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## 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

*Bernadette Atuahene\**

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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.<sup>1</sup> The dominant belief among South Africa's Black<sup>2</sup> majority is that whites obtained this property not through their hard work, but instead through systematic land dispossession and other forms of unyielding oppression that began at colonial conquest and intensified with Apartheid. There are several other countries where past theft rather than hard work is widely believed to explain the status quo of property ownership. Bolivia's indigenous majority—primarily the Aymara, Quechua, Chiquitano, and Guarani peoples—constitutes about 62% of the total population.<sup>3</sup> Yet, the minority—the Europeans and mixed-race peoples—owns the lion's share of the country's wealth.<sup>4</sup> In the minds of Bolivia's indigenous majority, the present distribution of land is the result of colonial-era theft, and is thus illegitimate.<sup>5</sup> In 1992, Russia embarked on a privatization program that established the post-Communism status quo of property ownership.<sup>6</sup> This program was so riddled with corruption that a signifi-

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1. Johan van Rooyen & Bongiwe Njobe-Mbuli, *Access to land: selecting the beneficiaries*, in AGRICULTURAL LAND REFORM IN SOUTH AFRICA: POLICIES, MARKETS AND MECHANISMS 461 (Johan van Zyl et al. eds., 1996) ("Land distribution in South Africa is highly skewed. Approximately 87% of agricultural land is held by almost 67,000 white farmers and accommodates a total population of 5.3 million. The remaining 71% of the population, which is predominantly black, live on 13% of the land in high density areas—the former homelands.").

2. When I refer to Blacks (with a capital "B") in the South African context, I am talking about those classified as Coloureds, Indians, and Africans under Apartheid.

3. Indigenous groups constitute 56-70% of the population, and two-thirds of indigenous people, who are mostly subsistence farmers, live in poverty. U.S. DEP'T OF STATE, BACKGROUND NOTE: BOLIVIA (Mar. 2007), <http://www.state.gov/r/pa/ei/bgn/35751.htm>.

4. See Jose de Cordoba, *Class Struggle: Along the Andes, Indians Agitate for Political Gain; Radicals Topple Governments, Test U.S. Regional Policy; Rising Clout in Bolivia; Longing for the Inca Empire* WALL ST. J., Jan. 8, 2004, at A1.

5. Land dispossession is one source of the indigenous people's recent unrest, which vaulted Evo Morales to the presidency. *Id.*

6. See generally Andrei Baev, *The Privatization of Land in Russia: Reforms and Impediments*, 17 LOY. L.A. INT'L & COMP. L. REV. 1, 9 (1994) (discussing the history of Russian land privatization programs and existing land legislation and land reforms); Merton Peck, *Russian Privatization: What Basis Does it Provide for a Market Economy?*, 5 TRANSNAT'L L. & CONTEMP. PROBS. 21, 22, 27 (1995) (noting the rapid pace of privatization: "There were only thirty-nine private enterprises as of January 1992; by February 1994 there were about 93,000 such firms.").

cant amount of state resources ended up in the hands of a few of Russia's powerful oligarchs.<sup>7</sup> As a result, the status quo of property ownership in Russia is widely perceived to be illegitimate.<sup>8</sup> These three examples are merely the tip of the iceberg; history is rife with similar examples.

Despite the fact that in certain countries the majority of citizens believe that the property status quo is illegitimate,<sup>9</sup> under the neoliberal paradigm for economic development,<sup>10</sup> property rights are nonetheless given sanctity and enshrined in their constitutions because people have an incentive to work hard and produce if they know that the fruits of their labor are secure and not subject to capricious takings.<sup>11</sup> The underlying

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7. See AMY CHUA, *WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY* 6 (2003); Virginie Coulloudon, *Privatization in Russia: Catalyst for the Elite*, FLETCHER F. WORLD AFF., Fall 1998, at 43, 44 (noting that privatization in Russia was riddled with scandals and gave birth to an oligarchic regime.).

