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The Political Possibilities of Reparations

Ezra Rosser¹

ALEXANDER, GREGORY S. 2014. The Complexities of Land Reparations.
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In “The Complexities of Land Reparations,” Professor Gregory Alexander gives a spirited attack on the idea that land reparations are an appropriate remedy for those whose land was wrongly taken in the past. Alexander does not come out and say land reparations are never appropriate. Instead, he argues that “the complexities involved in all the situations where claims for land reparations are made to correct historic injustices give us good reasons to be hesitant about granting such claims” (875). Alexander goes on to explain his hesitation in an argument that closely resembles an argument made by Jeremy Waldron in two previous articles (Waldron 1992, 2002). In line with the Supreme Court’s decision in *City of Sherrill v. Oneida Indian Nation of New York* (2005), Alexander argues that the passage of time can lessen moral and legal claims to dispossessed property (876). He also adds a *what’s done is done* argument: specific restitution of the wrongfully taken land cannot recreate the conditions at the time the land was taken, for “[t]he clock simply cannot be turned back” (879).

Overall, Alexander succeeds in showing “reasons to hesitate” when it comes to land reparations, but having reason to hesitate does not mean such claims should be pushed off the table (899). The clock may not be able to be turned back, but “the default position is never that the wrongdoer gets to keep what he stole” (Sanderson 2011, 160). Moreover, a common refrain in property law, picked up by Alexander, is that part of what you are is what you own. This idea shows up in everything from justifications for adverse possession to Radin’s personhood theory (Radin 1982). And it reflects a common experience: after you own something—whether it be land or a t-shirt—for a period of time, you develop attachment for that particular thing and in some ways, your identity becomes wrapped up in the item (Radin 1982, 959-60; Alexander 2014, 882). But missing from this account is an acknowledgment that for some people identity is marked by absence of property as much as by ownership of property. This idea, embodied in everything from the longing to return among exiled populations to the awareness of wealth among the lower classes as described in Bruce Springsteen’s “Mansion on the Hill” (1982), also reflects a common experience. Alexander dismisses the idea that people can remain closely bound to property held

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by others. Alexander writes:

. . . If the thing has been gone from me for a long time, it can no longer, in any meaningful sense, be said to be essential to my life plans. As circumstances change, whatever the reason, people move on with their lives. They change their plans. Things that were once essential in their lives fade in significance and are replaced by other things.

Nor can it be said to be essential to my personal identity. (880)

For Alexander, attachment to lost property takes the form of mere memories while attachment to things in one's possession constitutes one's present self (881). But this distinction not only seems forced but is likely inaccurate for many. A homeless person's identity is arguably more marked by his or her absence of housing than by, for example, possession of a shopping cart. Similarly, those who lost their position and many of their possessions in life as a result of the Great Recession may feel that items associated with their former lifestyle are "essential" to who they are, even if they can no longer afford the same items anymore. Alexander's position suggests such individuals should "move on," but that can be hard for those who lost property and impossible for those who never had property. To deny that property can be the basis of people's personal identity even when that property is held by another is to deny the power of property to impact the identity of the propertyless just as, if not more than, it impacts the identity of the holders of property (Taussig-Rubbo 2012, 288; Jones 2011, 128). What is true on an individual level is also true for whole communities who have lost their land: the identity of the community may still be wrapped up in their prior homeland, which is both a memory and who they are as a people. The Sioux, for example, have not accepted the financial compensation that they won in a U.S. Supreme Court decision, *United States v. Sioux Nation of Indians* (1980), recognizing the wrongful taking of part of their homeland (Lazarus 1991). Instead, they have been "pursuing their [land] claim to the Black Hills legally and politically" as a people for a century and a half because they "perceive the Black Hills to be priceless or irreplaceable" (Carlson 2013, 700). Despite rampant poverty on Sioux reservations, "about \$1 billion waits untouched in accounts at the U.S. Department of the Treasury" (Strechinsky 2011).

