. That is, while the fabric of society can withstand losing a few threads, there comes a certain point when a frayed fabric can do nothing but fall apart. To prevent this, the state must transform and thus legitimize the property status quo.

81. Id. (arguing that the exercise of negative freedoms edifies democracy and that "politics is a process by which a people can learn to live with their political discipline in a way that is at once democratic and individualistic")

82. This is the conception of invisibility espoused by Glaucon in Book II of Plato's *Republic* in his attempt to explain the nature of justice. In the myth of Gyges, a shepherd discovers a gold ring that has the power to make him invisible. Invisibility allows Gyges to break the law with impunity. He uses his newly found power to seduce the queen, kill the king, and usurp his kingdom. He derives a negative freedom from his invisibility. See Plato, *The Republic* 57–71 (O.R.F. Ferrari ed., Tom Griffiths tran., 2000) (360 B.C.).


84. See also **Patterson, supra note 30**, at 2 ("[T]otal personal power taken to its extreme contradicts itself by its very existence, for total domination can become a form of extreme dependence on the object of one's power, and total powerlessness can become the secret path to control of the subject that attempts to exercise such power.") (quoting *Gorg Hegel, The Phenomenology of the Mind* 228–40 (J.B. Baille trans., Swann Sonnenschein 1910) (1807)).

85. At one end of the spectrum, there is full compliance with the law, and at the other end, there are unmet expectations and chaos. In between these two extremes is a space where prevalent property-induced invisibility, at the very least, causes the cost of enforcing property rights to increase. The misaligned expectations caused by property-induced invisibility can be rectified through restoration of property. See Leonid Polischuk, *Production of Assets and Credibility of Property Rights* 3 (Mar. 2, 2004) (unpublished manuscript), available at http://harrischool.uchicago.edu/Academic/workshops/pol econarchive.asp ("The cost of enforcement of property rights is obviously correlated with the dispossession of their allocation in the society. . . . Destitution provokes attempts to control others' property, partly for a lack of socially productive alternatives, partly because those undertaking such attempts have little to lose.").

86. **Bentham, supra note 11** (emphasis added).

87. Perceptions of illegitimacy that can ignite social mayhem are suppressed through the criminal justice system, where the focus is to maintain the status quo through social control. For a review of the social control theories underlying criminal law, see DAVID GANZ, *PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY* 3–22 (1990); RICHARD CLARKSON, *CRIME, LAW AND ORDER: CRIME CONTROL IN CAPITALIST SOCIETY* 55 (1974) (arguing that through class repression, the criminal justice system is intended to maintain the status quo); Donald Black, *Crime as Social Control*, 46 Am. Soc. Rev. 34–45 (1983), Allen E. Liska, *A Critical Examination of Macro Perspectives on Crime Control*, 13 Ann. Rev. Soc. 67, 67–88 (1987).

88. See **Tyler, supra note 20**, at 376 ("The use of power, particularly coercive power, requires a large expenditure of resources to obtain models and limited amounts of influence over other. It is therefore important that under some circumstances people are also influenced by others because they believe that the decision made and rules enacted by influenced others are in some way right or proper and ought to be followed."); see also Morris Zelditch, *Processes of Legitimation: Recent Developments and New Directions*, 64 Soc. Psychol. Q. 4, 4–6 (2001).

89. Using Locke's imagery, widespread non-cooperation throws society back into a state of nature, which is bound to devolve into a state of war. See Locke, **supra note 33**, at 278–84.

90. Many scholars have noted that land reform can prevent revolution and as well as other forms of political instability. See, e.g., S. A. E. SAMUEL, P. HUNTINGTON, OF燈 LIGHTHOPE, *Political Order in Changing Societies* 375 (1968); B. Collins and W. White, *The Distribution of Wealth and the Efficiency of Institutions*, 29 Econ. Inquiry 336, 336 (1991) ("We find circumstances in which redistribution of wealth is Pareto optimal and in which increasing sanctions against theft to their maximum level is not."); Herschel Grossman, *Production,
III. RESTORATION

Under international law, a person who has property confiscated has various rights to the return of her property. Because property-induced invisibility is not only caused by the confiscation of property, the mere return of property will not be sufficient to correct it. Dehumanization and exclusion are central to property-induced invisibility. A society that is committed to the process of moral regeneration must find a way to include victims in the democratic project to affirm their humanity. A society can do this by giving invisible people or communities asset-based choices, which facilitate active participation in the remedial process and bring dignity to those formerly dehumanized.

Reparation is the return of property that does not emphasize rebuild-


91. See Scott Leckie, New Directions in Housing and Property Restitution, in Restoring Rights: How to Repair Property and Internally Displaced Persons 3 (Scott Leckie ed., 2003); Scott Leckie, Housing and Property Issues for Refugees and Internally Displaced Persons in the Context of Return: Key Considerations for UNHCR Policy and Practice, REFUGEE SURV. Q. No. 3 2000, at S–63. International human rights provisions entitling individuals to property restoration is the right to recover the enjoyment of housing, land or property, see Report of the Committee on the Elimination of Racial Discrimination, ¶ 2(c), U.N. Doc. A/51/18 (Aug. 16, 1996) ("All such refugees and displaced persons have, after their return to their homes of origin, the right to have restored to them property of which they were deprived in the course of the conflict and to be compensated appropriately for any such property that cannot be restored to them."); (2) the right of those displaced to return to their homes and places of habitual residence in their country should they so wish, see U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, Housing and Property Restoration in the Context of the Return of Refugees and Internally Displaced Persons, ¶ 1, U.N. Doc. E/CN.4/Sub.2/Res/1998/26 (Aug. 26, 1998) ("The Sub-Commission on Prevention of Discrimination and Protection of Minorities ... reaffirms the right of all refugees, as defined in relevant international legal instruments, and internally displaced persons to return to their homes and places of habitual residence in their country and/or place of origin, should they so wish."); Report of the Committee on the Elimination of Racial Discrimination, ¶ 2(a), U.N. Doc.A/51/18 (Aug. 16, 1996) ("All such refugees and displaced persons have the right freely to return to their homes of origin under conditions of safety."); (3) the right to compensation for land lost as the result of a forced eviction, see U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on Prevention of Discrimination & Prot. of Minorities, Expert Seminar on the Practice of Forced Evictions, ¶ 24, U.N. Doc. E/CN.4/Sub.2/2007/1 (July 2-7, 2007) (Section 24 provides that "[a]l [all] person[s] subject to any forced eviction ... should have a right to compensation for any losses of land or personal, real or other property or goods ... "); and (4) the state’s obligation to make reparation for injury, see U.N. GAOR Int’l L. Comm’n, Responsibility of States for Internationally Wrongful Acts, ¶ 34, U.N. Doc. A/56/10, ch. IV.1, E.1 (2001) (Article 31, Section 1 provides that "[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act." Article 34 provides that "[f]ull reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction either singly or in combination.").