8. Hilary Appel, *Voucher Privatisation in Russia: Structural Consequences and Mass Response in the Second Period of Reform*, 49 EUR.-ASIA STUD. 1433, 1441 (1997) ("A large number of Russians today hold the privatisation process in extreme contempt."); *id.* at 1448 n.51 ("Gurkov's 1994 survey research reports that 47.7% of respondents in October 1994 thought that privatisation equalled a robbery of national property.")

9. An individual's understanding of the circumstances under which property was generally acquired will determine what her attitudes are with respect to the legitimacy of property arrangements. If the prevailing perception is that, for the most part, people deserve to be in possession of the property that they presently own because they worked hard for it or inherited it from someone who did, then it is likely that the majority of citizens will be amenable to significant protection of private property. For instance, in the United States, the general understanding is that *today* people have not acquired their possessions through theft. Although people do acknowledge that at many points in history the United States usurped land from native peoples and others through illegal and immoral means, this has not created a widely held perception among Americans that the status quo of property ownership in the United States *today* is illegitimate because of past theft. This is in part because the injustice happened to a group that is now a politically and economically marginalized minority. Also, it happened so long ago that the majority views those who own property *today* as having a nominal connection to the perpetrators of the past land theft. This is not the case in a place like South Africa or Zimbabwe (particularly before the 2000 land crisis began), where the prevailing belief is that the *present* status quo of property distribution is a direct result of Apartheid or colonial-era theft, rather than hard work.

10. See generally GERARD DUMENIL & DOMINIQUE LEVY, *CAPITAL RESURGENT: ROOTS OF THE NEOLIBERAL REVOLUTION* (Derek Jeffers, trans., Harvard Univ. Press 2004); LESTER C. THUROW, *THE FUTURE OF CAPITALISM: HOW TODAY'S ECONOMIC FORCES SHAPE TOMORROW'S WORLD* 1-5 (1996); John L. Campbell & Ove K. Pedersen, *Introduction to THE RISE OF NEOLIBERALISM AND INSTITUTIONAL ANALYSIS* 1 (John L. Campbell & Ove K. Pedersen eds., 2001). The equity and efficacy of neoliberal economic policies has been vigorously debated in academic circles. For a conservative viewpoint, see MELVIN J. THORNE, *AMERICAN CONSERVATIVE THOUGHT SINCE WORLD WAR II: THE CORE IDEAS* 114-116 (Contributions in Political Science Series No. 251, Bernard K. Johnpoll ed., 1990) (discussing the importance of private property rights to individual liberty); for a liberal viewpoint, see Barry K. Gills, *Democratizing Globalization and Globalizing Democracy*, ANNALS AM. ACAD. POL. & SOC. SCI., May 2002, at 158, 167 (noting that the "neoliberal discourse has emphasized a Hayekian understanding of freedom as freedom above all for capital, for the movement of commodities, and for markets, that is, a freedom for the holders of PROPERTY to pursue maximum flexibility and profit"). See generally NOAM CHOMSKY, *PROFIT OVER PEOPLE: NEOLIBERALISM AND GLOBAL ORDER* 32 (1999).

11. Most notably, this is an idea espoused and defended by Jeremy Bentham. Bentham believed security of property is essential in maximizing social utility. See JEREMY BENTHAM, *Principles of the Civil Code*, in *THEORY OF LEGISLATION* 110 (Etienne Dumont

assumption behind the sanctity given to property is the notion of desert: People generally deserve what they own because they labored for it or received it through the hard work of someone else who bequeathed that property as a gift or in a will. The "sanctity of property" principle becomes obfuscated when sanctuary is given to property arrangements widely perceived to be defined by pervasive theft. In such cases, the principle merely serves to ossify ill-gotten gains.