For those opposed to land reparations, a dismissive stance towards the connection that prior possessors have to land is coupled with a celebration of current occupiers. If prior possessors do not have their identity bound up in the property, the same cannot be said of current occupiers or owners. Moreover, even though current occupiers are on land that was wrongly taken from others, Alexander argues that they are not "scofflaws" and that, having relied on representations about the land from the state, "it is difficult to characterize the improvers as engaging in bad faith" (885). Alexander goes on to say that where the property was transferred from the government, "the current owner-possessor is an innocent party, someone who had no part in the expropriation" (895). But is Alexander right? Should current owners who acquired land from a government that wrongly took land from prior possessors, often Indian nations, be so quickly absolved of wrongdoing? Generally they are. Even as

historians have recast the story of how the west was won to better account for the wrongs committed against Indian tribes, rarely are individual settlers faulted. Even though Justice Stevens, for example, dissented in the holding of *City of Sherrill v. Oneida Indian Nation of N.Y.*, he too saw the non-Indians who settled in the boundaries of the Oneida reservation as “innocent landowners” (266). In line with Alexander’s inclination, we fault government policies, but not the beneficiaries of such policies, even though they elected the government leaders who perpetrated these policies. Those who initially acquired the land from the government and even current possessors often had, and have, reason to know of the questionable status of the land title that was conveyed by the government (Tweedy 2012; Rosser 2008, 216-19). If the only options are “guilty” or “innocent,” then “innocent” may be the proper label, but, as with property law in general, complexity abounds and current possessors arguably should not be entirely absolved.

As a practical matter, if land restoration is taken off the list of possible remedies, wrongfully dispossessed people may lose the leverage they need for their cause. Alexander notes that failing to acknowledge and right the wrongs of the past “creates a cloud on the legitimacy of the present” (883), which, while true, may not be enough to make an indifferent settler population revisit the past. On the other hand, putting a cloud on the property held by current possessors can force the issue. Although blocked by the Supreme Court’s adoption of laches in *Sherrill* (a decision Alexander would seem to support), using the possibility that current-possessors could see their right to land diminished or even taken away was a crucial strategy of Indian tribes on the eastern seaboard (Wilkinson 2005, 220-29; Cramer 2006, 323-24; Brodeur 1995). By raising the possibility of a cloud on the titles of non-Indians, tribes in Maine and Connecticut were able to restore part of their land and get Congress and the states to act on their behalf (Nelson 1994, 546-57; Gousse 2014, 546). If the only remedy available to tribes in these land claims had been a financial settlement or payment out of the judgment fund, non-Indians would have been unlikely to see as much need to meaningfully right past wrongs towards these particular tribes (Parker 1989, 132-67). Alexander seems to recognize this, noting, at the end of his discussion of the challenges created by the conflict between current possessors interests and land claims, that “[a]ll of the difficult questions that I have raised go away, obviously, if we decide that the land need not be returned to its former occupants or their descendants” (885). Making sure these difficult questions do not simply “go away” is one of the goals of seeking land reparations. Part of resisting the idea that these questions should “go away” involves the recognition that conquest was not completed at the time of *Johnson v. M’Intosh* (1823), but instead is an ongoing and messy process (Ruppel 2008, 162).

Alexander’s final argument against land reparations is that restorative justice should come after, not before distributive justice. Alexander argues, “A society whose existing distributive scheme of basic resources is fundamentally unjust or inadequate cannot justify satisfying historically-grounded claims on resources” (898). But he qualifies this argument by limiting it in cases where a state can meet its restorative justice obligations without “jeopardiz[ing] its ability to meet its

distributive justice obligations” (898). The problem with this argument is it amounts to an intellectual version of the idea, also found elsewhere (Wyman 2008, 196), that the land claims should “go away.” That a society has distributive justice problems should not be grounds for rejecting land reparations, especially where the society lacks political will to work towards distributive justice. The idea that wrongful acquisition and, relatedly, reparations should be understood as outside of the ordinary workings of property law is dangerously short-sighted in that it ends up giving a free pass to those who benefit the most from the property system. Put differently, the racialized nature of property and systematic inequality should force property scholars to question whether property law is up to the task of responding to problems in the acquisition and distribution of property (Rosser 2013, 2015). But instead of opening space to make progress on these problems, Alexander’s skepticism regarding land reparations narrows the range of remedies and diminishes the political power of calls to correct past injustice. Instead of repeating the comforting argument that reparations are too disruptive and therefore should largely be taken off the table, property scholars should do more to listen to the voices of those still suffering the repercussions of past and continued injustice.

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