92. In the legal literature, the definition for reparations is consistent, although subtle differences exist. See, e.g., Charles J. Ogletree, Jr., The Current Reparations Debate, 36 U.C. DAVIS L. REV. 1051, 1055 (2003) (emphasizing four features of reparations: (1) a focus on the past to account for the present; (2) a focus on the present, to reveal the continuing existence of race-based discrimination; (3) an accounting of past harms or injuries that have not been compensated; and (4) a challenge to society to devise ways to respond as a whole to the uncompensated harms identified in point (3)); Eric A. Posner & Adrian Vermeule, Reparations for Slavery and Other Historical Injustices, 105 COLUM. L. REV. 689, 700 (2005) (noting that "[p]aradigmatic examples of reparations typically refer to schemes that (1) provide payment (in cash or in kind) to a large group of claimants, (2) on the basis of wrongs that were substantively permissible under prevailing law when committed, (3) in which current law bars a compulsory remedy for the past wrong, and (4) in which the past wrong is justified on forward-looking grounds of corrective justice, rather than forward looking grounds such as the deterrence of future wrongdoing.").

93. See John Braithwaite, Restorative Justice: Assessing Optimistic and Pessimistic Accounts, 25 CRIME & JUST. 1, 6 (1999) (emphasizing the following objectives of restorative justice: "restoring property loss, restoring injury, restoring a sense of security, restoring dignity, restoring a sense of empowerment, restoring deliberative democracy, restoring harmony based on a feeling that justice has been done, and restoring social support"); John Braithwaite, A Future Where Punishment Is Marginalized: Realistic or Utopian?, 46 UCLA L. REV. 1727, 1743 (1999) (describing restorative justice as "a process of bringing together those parties who have been affected by an offense to work and have the power to determine how to repair the harm. . . . The purpose is to restore victims, restore offenders, and restore communities in a way that all stakeholders can agree is just."); David Dolinko, Restorative Justice and the Justification of Punishment, 2003 UTAH L. REV. 319, 319 ("Restorative justice . . . involves the victim, the offender, and the community in a search for solutions which promote repair, reconciliation, and reinsurance." (quoting Howard Zehr, Changing Lenses: A New Focus for Crime and Justice 181 (1990))); Mark S. Umbreit, Holding Juvenile Offenders Accountable: A Restorative Justice Perspective, JUV. & FAM. L. BUL. 7, 28 (2003) ("Rather than defining the state as the victim, restorative justice theory views criminal and delinquent behavior as first a conflict between individuals . . . (Both victim and offender are placed in active problem solving roles.").


95. See generally, Neff, supra note 94, at 364–73.
The most important difference between restitution and redistribution is that the former connects directly to a past violation of rights. Restoration is largely protected from political vicissitudes and a claimant that successfully traverses the established judicial or quasi-judicial process is entitled to it. Conversely, politics more profoundly affects redistribution. For instance, while one political administration acknowledged and defended redistributive welfare programs, such as Affirmative Action, because they ameliorate past wrongs, another denied the connection altogether and cancelled the programs. Affirmative Action programs were subject to cancellation because the beneficiaries did not have a right to the benefits. In contrast, restoration restores a past legal right in property and cannot be withdrawn without some judicial or quasi-judicial review.

Depending on the context, redistribution may be more appropriate than restoration. If a state decides to pursue restoration, it must happen in conjunction with broad-based redistribution through the tax and transfer system, which will address non-property related harms. Property-induced invisibility historically coincides with other forms of oppression, such as disappearance, execution, incarceration, torture, loss of employment, educational disruption, psychological scars, and/or sexual violence. A society that appears to be prioritizing only the dispossession of property over other forms of oppression and dehumanization will undoubtedly foment animosities among citizens.

A. THE IMPORTANCE AND LIMITS OF CHOICE

Although what makes us human is a complex convergence of factors, at least one pronounced and critical thread in this multifaceted tapestry is the ability to have and make simple choices that determine the trajectory of one’s life. Dehumanization, which is a defining feature of property

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96. The legislature’s role is especially important when interagency coordination is necessary for the delivery of the assets, because either confusion or paralysis will abound if implementing bureaucracies do not have a clear political mandate.

97. The best form of reparations will not always be in monetary form. See William Bradford, Beyond Reparations: An American Indian Theory of Justice, 66 Ohio St. L.J. 1, 1-7 (2005) (noting that “[n]on-monetary modes of redress may be more effective in inducing the national government to accept moral responsibility, in restoring the dignity and autonomy of injured groups, and in healing, reconstituting, and re legitimizing the nation”); Aari J. Matsuda, Looking to the Bottom: Critical Legal Studies and Reparations, 22 Harv. C.R.-C.L. L. Rev. 323, 391 (1987) (noting that appropriate reparations might include “[m]oney for education, housing, medical care, food, job training, cultural preservation, recreation and other pressing needs of victim communities [that will] raise the standard of living of victims, promoting their survival and participation”).

98. For an intriguing view of redistribution, see Arthur Cockfield, Income Taxes and Individual Liberty: A Lockean Perspective on Radical Consumption Tax Reform, 46 S.D. L. Rev. 8, 65 (2001) (“Redistribution of wealth and the accompanying high levels of taxation also help to promote the view that all (or almost all) benefit from capitalist taxation systems. There is an important norm that continually needs to be communicated to citizens in order to legitimize these institutions protecting the poor. Rousseau and other social-contract theorists also emphasize the importance of choice and autonomy because they premise their work on the fact that individual choice to enter into a social contract with the state. See generally Locke, supra note 33; Thomas Hobbes, Leviathan (A. P. Martinich ed., Broadview Press 2002) (1651); Jean Jacques Rousseau, The Social Contract (Muirhead Cranston trans., Penguin Books 1968) (1762); but cf. Bentham, supra note 11, at 72–74, 81–82. Nozick recognizes choice as a defining feature of humanity and states that, “[a] person’s shaping his life in accordance with some overall plan is his way of giving meaning to his life; only a being

original victim has died, who inherits her claim? And what types of validating documents are sufficient to honor a claim? These are all very context-specific questions that each country must figure out for itself.


101. See id. at 498–501.

102. Many of the most prominent philosophers have acknowledged the importance of choice and autonomy. See generally John Rawls, A Theory of Justice (1971) (emphasizing that the principles of autonomy and choice require that individuals who act as representatives for the larger population have one job; to choose principles of justice. The works of Hobbes, Locke, Rousseau, and other social-contract theorists also emphasize the importance of choice and autonomy because they premise their work on the fact that individuals choose to enter into a social contract with the state. See generally Locke, supra note 33; Thomas Hobbes, Leviathan (A. P. Martinich ed., Broadview Press 2002) (1651); Jean Jacques Rousseau, The Social Contract (Muirhead Cranston trans., Penguin Books 1968) (1762); but cf. Bentham, supra note 11, at 72–74, 81–82. Nozick recognizes choice as a defining feature of humanity and states that, “[a] person’s shaping his life in accordance with some overall plan is his way of giving meaning to his life; only a being
induced invisibility, is based on the underlying notion that the subject lacks a threshold level of capacity to fully participate in society. The establishment of choice-based remedies is predicated on the countervailing assumption that a person does indeed have the capacity to navigate her life and determine her actions. Restorative policies cannot afford to remain unduly rigid by failing to offer meaningful choices. Instead, these policies must allow people to exercise their volition by choosing the mode of restoration that best fits their idiosyncratic situation to the extent possible, and this will do a significant amount of work in restoring an invisible community or individual's relationship to society.