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

Transforming the property status quo is especially necessary when an ethnically distinct minority acquired significant amounts of property through some form of past theft and today continues to enjoy the benefits of their illicit or immoral act at the expense of the majority. At the very least, the majority would resist strong property rights that ossified these illicit gains; at worst, they would be more inclined to capricious and arbitrary takings of land, as witnessed in Zimbabwe beginning in 2000.<sup>13</sup>

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

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

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

13. See generally DONALD S. MOORE, *SUFFERING FOR TERRITORY: RACE, PLACE, AND POWER IN ZIMBABWE* (2005).

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

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

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

Part II explores who, at a minimum, should receive restoration of property rights. I argue that, under certain circumstances, confiscating property removes people from the social contract and renders them invisible. I call this property-induced invisibility. Widespread property-induced invisibility is of particular concern because it can place the legitimacy of existing property arrangements in serious doubt. As a baseline, therefore, states must rectify property-induced invisibility in the restorative process.<sup>16</sup>

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14. CHUA, *supra* note 7, at 6. See also Amy Chua, *The Paradox of Free Market Democracy: Rethinking Development Policy*, 41 HARV. INT'L L.J. 287, 287-92 (2000); Amy Chua, *Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development*, 108 YALE L.J. 1, 6 (1998); Amy Chua, *The Privatization-Nationalization Cycle: The Link Between Markets and Ethnicity in Developing Countries*, 95 COLUM. L. REV. 223, 226 (1995). Also, it is important to note that Chua recognizes that the introduction of democracy does not necessarily mean that the majority will gain any significant political power because the will of the majority is still often subordinated via vote rigging and corruption of various hues. Chua, *Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development*, *supra*, at 56.

15. CHUA, *supra* note 7, at 6.

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

Part III investigates how the restorative process can address property-induced invisibility. I argue that societies must change the focus from the limited concept of reparations—return of the actual property confiscated—to restoration, which is the larger project of restoring a dispossessed group or individual's relationship to society.<sup>17</sup> In the context of property-induced invisibility, the confiscation of property is part of a larger strategy of dehumanization, resulting in the removal of that person or community from the social contract. The consequence is more than just the taking of real property, but also the destruction of their relationship to society. Hence, the restorative process must do more than just give people their property back; its aim must be to repair this relationship to society (that is, restore political and economic visibility). I argue that a substantial amount of work towards restoring a relationship to society and correcting property-induced invisibility will occur if the dispossessed are included in the social contract through a bottom-up process that provides asset-based choices, which both allow people to choose how they are made whole and give them viable options from which to choose.<sup>18</sup>

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

For the purposes of this Article, legitimacy is construed in both empirical and moral terms. Empirically, legitimacy is determined by the number of citizens who believe that land arrangements are legitimate.<sup>19</sup> Under the Weberian view, legitimacy "is meant to designate the beliefs and attitudes that members have toward the society they make up. The society has legitimacy when members so understand and value it that they are willing to assume the disciplines and burdens which membership entails. Legitimacy declines when this willingness flags or fails."<sup>20</sup>

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

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

19. A. John Simmons, *Justification and Legitimacy*, 109 ETHICS 739, 748 (1999).

20. Charles Taylor, *Alternative Futures: Legitimacy, Identity, and Alienation in Late Twentieth Century Canada*, in COMMUNITARIANISM: A NEW PUBLIC ETHICS 58 (Markale Daly ed., 1994). See also JEREMY BENTHAM, THE THEORY OF LEGISLATION xiv (Oceana Publications 1975) ("Bentham grasps, thus, that public opinion is an important supportive structure both for the legitimacy of the law (as well as the legal system) and for its effective

When evaluating the legitimacy of property arrangements, I will use the same empirical approach adopted by Weber. Property arrangements are considered legitimate as long as a substantial portion of society believes so and is willing to respect and accept the disciplines and burdens of maintaining the property status quo.<sup>21</sup> To protect minorities, this empirical approach will be supplemented with a moral understanding of legitimacy, which considers actions that contravene a person or community's fundamental human rights as necessarily illegitimate.<sup>22</sup>

## II. INVISIBILITY

### A. PROPERTY CONFISCATION CAN REMOVE INDIVIDUALS AND COMMUNITIES FROM THE SOCIAL CONTRACT AND RENDER THEM INVISIBLE

Aside from actual execution, being rendered invisible is the worst thing that can happen to an individual or community because invisibility is a type of social death. If citizenship is defined as "membership in a political community,"<sup>23</sup> invisible people are either completely excluded from citizenship or are, in effect, sub-citizens. They are politically or economically powerless populations and hence the state can gaze past their diaphanous needs with nominal immediate consequence. Although invisible people live physically within a society, they are not fully part of it. They are not given space at the core of the polity as full members treated with dignity; rather, they are relegated to the periphery where their humanity is denied, and they vanish from the political eye in a haze of otherness.