Nobel laureate, economist, and philosopher Amartya Sen argues that freedom is integral to the foundations of justice; freedom entails having the capability to make choices, which lead to outcomes that one has reason to value.103 Sen's binary conception of freedom is not limited to a procedural "freedom from" framework, which requires noninterference with the exercise of one's agency.104 Rather, it also incorporates a "freedom to" element, which evaluates the substance of the choices made available.105 Sen's conception of freedom must permeate restoration programs, because it is critical for a society to allow invisible people to exercise their agency by choosing how they are restored to full citizens, while also ensuring that they have viable options from which to choose.106 In order for a dispossessed person or community to choose how they are restored, the state and civil society must provide information and assistance; also, the concept of choice suggests that there must be at least two viable choices that a dispossessed person or community is willing to accept. It does not suggest a libertarian conception of choice, which assumes "that all persons are the absolute owners of their own lives, and should be free to do whatever they wish with their persons or property, provided they allow others the same liberty."107 Choice may be limited in various ways.

There may be practical restraints to providing a full array of choices. While cash distributions give communities and individuals maximum choice, many nations, especially poor ones, must focus on in-kind options because they do not have the ability to give cash payments without printing additional money, thereby triggering inflation.108 In addition, due to financial constraints, a nation may have to limit in-kind benefits to those that have low marginal costs.109 Beyond practical constraints on choice, the state may restrict the choices given to dispossessed populations in order to achieve the larger goal of legitimizing the property status quo. For instance, the state should disallow cash payments if they do not increase the well-being of recipients in the long-term, such that the legitimacy of property institutions is greatly increased.

Evidence suggests that some people who receive an unexpected windfall of money, such as winning the lottery or receiving a large legal settlement, will lose a significant portion of their wealth in a short period.110 In South Africa it has been reported that "the unaccustomed windfall of relatively large sums of money (from 17,500 rand upward) [through the LRP] can be quickly dissipated in poor households, without producing lasting material benefit or a sense of closure about the past."111 This is exactly what happened in St. Lucia, South Africa, which is a dispossessed community of about a thousand households.112 In this case, the land commission determined that St. Lucia had a valid claim to land that is now used for conservation purposes. Due to the present use of the claimed land, the community was offered alternative land or financial compensation, but the community was not given the option of crafting their own remedy.113 They opted for financial compensation. The Land Claims Commission determined the present value of the claim and decided that each household was entitled to R30,000 (approximately $5,000 U.S.). Due to the extreme poverty of the residents, most of the funds were spent within six months with no notable improvement in the community's condition.114 There are now rumors that the community is considering retaking their ancestral land via land invasion, despite the fact that they have already been paid.115 Substantial quantities of money have been expended by the government, but the legitimacy of property arrangements is still under question. In these types of situations, South Africa and other similarly situated states should give assets with less liquidity than cash, such as fixed assets, to prevent people from rapidly

103. AMARTYA SEN, DEVELOPMENT AS FREEDOM 54-87 (1999).
104. Id.
105. Id.
106. Id. "[F]reedom is concerned with processes of decision making as well as opportunities to achieve valued outcomes." Id. at 291.
108. A cash payment may also be a more politically volatile option. If a government's restorative agenda has a critical amount of opposition, then payoffs in the form of in-kind services may be easier to sell to the public because the costs are less obvious.
109. For example, assume that providing subsidized credit costs $8000 and that tuition for a government-funded vocational school is also $8000, but the government's marginal cost of admitting one more student is $200. In this example, despite the fact that the access to subsidized credit is important, providing free education is the type of in-kind option that would be more practical for the government to offer.
110. See ROBERT WAGMAN, INSTANT MILLIONAIRES: CASHING IN ON AMERICA'S LOTTERIES 71-116 (1986); see also ELLEN GOODSTEIN, EIGHT LOTTERY WINNERS WHO LOST THEIR MILLIONS, MSN MONEY, http://articles.moneycentral.msn.com/SavingandDebt/SaveMoney/8lotteryWinnersWhoLostTheirMillions.aspx (last visited Aug. 20, 2007); Reversal of Fortune (Showtime documentary broadcast Dec. 15, 2006) (experimenting by giving a homeless man with no drug or mental problems $100,000 to see what he would do with the money, within a short amount of time, he lost it all).
113. Id.
114. Id.
115. Id.
dissipating their new wealth due to short-term exigencies. If there is no long-term improvement in one’s welfare, the perceived legitimacy of land arrangements will not be altered.

Choices should be restored at the level of the individual when the land in question is individually owned, and at the communal level for communally-owned land. For example, through a just and culturally relevant process, a community can decide, among other things, that the harm was intergenerational, such that one generation should not have the ability to dissipate the assets received. The group may decide that lands acquired through the restoration process can be occupied, but may not be sold without the approval of the group. Although restraints on alienation will truncate each individual beneficiary’s spectrum of choices, these restraints are a tool to ensure respect of the collective choice, which will move the community towards visibility. The ousted members of the group, however, may remain invisible, and this is particularly problematic if they are a historically marginalized sub-group. In order to ensure that sub-groups do not remain invisible, restoration programs must allow people to opt out of the group and receive their pro rata share, so that if people feel that they are being ignored or marginalized, they can choose to either exit or remain part of the group and advocate for change from within.

B. The Importance of Asset Ownership

Restoring a community or individual’s relationship to society is a complex process that requires a considerable amount of private healing and reconciliation that must take place outside of the government’s purview. Beyond these private acts, the restorative process can also include public measures, such as public apologies, truth commissions, and public monuments. These public measures can help to restore lost dignity, but cannot adequately address property-induced invisibility. Property-induced invisibility entails economic vulnerability, such that one is dependent on the state for basic needs, so restoration of assets must be a central element in any reversal strategy.

When property is confiscated in such a way that property-induced invisibility occurs, wealth is decimated, and this deficit is transferred intergenerationally until there is an opportunity for a family, community, or individual to re-accumulate the assets stolen and re-establish itself eco-

116. This is exactly what happened to Native American Tribes with the General Allotment Act of 1887, a federal statute that allotted tribally-owned lands to individuals. The gains from the sales were often quickly dissipated, leaving individuals in abject poverty and tribes with significantly less land. Congress stopped the allotment of tribal lands via the Indian Reorganization Act of 1934 (IRA) after tribes lost over 90 million acres of land to white settlers. Judith V. Rynker, The Legacy of Allotment, 27 ARIZ. ST. L.J. 1, 7-16 (1995).

117. See generally ALBERT O. HIRSCHMAN, EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

nomically. Property-induced invisibility will persist for generations if people are not able to rebound economically from the initial confiscation. Asset transfers will afford people the opportunity to re-build their wealth and move beyond their economic dependence on the state for basic needs.

Also, given that exclusion is a defining feature of property-induced invisibility, assets are crucial because they promote economic and political inclusion. On the political front, assets increase poor people’s stakeholding and thereby, their investment and participation in the democratic process. This is demonstrated, in part, by the fact that, controlling for relevant factors, property owners vote more often than non-property owners. Asset ownership can also help to overcome barriers that prevent people from being more involved in the democratic process, such as lack of time and economic dependence. Economically, by providing people with capital that they can leverage for productive investments, asset
sets allow those once excluded from effectively participating in the capitalistic economy to participate.122

Lastly, assets have the power to increase the long-term well-being of invisible communities and individuals, which is crucial for increasing the legitimacy of the property status quo. Michael Sherraden convincingly argues that assets have several general welfare effects.123 They improve economic and household stability,124 create an orientation toward the future,125 stimulate development of human and other capital,126 enable people to focus and specialize,127 provide a foundation for risk-taking,128 yield personal social and political dividends,129 and enhance the welfare of offspring.130

IV. CASE STUDY: MOVING FROM REPARATION TO RESTORATION IN SOUTH AFRICA’S LAND RESTITUTION PROGRAM

History reveals numerous incidences in which property was confiscated in such a manner that individuals and communities were removed from the social contract and thus rendered invisible. There is, however, a paucity of cases in which governments have taken action to correct past deprivation of property rights.131 South Africa is one of them. More significantly, South Africa’s land policy states that it is committed to a program that moves beyond the limited emphasis on return of property, and is invested in the larger project of restoring invisible peoples’ relationships to society.132 As such, the country ideally serves to further explore the conceptions of property-induced invisibility and restoration developed in this Article.

A. PROPERTY-INDUCED INVISIBILITY IN SOUTH AFRICA

I. Historical Context of Property-Induced Invisibility

Upon their arrival in 1652, Europeans were able to assume a dominant position in southern Africa through their superior weaponry and warfare strategies.133 From the time of their arrival until the demise of Apartheid in 1994, Europeans and their descendants leveraged their dominance and unilaterally set the terms of the social contract. Based on the white supremacist notion that all non-whites belonged to ontologically inferior, savage races, non-whites were dehumanized and explicitly excluded from the social contract. Consequently, South Africa is a country that has high levels of property-induced invisibility. That is, the white supremacist state systematically confiscated land from Blacks with no payment of just compensation, and this land dispossession was part of a larger strategy of dehumanization, which left the majority of Blacks powerless, poor, and dependent on the state to satisfy their basic needs.134

Land dispossession in South Africa was executed, in part, within a legal framework that began with the 1913 Native Land Act, which constrained Black land rights by prohibiting them from buying or leasing land from whites who lived outside of areas where Black land ownership was allowed.135 After the Native Land Act came two legal proclamations that further infringed upon Black land rights. The Native Administration Act of 1927 gave the Governor-General plenary power to “order the removal of any tribe or portion thereof or any Native from any place to any other place within the Union upon such conditions as he may determine.”136 The Development Trust and Land Act of 1936 vested title to all native reserves in a trust rather than to Blacks.137 Black land loss was further entrenched when the National Party came to power in 1948 and introduced a system of separate development called Apartheid. Apartheid legally mandated that whites live apart from Blacks and systematically divided Blacks into homelands, or Bantustans, according to ethnicity.138

124. Assets do this by serving as a bulwark against income shocks and thereby maintain a family’s social and economic health until income flows recommence. “[B]ecause economic worries are a major contributor to a cluster of psychological and social problems associated with unemployment, the family is also more likely to bear the wounds of mental depression, rage, marital breakup, child and spouse abuse, alcohol and drug use, and so forth.” Id. at 149.
125. Assets give people a larger stake in the future. Also, asset management requires long term thinking and planning. Id. at 151.
126. For example, for many Americans, home ownership is the most common way to build wealth. Through homeownership, people have an incentive to learn about real estate markets and capital investments generally. They also have an incentive to acquire home improvement skills. Id. at 156-57.
127. Id. at 158-59 (“In poor households, people spend their time in a wide diversity of tasks because they do not have sufficient assets to enable greater focus and specialization. . . . Many people forego opportunities for specialized education and training because they have to feed their families.”).
128. High risks bring high rewards, but many people are not in a position to take risks because they have nothing to fall back on. Assets provide the security that places people in a position to take social or psychological risks. Id. at 159-60.
129. Assets allow greater strength, control, and security. They provide greater power in social and economic negotiations. In addition, with assets, people have a higher incentive and greater resources to participate in the political process. Id. at 161-67.
130. Id. at 166 (“[A]ssets also increase the welfare of offspring. Assets provide an intergenerational connection that income and consumption cannot provide.”).
134. For the definition of property induced invisibility, see infra Part II and accompanying discussion.
135. See Green Paper, supra note 133, at 37.
136. Id. at 88.
137. Id. at 89.
138. See Thoko Didiza, Minister for Agric. & Land Affairs, The Importance of a Successful Land Reform Programme in South Africa, Opening Address at the National Land
In order to more thoroughly institutionalize the separate development policy, the 1950 Group Areas Act and the Black Resettlement Act of 1954 were passed, which both sought to eradicate “black spots” in urban areas. Blacks who owned property in areas newly declared as white were forcibly removed. The 1964 Bantu Laws Amendment Act intensified Black land loss by giving the government legal license to remove Africans from any town or white farming area at any time. All of these laws were part of the legal architecture intended to sequester Blacks in the homelands and deprive them of any possibility of acquiring or sustaining rights in land.

In addition to the scores of individuals and communities who were dispossessed before 1960, “[t]he Surplus People Project . . . estimated that 3,548,900 people were removed between 1960 and 1983: 1,702,400 from the towns, 1,129,000 from farms, 614,000 from black spots, and 103,500 from strategic and developmental areas.” Property-induced invisibility will persist for those dispossessed Blacks and their descendants who have been unable to recover from the original theft and thus remain economically vulnerable without land or other assets.

As a result of continuous legal land dispossession, whites who constituted less than ten percent of the population upon independence in 1994 owned eighty-seven percent of the country’s land, while Blacks owned a mere thirteen percent. Because there has been significant transformation of property arrangements since liberation, the perception commonly held by the Black majority is that the status quo of property ownership is illegitimate because the racially imbalanced property distribution is a direct result of past colonial and Apartheid-era theft. Before any commitment to significant protection for private property can gain widespread purchase among the Black majority, something must be done to assuage the profound sense of illegitimacy that pervades perceptions of present land arrangements. If nothing is done, then one can expect the present disregard for property rights to continue.

2. Consequences of Property-Induced Invisibility

Nationally, sixty-eight percent of crimes are property-related. In the

28946a1002.htm. The homelands were purportedly self-governing, but in reality, traditional chiefs were hand-picked by the Apartheid government to rule the Bantustans and were given power that far exceeded their traditional authority. See also GREEN PAPER, supra note 133, at 9.

139. See Didiza, supra note 138.

140. See LEONARD THOMPSON, A HISTORY OF SOUTH AFRICA 194 (3d ed. 1995). Two of the most infamous forced removals were in Sophiatown and District Six. Id.

141. Id. at 199.

142. Id. at 194.

143. DANIEL OWEN, LAND REFORM—RUNNING OUT OF TIME, THE PROGRESSIVE REP.

144. The most common types of property-related crimes are “burglary at a residential premises,” “theft of or from a motor vehicle,” and “malicious damage to property.” CRIME INFO. ANALYSIS CTR., S. AFR. POLICE SERV., CRIME STATISTICS FOR SOUTH AP-

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country’s urban centers, electric fences, private security guards, high security walls, and alarm systems are the norm because of the high theft rates. Also, land invasions are on the rise. Upon independence in 1994, grassroots groups organized around the constitutional mandate to redistribute and redistribute land. The government, thus far, has not been able to make the constitutional mandate a reality, so many of these groups are now beginning to employ extra-legal strategies to achieve land equity. For instance, organizations such as the Landless People’s Movement (“LPM”) organize communities to reclaim land through illegal occupation. Founded in 2002, the LPM claims upwards of 100,000 members. In the eyes of the poor landless masses in South Africa, the LPM has the moral high ground, though it advocates illegal actions, because it is somewhat akin to the United States civil rights organizations that engaged in illegal sit-ins during the 1960s. Sit-ins violated the illegitimate but legal architecture of segregation, just as land invasions violate property laws that uphold a distribution of property widely perceived to be illegitimate.