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implementation"). Legitimacy can be based on perceptions. See Simmons, *supra* note 19, at 749. In contrast, it can be based on rights derived from either written documents (for example, a constitution) or unwritten conceptions of morality. There is substantial literature in psychology and political science about legitimacy. For a thorough literature review of legitimacy as discussed in psychology, see Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375, 375 (2006) ("[L]egitimacy is a psychological property of an authority, institution, or social arrangement that leads those connected to it to believe that it is appropriate, proper, and just. Because of legitimacy, people feel that they ought to defer to decision and rules, following them voluntarily out of obligation rather than out of fear of punishment or anticipation of reward. Being legitimate is important to the success of authorities, institutions, and institutional arrangements since it is difficult to exert influence over others based solely upon the possession and use of power."). For a thorough literature review of legitimacy as discussed in political institutions, see James L. Gibson et al., *Why Do People Accept Public Policies They Oppose? Testing Legitimacy Theory with a Survey-Based Experiment*, 58 POL. RES. Q. 187, 187 (2005).

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

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

23. T. Alexander Aleinikoff, *Theories of Loss of Citizenship*, 84 MICH. L. REV. 1471, 1486 (1986) (discussing citizenship).

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

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

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

25. See Christopher Cameron, *How the Garcia Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CAL. L. REV. 1347, 1354, 1358 (1997) (arguing that a lack of legal recognition for national origin discrimination under Title VII is due to Latino's exclusion from the black-white, "bifurcated universe" of racial discourse in the United States: "Racial dualism is problematic not only because it limits judges' understanding of national origin claims, but also because it makes Latinos and their problems in the workplace invisible."); Juan F. Perea, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965, 966 (1995) (arguing that Latino invisibility is created by an "absence of public recognition and portrayal . . . prohibitions on the use of Spanish . . . [and] through the attribution of foreignness, [which the author termed] 'symbolic deportation'").

26. Mark Chekola, *Equality Foundation v. City of Cincinnati: Invisibility and Identifiability of Oppressed Groups*, 6 LAW & SEXUALITY 141, 143-44 (1996) (suggesting that homosexual invisibility is brought on by the fact that gays are not physically recognizable, which explains the Sixth Circuit's reasoning in the case for holding that homosexuals are not an identifiable class); Darren Lenard Hutchinson, *"Closet Case": Boy Scouts of America v. Dale and the Reinforcement of Gay, Lesbian, Bisexual, and Transgender Invisibility*, 76 TUL. L. REV. 81, 110 (2001) (arguing gays are rendered invisible by the courts because they fail to "recognize the expressive components of sexual identity"); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell"*, 108 YALE L.J. 485, 487, 490 (1998) (arguing that courts encourage homosexual invisibility through equal protection heightened scrutiny).

Two commonalities emphasized by the courts are that race and sex ostensibly mark individuals with immutable and visible traits. A classification will therefore be less likely to receive heightened scrutiny if its defining traits can be altered or concealed. By withholding protection from these classifications, the judiciary is subtly encouraging groups comprised by such classifications to assimilate by changing or hiding their defining characteristic. See Yoshino, *supra*, at 487, 490.

27. See generally BREAKING OUT OF INVISIBILITY: WOMEN IN INDIAN HISTORY (Aparna Basu & Anup Taneja eds., 2002); Berta Esperanza Hernandez-Truyol, *Sex, Culture, and Rights: A Reconceptualization of Violence for the Twenty-First Century*, 60 ALB. L. REV. 607, 616 (1997) (using invisibility to describe the lack of female representation in organizational bodies involved in decision making and rights defining); Patricia McLean & Marion Kostanski, *Factors that Protect Women from Becoming 'Invisible'*, 55 AUSTR. J. PSYCHOL. 197, 197 (2003); Carolyn Whitzman, *At the Intersection of Invisibilities: Canadian Women, Homelessness and Health Outside the 'Big City'*, 13 GENDER, PLACE & CULTURE: J. FEMINIST GEOGRAPHY 383, 383-84 (2006).

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

plight of blacks is relegated to obscurity and societal institutions systematically deny black people's humanity. Invisibility is caused by the onlooker's blindness rather than the protagonist's lack of substance or translucent humanity. "I am invisible, understand, simply because people refuse to see me. . . . When they approach me they see only my surroundings, themselves, or figments of their imagination—indeed, everything and anything except me."<sup>29</sup>

In his book, *Slavery and Social Death*, Orlando Patterson further develops the idea of invisibility with his concept of social death.<sup>30</sup> Patterson argues that a socially dead person has no recognizable being outside of that given to her by, or derived from, her powerful master.<sup>31</sup> A socially dead person does not exist in society in her own right because the reigning social compact includes her only as a sub-person, if it includes her at all.

Like Ellison and Patterson, my conception of invisibility is predicated upon a person's dehumanization and exclusion from society. Invisibility results when the terms of the social contract are set or reordered such that individuals or communities are dehumanized and excluded from the contract. Invisible people are those who are denied their basic humanity by the state, or other prevailing power structures, and excluded from the polity; invisibility is a term that describes their consequent relationship to that state. My definition of invisibility is centered upon the social contract, because this is an effective tool to explain the moral and political obligations between individuals and the state: the social contract sets the terms of people's relationship to the state.<sup>32</sup>

The body of literature that discusses the conditions under which individuals and communities are made invisible through their dehumanization and exclusion from the social contract includes the diverse and enlightening insights of John Locke, Carole Pateman, and Charles Mills.

29. *Id.* at 3.

30. See generally ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY* (1982).

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

32. In democracies, the terms are set by a constitution or other federal and local laws as well as informal or customary laws. For more on how the social contract establishes moral and political obligations between the state and individuals, see, for example, P.F. Brownsey, *Hume and the Social Contract*, 28 *PHIL. Q.* 132, 132 (1978) ("While the details of the social contract varied from theorist to theorist, it was common to all forms of social contract theory that no one has rightful political authority and no one is morally obliged to yield political obedience except in consequence of a social contract."); Edward A. Harris, Note, *From Social Contract to Hypothetical Agreement: Consent and the Obligation to Obey the Law*, 92 *Colum. L. Rev.* 651, 657 (1992) ("Social contract theory appeals to the principle of rational voluntarism in explaining the origin of moral and political obligations, and to the principle of consent in explaining how the autonomous individual voluntarily relinquishes her natural liberty to the state, thereby incurring moral and political obligations."). Many scholars also question whether the social contract is the source of moral and political obligation. See, e.g., A. JOHN SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* 3–4 (1979); *SOCIAL CONTRACT THEORY* 83–90, 97–123 (Michael Lessnoff ed., 1986).

Their work provides the foundation for my understanding of the circumstances under which a relationship between the state and an individual breaks down, such that a person or community is taken out of the social contract and made invisible.

According to Locke, in the state of nature, all individuals are equal and "much better that they are not bound to submit to the unjust will of another."<sup>33</sup> When an aggressor threatens to take away an individual's life, liberty, or estate (that is, their Property),<sup>34</sup> that individual has the right to resort to violence in self-defense.<sup>35</sup> Consequently, a state of war ensues and is fueled by the need for every person to constantly and individually defend their Property against interlopers and thieves. To avoid this calamitous fate and to secure protection of their Property, people ceded their individual God-given sovereignty and vested it in the state as fiduciary.<sup>36</sup> For Locke, this bargained-for exchange is the essence of the social contract.<sup>37</sup>