In the face of increasing land invasions and high property-theft rates, the obvious question becomes whether South Africa will end up in chaos like Zimbabwe. After all, the unequal, illegitimate distribution of land in Zimbabwe was a major impetus behind the war veteran occupation of white farms and ensuing chaos that erupted in 2002. The little known fact, however, is that there has been more farm-related violence in South Africa than in Zimbabwe. South Africa’s commitment to the rule of law is the only thing preventing a reproduction of the Zimbabwe crisis.

In sum, there is a backlash against markets in South Africa in the form of disdain for property rights. This should not be surprising, given the

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145. Statistics show that a murder was committed every hour, so there is no mystery as to why people live in fear. See CRIME SHOWDOWN IN THE WILD SOUTH, GUY


146. The LPM demands "an end to evictions, whether on farms or in informal and other settlements, and a process of transferring land to those residing and working on it. The movement has targeted land occupations as one method of redistributing land through the self-activity of the landless, and has identified unproductive, unused or underused land and land belonging to abusive farmers as the focus for initial redistribution." See STEPHEN

GREENBERG, THE LANDLESS PEOPLE'S MOVEMENT AND THE FAILURE OF POST-


147. Id. The LPM is the South African counterpart to the Brazilian movement called the Landless Rural Workers’ Movement (Movimento dos Trabalhadores Rurais Sem Terra). Id. at 5–6.

148. Its membership increases in accordance with the level of dissatisfaction with the LRP. Interview with Andile Magumza, Land Activist and leader in the Landless People’s Movement, in Pretoria, S. Afr. (Sept. 19, 2006).

149. See MOORE, supra note 13, at 320.

150. See More Squeeze than Grab, Land Reform in South Africa: Don't Expect


151. Id.
high rate of invisibility, especially property-induced invisibility, that persists in the country. To end this backlash against property rights, the government must work to instill a sense of legitimacy in present property arrangements through restoration. In their article about countries in transition, Eric Posner and Adrian Vermeule have noted that “when historical property rights have more legitimacy than the distribution existing at the time of transition, restitution programs channel claims into the legal system that might otherwise destabilize the market by posing a political threat to the security of post-transitional property rights.” If nothing is done to address the ongoing effects of past theft in South Africa, then political unrest will reign supreme. The Land Restitution Program (“LRP”) is South Africa’s attempt to address past theft.

B. Reforming the Land Restitution Program

1. The Land Restitution Program and Its Challenges

Under the LRP, only those dispossessed of a right in land after 1913 will receive compensation. This particular date was chosen for several reasons. First, although Black land dispossession prior to 1913,


153. “Despite recent political improvements, South Africa is still in danger of widespread unrest brought on by the continued presence of economic inequality along racial lines.” Schneider, *supra* note 12, at 24.

154. (1) A person shall be entitled to restoration of a right in land if—
(a) he or she is a person dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; or
(b) it is a deceased estate dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; or
(c) he or she is the direct descendant of a person referred to in paragraph (a) who has died without lodging a claim and has no descendant who—
(i) is a direct descendant of a person referred to in paragraph (a); and
(ii) has lodged a claim for the restoration of a right in land; or
(d) it is a community or part of a community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; and
(e) the claim for such restoration is lodged no later than 31 December 1998.

(2) No person shall be entitled to restoration of a right in land if—
(a) just and equitable compensation as contemplated in section 25 (3) of the Constitution; or
(b) any other consideration which is just and equitable, calculated at the time of any dispossession of such right, was received in respect of such dispossession.

(3) If a natural person dies after lodging a claim but before the claim is and—
(a) leaves a will by which the right or equitable redress claimed has been disposed of, the executor of the deceased estate, in his or her capacity as the representative of the estate, alone or, failing the executor, the heirs of the deceased alone; or
(b) does not leave a will contemplated in paragraph (a), the direct descendants alone, may be substituted as claimant or claimants.

(4) If there is more than one direct descendant who have lodged claims for and are entitled to restoration, the right or equitable redress in question shall be divided not according to the number of individuals but by lines of succession.

Land Restitution and Reform Laws Amendment Act of 1999 § 2(1) [hereinafter the “LRA”].

155. The Afrikaner government immediately passed laws that gave Africans the right to own land only if it was located in areas designated as native reserves. The government then confiscated land from blacks who occupied property outside of the reserves and transferred it to white farmers so that many black landowners were transformed into employees or sharecroppers on white farms. See GREEN PAPER, supra note 133.

156. Id.

157. Id.

158. Id.

159. Id.

160. Bentham is the most famous for characterizing property as a basis of expectation: “Property is nothing but a basis of expectation: the expectation of deriving certain advantages from a thing which we are said to possess, in consequence of the relation in which we stand towards it.” BENTHAM, supra note 11, 111–12.

161. “When there is a taking, the majority of states agree that some form of compensation is due. See IAN BROWNLEE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 509 (6th ed. 2003) (Under international law ‘[a] considerable number of states insist that expropriation can only take place on payment of adequate, effective compensation. In practice deferred payments are regarded as sufficient provided effective compensation takes place. The requirements of promptness have become subordinated to the other conditions and also to economic realities relating to payment of large sums. . . . The majority of states accept the principle of compensation, but not on the basis of the ‘prompt, adequate, and effective formula.’”) (internal citations omitted).
is extensive literature concerning the virtues and vices of land reform, which reveals that restructuring the property status quo using the powers of eminent domain can increase efficiency, promote equality, and buttress democracy.162

A second common critique is that restoration programs that allow restitution (return of the actual parcel of land stolen in the past) are inefficient because they unsettle property rights by introducing an unacceptably high degree of uncertainty over ownership rights. This is not necessarily true. Restitution done in an orderly and efficient manner causes no more uncertainty than accepted and routine features of mature capitalist economies, such as adverse possession, unrecorded security interests, uncompensated regulatory takings, inadequately compensated ordinary takings, increases in property taxes, and government regulation.163 There is no doubt that during the time between the beginning and end of the claim-filing period, property rights will be uncertain. Once this period is over, "[i]f all claims are immediately recognized and announced to the world, then both losers and winners will know the extent of their existing property rights, and they will invest and trade accordingly."164

A third issue raised is the notion that restoration requires one to make morally arbitrary distinctions that have potentially life-changing consequences and hence, the distinctions are unjust. For instance, choosing who will benefit and what violations are covered in the LRP involves morally arbitrary distinctions that have changed the course of many lives.165 Only those who were dispossessed of a 'right in land or portion of land dispossessed after 19 June 1913 as a result of past racially discriminatory laws or practices' are eligible to participate in the LRP.166 On what moral basis are those dispossessed the day before (on 18 June 1913), or even earlier, left out? By what moral standard is compensation offered for property dispossession rather than other injustices that occurred under Apartheid such as death, torture, or loss of employment?

The fact that a state cannot compensate everyone is not a valid reason for it not to compensate anyone. The best cannot be the enemy of the good.167 In addition, morally arbitrary distinctions are made all the time with regard to compensation. For example, United States takings law is replete with morally arbitrary distinctions. For example, regardless of the size of the invasion, a physical occupation of property is a per se taking, while a regulation that does not allow one to transform their property and thus decreases its potential value is not a taking.168 There is a high degree of moral arbitrariness in this distinction.

A fourth critique makes the case that the selection of beneficiaries for the LRP may cause serious divisions among citizens. There may be tension between beneficiaries and non-beneficiaries. Although there may be some short-term social tension, research shows that efforts to change an illegitimate status quo have the potential to reduce rather than inflame social strife in the long-term.169 It is important to note that in many cases, the illegitimate property ownership status quo is what foments social animosities.