An individual's consent to be part of a particular society is a binding obligation that forbids him from returning to the state of nature, unless the government is dissolved or an unjust state action terminates his participation in the contract.<sup>38</sup> The state was given its sovereignty in a fiduciary capacity, and if the state fails to fulfill its fiduciary duties, then sovereignty is returned to its source—the people. Since the protection of Property is the central reason for entering into a social contract in the first place, the systematic and arbitrary confiscation of Property by the state is one of the primary reasons that an individual would be removed

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33. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 276 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690). Locke's state of nature explanation of moral obligation to the state is still relevant because

State-of-nature explanations of the political realm *are* fundamental potential explanations of this realm and pack explanatory punch and illumination, even if incorrect. We learn much by seeing how the state could have arisen, even if it didn't arise that way. If it didn't arise that way, we also would learn much by determining why it didn't; by trying to explain why the particular bit of real world that diverges from the state-of-nature model is as it is.

ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 8–9 (1974) (emphasis in original).

34. LOCKE, *supra* note 33, at 368. Life, liberty and estates are what Locke defines as property, and this is what I mean when I use the capitalized term "Property" in this portion of the article discussing Locke. When I use the un-capitalized term "property" throughout the article, it refers to real property. I limit the discussion in this Article to the confiscation of real property and do not include other types of property, including cultural, intellectual, or property in one's person.

35. *Id.* at 308–09.

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

37. *Id.*; but cf. BENTHAM, *supra* note 11, at 72–74, 81–82 (discussing Locke's social contract theory).

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

from the social contract and once again become sovereign in her own right.<sup>39</sup> This is especially true when the arbitrary confiscation leads to the individual's total dependence on the state, such that she is in the state's absolute power.<sup>40</sup> At this point, individuals have a right to revolution which those who are still in the social contract do not have.

Carole Pateman and Charles Mills give another perspective on how people are excluded from the social contract. Their concept of exclusion is more extensive than Locke's, in that it describes how some people are never initially included, or are included but relegated to a subordinate position, in the social contract. Also, while Locke's analysis is at the level of the individual, Pateman and Mills analyze how groups are excluded from the social contract.<sup>41</sup>

In her groundbreaking book *The Sexual Contract*, Pateman argues that alongside the social contract exists a concomitant sexual contract.<sup>42</sup> The sexual contract ensures and solidifies men's political right over women.<sup>43</sup> She argues that while social contracts are supposed to enhance and secure freedom,<sup>44</sup> this freedom is reserved for certain classes of individuals, excluding women.<sup>45</sup> Pateman claims that contracts are one of the most important ways social relationships are formed, and women are subordinated in these relationships due to social fictions surrounding who

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

40. LOCKE, *supra* note 33, at 297 (emphasis original) ("[H]e who attempts to get another Man into his Absolute Power, does thereby *put himself into a State of War* with him; It being to be understood as a Declaration of a Design upon his Life.").

41. Locke bases his justification for private ownership on the individual. See Christopher Berry, *Property and Possession: Two Replies to Locke—Hume and Hegel*, in NOMOS XXII: PROPERTY 89 (J. Roland Pennock & John W. Chapman eds., 1980) ("The most distinctive element in Locke's theory of property in his two *Treatises of Government* is his justification of private ownership in purely individual terms.").

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

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

44. *Id.* at 62.

45. *Id.* at 5.

has the capacity to enter into contracts.<sup>46</sup>

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

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

One fundamental premise of contract theory is that all men are born free and live as such in the state of nature. Mills argues that European powers considered non-white people to be savages born "*unfree and unequal*."<sup>52</sup> This subordinate ontological status was then legally codified and perpetuated by both individuals and institutions. Despite the strands of enlightened thought and egalitarianism that pervaded Europe at different points in history, Mills posits that "*European humanism usually meant that only Europeans were human . . . [and] nonwhite subpersonhood is enshrined simultaneously with white personhood*."<sup>53</sup> Like Pateman, Mills

46. *Id.*

47. *Id.* at 6.