Fifth, critics may argue that the LRP is not necessary because the market will efficiently allocate resources such that those who value them the most will purchase them,170 and thus, government intervention through the LRP is not necessary. Also, the LRP is subject to bureaucratic inefficiency, such as rent seeking in the selection of beneficiaries and the distribution of goods. For the foregoing reasons, critics may argue that the LRP is per se inefficient as compared to a strictly market-based solution.

This is untrue because, as Polischuk argues, "if private property rights are not sufficiently broadly recognized in the society as legitimate and fair, it makes the property rights regime unstable. This instability precludes efficient relocation of assets, and as a result, expected efficiency gains of private ownership fail to materialize."171 In South Africa, property arrangements are widely perceived to be illegitimate due to pervasive past theft. The only way to change this perception is by transforming the property status quo. This will only happen with government intervention, because a market-driven process would favor those with resources while excluding the economically vulnerable masses from receiving property.


163. Posner & Vermeule, supra note 152, at 783–86.

164. Id. at 785.

165. See infra note 171. Hungary's program makes morally arbitrary distinctions. In Hungary, the restitution program extends to foreign citizens and residents so long as: (1) they were Hungarian citizens at the time of the taking; (2) it was the taking that caused them to lose their status as a Hungarian citizen; or (3) they were residents in Hungary as of December 31, 1990. Stolen land, stolen personal property, and shares in expropriated companies may all be restituted in Hungary. The restitution program allows claims from both communist expropriations that occurred after June 8, 1949, and anticomunist confiscations that occurred between May 1, 1939, and the first Communist Parliament in June 8, 1949. All other expropriations are not covered. See András Oskó, Land Restitution and Compensation Procedures in Central Eastern Europe, OICRF, Nov. 19, 2002, available at http://www.oicrf.org; Istvan Pogany, The Restitution of Former Jewish-owned Property and Related Schemes of Compensation in Hungary, 4 EUR. PUB. L. No. 2, 211, 215 (1998). For information about the compensation program for East Germany and the morally arbitrary distinctions made therein, see, for example, Jessica Heslop & John Roberto, Property Rights in the Unified Germany: A Constitutional, Comparative, and International Legal Analysis, 11 B.U. INT'L L.J. 243, 288 (1993); Frank, supra note 63, at 809, 833; William Karl Wilburn, Filing of U.S. Property Claims in Eastern Germany, 25 INT'L LAW. 649, 656 (1991).

166. See the LRA, supra note 154.


169. See supra note 90.


171. See generally Ronald Coase, The Problem of Social Costs, 3 J. L. & ECON. 1 (1960) (theorizing that if there are zero transaction costs, the efficient outcome will occur regardless of legal entitlement because those who value the resource most will purchase it).
Polishchuk further argues that “[c]redibility of existing property rights is . . . critically important for efficient deployment of privately owned resources.” Without credibility, present owners will use resources to protect their property from expropriation rather than investing them efficiently, and trade will be suppressed. One critical source of the lack of credibility, widespread property-induced invisibility, would be untouched without government involvement.

Sixth, critics may claim that the LRP is faced with insurmountable barriers that exist because different property systems from different eras must be taken into consideration. In South Africa, European settlers and indigenous Africans have had fundamentally different conceptions of "ownership." At the point of expropriation, African norms were dominant, so people had occupancy and cultivation rights allocated by traditional leaders, which were based on need and availability. At the point of compensation through the LRP, however, individuals and communities are given title to land in fee simple, because the prevailing norm is the European notion of ownership. What was taken and what is being restored are two different things.

Under my conception of restoration, there is no challenge presented by the fact that the thing taken and the thing restored are different, and in fact, my emphasis on choice encourages this. If a person was dispossessed of a tract of land, the solution is not necessarily to give her that tract of land back, but instead to give her choices as to what kind of asset she wants. The goal is to place her in the driver’s seat, because this is how a society can begin the process of reconciling an invisible person’s relationship to society.

A seventh critique is that past wrongs should not feature prominently in a new social contract because efforts to redress wrongdoing that occurred under an invalid and presently defunct contract can undermine the new regime. While South African society can enter a new social contract, it does not start at ground zero. There are certain institutions, processes, and status quos established by previous contracts that a society inherits and brings into the new one. Only if the new political dispensation’s break from the past is credible can its new beginning be credible. The South African government’s commitment to restoration sends a message that it is committed to protecting everyone’s property (both white and black), and this commitment is a credible signal that the new regime has done away with the old social contract, which prioritized the rights of whites.

Eighth, critics may also suggest that changed circumstances can void an individual’s or community’s claim to restoration. This argument suggests that we do not know what would have happened to property but for the original theft. The individual may have lost the property due to a natural disaster or bad investments, or alternatively, she might have doubled the value of her asset. Thus, the goal of restoration cannot be to restore a victim to the state she would have been in today but for the act. This would merely be an exercise in conjecture with no basis in fact because it is impossible to know exactly how history would be altered.

Jeremy Waldron argues that:

The idea is that titles and jurisdictions unjustly appropriated in the mid-nineteenth century might simply revert now to their original possessors, who would then set the terms (or participate from a privileged position in setting the terms) on which the resources in question would continue to be used by present-day inhabitants of the territory. And this, it is suggested, is not by way of compensation or reparation of injustices that began and ended in the past, but, rather, as a way of putting a stop to ongoing injustice and restoring resource and power to those who have continued along all along to be entitled to them. Such a reversionary proposal evidently assumes that those who were entitled to the resources just before the injustice complained of began, say, in 1850 would — apart from that injustice—still have been entitled to them in 2003. And that is what the supersession argument contests in denying that justice is impervious to changes in circumstances. It is a way of showing that, in certain sequences of circumstances, dispossession may not continue to count as an injustice even though the events that led to it undoubtedly were an injustice. And if the dispossession does not continue to count as an injustice, then reversion cannot be conceived as an appropriate

175. See generally Kugel, supra note 174.
176. The South African government clearly recognizes the connection between past injustices and the new social contract. See White Paper, supra note 132 § 3.17.3 (“Considering the fact that more than 3.5 million people and their descendants have been victims of racially based dispossession and forced removal during the apartheid era, it is clear that a mammoth responsibility rests on the shoulders of the state to give effect to restitution of land rights.”).
remedy.\textsuperscript{179}

Waldron is correct, and an attempt to reverse past theft might very well be an injustice to current inhabitants if, as he points out, restoration means current inhabitants will starve or be subject to repugnant inequalities.\textsuperscript{180} Justice may require the children of the dispossessed share the land with the daughters and sons of those who unjustly expropriated it, or with newcomers, who may have had nothing to do with the past wrong.

Nonetheless, the dispossessed are still owed compensation for past injustice, insofar as it does not have debilitating consequences for current owners. The correct conceptual framework for restoration is that of unpaid debt obligations, which are inheritable.\textsuperscript{181} The debt includes two aspects—which are assets and the agency that comes with owning assets—so justice requires that assets and agency be restored. Restoration does just this, by giving the dispossessed asset-based choices.

Ninth, in addition to the problem of changed circumstances, the passage of time presents other barriers to the LRP. For instance, property may have been dispossessed from an individual, who is now deceased, or a community, whose members are now difficult to identify, evidence of ownership may be depleted or nonexistent, and the present value of the property stolen may be difficult to determine. The LRP, as well as compensation programs in Germany, Hungary, and beyond, prove that these challenges are significant but not insurmountable.\textsuperscript{182}

In South Africa, for example, if the entitled individual is dead, then the LRP allows for the direct descendants or the deceased’s estate to receive compensation. Various forms of evidence are accepted to prove that an individual was part of a community or that she had a right to a particular piece of land. These include anthropological evidence, evidence from the national archives, graves and ruins that prove occupation by a certain individual or family, and site visits where claimants testify as to exactly where they used to reside, and this testimony is compared to the testimony of neighbors.\textsuperscript{183} In terms of valuation, the Land Claims Court decided that the market value at the time of dispossession would be the starting point, which could be adjusted according to factors set out in section 25(3) of the Constitution.\textsuperscript{184} All market-value assessments are determined by an independent assessor.\textsuperscript{185}

\textsuperscript{179} Waldron, supra note 178, at 244-45 (emphasis added).
\textsuperscript{180} This is one example Waldron gives to explain why it is the case that “in certain sequences of circumstances, dispossession may not continue to count as an injustice even though the events that led to it undoubtedly were an injustice.” Id. Id.
\textsuperscript{181} For more about the inheritance argument, see generally Bernard Boxill, A Lockean Argument for Black Reparations, 7 J. ETHICS 63 (2003).
\textsuperscript{182} See supra note 65 and accompanying text.
\textsuperscript{183} Interview with Maureen Tong, Chief Operations Officer of Housing Department (SA), in Capetown, S. Afr. (Sept. 13, 2006).
\textsuperscript{184} See Former Highlands Residents: Ex parte In re Ash v. Dept’ of Land Affairs 2000 (Zail) 5A (LCC) (S. Afr.).
\textsuperscript{185} Id.
The LRP received broad political support because it benefits the pre-1913 Black elite who owned land, as well as those of humble means with mere occupancy rights.\(^\text{199}\)

The LRP, however, does not place limits on how much an individual or community can claim, so it is possible for a member of the past Black elite to receive R2,000,000, while a former labour tenant receives R200. Insofar as the LRP perpetuates these glaring inequalities, the process and result are less likely to be viewed as legitimate. In order to reduce inequalities, it is advisable for South Africa to provide full compensation up to a certain amount, partial compensation for amounts above this, and an upper limit on the amount of compensation people can receive.\(^\text{191}\) In order to mitigate inequality, the Hungarian government followed a similar path in their reparations program.\(^\text{191}\) They compensated in full up to HUF 200,000 ($2,300), and the remainder was compensated on a sliding scale, but compensation could not exceed HUF 5,000,000 ($57,600) per piece of property and per former owner.\(^\text{192}\)

It would not be fair, however, for the past Black elite to receive less than the full market value for land expropriated pre-1994, while present landowners (mostly white) receive full compensation if their land is expropriated through the state’s power of eminent domain post-1994. The weight of reducing inequality must be borne by both the past Black elite, as well as the present white elite. Section 25 of the Constitution takes this into account by making the fair market value applicable to post-1994 expropriations only the starting point for just compensation.\(^\text{193}\) The award can be adjusted depending upon the following equitable factors: “the current use of the property; the history of the acquisition and use of the property; the market value of the property; the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; the purpose of the expropriation.”\(^\text{144}\)

The present landowning white population must help shoulder the burden of legitimizing property rights alongside the past Black elite.

3. How Should the Process Unfold?

Invisibility was caused in many ways. Many people were routinely dispossessed of land, subjected to the cruelest forms of torture, deprived of employment and educational opportunities, and denied the most basic human freedoms. That is why it is crucial that the LRP is part of a larger restorative process that includes the Truth and Reconciliation Commission,\(^\text{195}\) as well as general redistributive measures through the housing, education, social security, and health sectors. The end of Apartheid began the process of political inclusion, while restoration can do a significant amount of work towards basic economic inclusion.\(^\text{196}\)

a. Transparency and Rule of Law are Crucial

Racist land laws served as the foundation upon which the Apartheid state was constructed and hence, reversing the effects of these laws is an essential element in the present, ongoing deconstruction of that white supremacist state. An important part of the deconstructionist project is the property clause of the Constitution.\(^\text{197}\) That clause takes into account the American blacks are a minority and are politically and economically marginalized. In contrast, Blacks in South Africa are the majority and hence, politically empowered, but economically marginalized. Reversing invisibility in South Africa must focus on economic inclusion, where a two-prong approach may be more appropriate for American blacks.

194. Id.
196. See also THEUNIS ROUX, LAND RESTITUTION AND RECONCILIATION (Nov. 2006), available at http://www.safac.org.za/docs/2006/Land%20Restitution%20and%20Reconciliation%2099.pdf (suggesting that the Truth and Reconciliation process should have dovetailed with the LRP).
197. See S. AF. CONST. 1996 BILL OF RIGHTS § 25 (“No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. 2. Property may be expropriated only in terms of law of general application: a. for a public purpose or in the public interest; and b. subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court. 3. The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including a. the current use of the property; b. the history of the acquisition and use of the property; c. the market value of the property; d. the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and e. the purpose of the expropriation. 4. For the purposes of this section; a. the public interest includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources; and b. property is not limited to land. 5. The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis. 6. A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the...”)
pervasive property theft that occurred in South Africa’s tumultuous past, while setting the stage for a future where equality and dignity are paramount. The LRP is transparent and comports with the Constitution. In fact, although the Constitution allows expropriation, LRP officials are taking an extremely cautious approach and have for the most part relied on a market-driven willing seller/willing buyer approach. The government did not initiate its first formal proceeding to expropriate white farms until 2007.198

So long as the state continues to operate within the Constitution’s parameters and pays just compensation for expropriated properties, its efforts to rectify property-induced invisibility will not lead to more property-induced invisibility. Its efforts may cause less severe harms, such as emotional distress, inconvenience, and lack of compensation for the non-market value people place on property, but restructuring the property status quo in order to legitimize it is not a costless, frictionless process.

Nevertheless, it is crucial that all members of society view the process as fair. Whites, who are the gatekeepers of capital in South Africa, will likely close the gate if the process is viewed as unfair. Also, if LRP beneficiaries feel like both the process and result were fair, then it is more likely that the LRP will edify invisible people’s relationships to society.199

b. Providing Asset-Based Choices Is Critical

I have argued that a transfer of assets within a paradigm of choice is required to bring invisible people into the social contract. In theory, under the LRP, a dispossessed claimant can be compensated with a variety of asset-based choices. The options include:

restoration of the land from which claimants were dispossessed; provision of alternative land; payment of compensation; alternative relief including a package containing a combination of the above, sharing of the land, or special budgetary assistance such as services and infrastructure development where claimants presently live; or

extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress. 7. A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress. 8. No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 56(1). 9. Parliament must enact the legislation referred to in subsection (6)."


199. Tom R. Tyler, Why People Obey the Law 162 (1990) (arguing that the normative rather than instrumentalist perspective better captures why people obey the law: From the normative perspective “people react to social experiences in terms of the fairness of the outcomes they receive (distributive justice), and the fairness of the procedures by which those outcomes are arrived at (procedural justice)."

priority access to state resources in the allocation and development of housing and land in the appropriate development programme.200

South Africa is unique because, at least in theory, it has embraced the importance of a bottom-up approach that focuses on asset-based choices in addressing past land dispossession. The White Paper on Land Policy, which is the government’s definitive policy on land matters, states that “solutions must not be forced on people.”201 As a result, the country has the potential to move beyond a paradigm that focuses merely on reparations to a new emphasis on restoring people’s relationships to society.

Choice is particularly important with respect to the return of land, as opposed to other forms of property. For example, one cannot assume that people necessarily want to return to the land that was stolen from them, especially when there has been a significant passage of time between the expropriation and the restorative act. If agricultural land was confiscated, people may no longer have the skills, capital, or desire to work the land as they once had. Instead, they may prefer to establish themselves in the city in order to access the wealth, opportunities, and social infrastructure found therein. Alternatively, the passage of time may have attenuated ties to the community where the property is situated, or individuals may not want to return to the land because a series of harrowing events that culminated in the expropriation make the land a constant reminder of the trauma and pain suffered. Similarly, it is also not fair to assume that people do not want to return to the land. Many people have an unquantifiable but reasonable attachment to a particular piece of land. The land may be where their ancestors are buried, it can be a constitutive element of their cultural identity, or it can be infused with valid emotive significance of various other origins.

Unfortunately, despite the mandate of the White Paper, in practice, the role of choice is muted to a large extent, and those who have been dispossessed are not given the full array of asset-based choices.202 Individual claimants have mostly been levied against urban land, where the government’s preference (and the most common form of compensation) is monetary compensation.203 The experience of former Sophiatown residents, which is the site of one of the most infamous Apartheid-era urban evictions, is telling. Nkuzi, a well-regarded land-sector NGO noted that, “while the validity of their claims was undeniable the government decided that ‘restoration of land was not feasible . . . and alternative land within the same magisterial districts was not available’. . . and therefore they offered only financial compensation to the claimants . . .”204 It is clear from Nkuzi’s accounts that there was no room for creative, people-

201. Id. § 4.14.1.
202. Id.
203. Id.
204. Walker, supra note 111, at 662.
driven remedies as contemplated in the White Paper, because the only options contemplated were return of the land, alternative land, or financial compensation.205 There were no innovative in-kind options offered, such as access to highly subsidized credit, free vocational training, or any other options claimants may have desired.206

Group claims are largely made against rural lands, where the government’s preference (and incidentally, the common outcome) is to give the group their land back.207 For all group claims, the Commission on Restitution of Land Rights holds a general meeting that all beneficiaries are invited to attend.208 Ostensibly, the advantages and disadvantages of all options are discussed and eventually a remedy is chosen by majority vote. But it is unclear to what extent the government’s preferences color these meetings or which options are discussed. What is clear is that people-driven, in-kind options are not seriously on the table.

Despite the political mandate articulated in the White Paper and the fact that approximately 68,000 claims have already been decided,209 there have only been a few instances where people were given the opportunity to craft bottom-up, self-styled restoration packages. This is what led Tozi Gwanya, Chief Land Claims Commissioner, to admit that “the White Paper provides for options but as officers, we have been unable to make it a reality.”210 The problem is that providing creative choices takes time, but time is short.211 The Commission on Restitution of Land Rights was given until March 31, 2008 to finish its job.212

There have been a few rural examples of self-styled remedies where beneficiaries were allowed to exercise their agency.213 A community in Putfontein, which is located in the Guateng region, leveraged their money to construct a housing development.214 A community in Queenston, which is located in the Eastern Cape, received half of their award in money paid to eligible households, while the other half was used for three development projects that would benefit all members of the community—a community center, an old-age home, and an indoor sports center.215 Finally, a community in Keiskammahoek also split the funds: Half of the money was received in financial compensation, while the other half was invested in community development projects, which included building three extra classrooms in the local school, repairing the central road, and creating a forestry project to expand the forest.216

In urban areas, there are also a few instances where people were able to take an active role in shaping their remedy. District Six, in Cape Town, is the most acclaimed example, but communities in Port Elizabeth, East London, and Durban have been successful at moving beyond the cookie-cutter remedies presented by the government to remedies that are largely self-styled housing developments.217

South Africa must transform the LRP, which at present functions as a reparations program, into a restoration program. The state must encourage communities and individuals to exercise their volition as they did in the few rural and urban communities discussed above, because ultimately, the provision of asset-based choices is how the larger project of restoring a community or individual’s relationship to society will be accomplished. This type of creative, humanizing approach that places dispossessed individuals in control of their own lives and communities will go a long way toward reintegrating people back into the social contract, thereby ameliorating property-induced invisibility.

When the full array of choices is not on the table, then the consequences can be dire. For example, the Khomani San were given limited options—return of their land or cash compensation.218 They chose return of their land, but today, the settlement is in shambles, partly due to lack of post-settlement support.219 This could have been avoided if the Khomani San were given a more robust set of options. They could have, for example, reduced the acreage received in exchange for various types of government-guaranteed post-settlement support. The key is for the government to provide a space in which beneficiaries are heavily encouraged to look beyond the narrow options presented, take charge, and, within the bounds of resources available, create a remedy that satiates their idiosyncratic needs.

205. Id.
206. Id.
207. Didiza, supra note 138.
208. Id.
209. See Interview with Tozi Gwanya, supra note 112.
210. Id. See also Interview with Blessing Mphela, Land Claims Commissioner for Guateng and North West, in Pretoria, S. Afr. (Jan. 11, 2006) (expressing the view on the matter that “issues around remedies were not well thought out”).
211. In general, in order to allow for creative asset-based choices, restoration programs require a sophisticated, efficient, and non-corrupt bureaucracy. The problem is that transitional or developing governments who most need restoration programs often do not have developed bureaucracies or suffer from high rates of corruption. See generally, SHAUKAT ALI, CORRUPTION: A THIRD WORLD PERSPECTIVE (1985); DAVID J. GOULD, BUREAUCRATIC CORRUPTION AND UNDERDEVELOPMENT IN THE THIRD WORLD: THE CASE OF ZAIRE (1980); STEPHEN KOTKIN & ANDRÁS SÁJO, POLITICAL CORRUPTION IN TRANSITION: A SKEPTIC’S HANDBOOK (2005).
212. Walker, supra note 111, at 648.
213. One critique proffered by an opposition party is that restoration monies are being used to provide services that the government is supposed to provide anyway. However, many of the projects the communities are pursuing were not on the local government’s priority list. By using restoration monies, communities are able to make their priorities come to fruition because they are able to leverage their monies to receive additional monies from the government. Interview with Tozi Gwanya, supra note 112.
214. Id.
215. The Department of Social Development and the local municipality contributed to the development projects. Id.
216. Id.
218. Id. at 649.
219. Id.
V. CONCLUSION

My analysis begins at the point that a state has already decided to compensate people for past dispossession. The two pertinent questions this Article addressed were: Who should benefit?, and How should the process unfold? I have argued that, as a baseline, those subject to property-induced invisibility must be restored. Property-induced invisibility results when property is confiscated, such that a person or community is removed from the social contract.

In terms of how the process should unfold, I have argued that states must move beyond mere reparations (compensation without choice) to restoration (compensation with choice). Restoration is superior to reparations because it entails the larger, more complex task of restoring an invisible person’s or community’s relationship to society. The reintegration process of dispossessed individuals and communities is facilitated when they are allowed to choose how they are compensated and given viable asset-based options to choose from. By rejecting the dominant paradigm of reparation and adopting a policy of restoration, a country can move beyond restoring property rights to restoring political and economic visibility.