48. In the work of Hobbes, women are excluded from becoming civil individuals with the capacity to enter into the original pact. *Id.* at 50. For Locke, women have not risen to the status of individual in the State of Nature, and only individuals can enter into the social contract. *Id.* at 52. Pateman highlights, however, that women's capacity with regard to entering into the marriage contract was never questioned. *Id.* "Women are held both to possess and to lack the capacities required for contract—and contract demands that their womanhood be both denied and affirmed." *Id.* at 60.

49. See generally CHARLES W. MILLS, *THE RACIAL CONTRACT* (1997).

50. *Id.* at 18–19. The social contract story recounted by Hobbes, Locke and other philosophers is a political fiction and thus does not explain the actual and historical origins of society. *Id.* at 19. Although the sexual contract explains actual conditions, it does not give an historical exposition of how things come to be. *Id.*

51. *Id.* at 72–73.

52. *Id.* at 16 (emphasis in original).

53. *Id.* at 27, 56 (emphasis in original).

In philosophy one could trace this common thread through Locke's speculations on the incapacities of primitive minds, David Hume's denial that any other race but whites had created worthwhile civilizations, Kant's thoughts on the rationality differentials between blacks and whites, Voltaire's polygenetic conclusion that blacks were a distinct and less able species, John Stuart

argues that when certain people are considered sub-persons, this conceptual dehumanization becomes the yeast in the leaven bread of oppression and exclusion.<sup>54</sup>

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

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

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Mill's judgment that those races 'in their nonage' were fit only for "despotism."

*Id.* at 59–60.

54. Friend, *supra* note 39 ("This racial contract determines in the first place who counts as full moral and political persons, and therefore sets the parameters of who can 'contract in' to the freedom and equality that the social contract promises. Some persons, in particular white men, are full persons according to the racial contract. As such they are accorded the right to enter into the social contract, and into particular legal contracts. They are seen as fully human and therefore as deserving of equality and freedom. Their status as full persons accords them greater social power. In particular, it accords them the power to make contracts, to be the subjects of the contract, whereas other persons are denied such privilege and are relegated to the status of objects of contracts.").

55. LOCKE, *supra* note 33, at 350–51.

56. Invisibility and property-induced invisibility are highly interrelated concepts. Property confiscation can cause invisibility or, alternatively, property confiscation can be a consequence of the fact that people were made invisible through other means.

57. In the language of Carol Rose, the nature of the property disruption I speak of can be classified as a "Type III disruption." Carol Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 UTAH L. REV. 1, 6 ("Type III disruptions are what I will call 'extraordinary.' These are the rights alterations that accompany revolutions and warfare or other upheavals that create massive overthrowings of existing property rights and resource uses."). This is in contrast to property disruptions classified as Type I and Type II, which are of the "housekeeping" and "regulatory" varieties, respectively. *Id.* at 5–6.

by the act, such that they are effectively left economically vulnerable and dependent on the state to satisfy their basic needs.<sup>58</sup> Individuals and communities subject to property-induced invisibility have a moral right to compensation.

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

### CONTOURS OF PROPERTY-INDUCED INVISIBILITY

	Property confiscations with no payment of just compensation	Executed such that dehumanization occurs	Perpetrated by the state or other prevailing power structure(s)	Adversely affecting powerless people(s) or people(s) made powerless by the act	Such that communities, individuals or their heirs are effectively left economically vulnerable and dependent on the state to satiate their basic needs
<b>Property confiscated during slavery, colonialism and/or Apartheid</b>					
Black farmers in South Africa under colonialism and Apartheid. <sup>59</sup>	Yes. Most times payment was not made, but in rare in-	Yes. Colonialist and Apartheid governments conspicuously	Yes. Land was first taken by England, the colonial power,	Yes. The fact that victims owned land signified they were bet-	Yes. Forced to move to Bantustans, where land was infer-

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

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

59. Confiscation of native land began with the arrival of the Dutch in the 17th century, and mass land removals continued until the 1980s as racist Apartheid land policies mandated the forced removal of blacks from their farmland. See generally LAURINE PLATZKY & CHERYL WALKER, *THE SURPLUS PEOPLE: FORCED REMOVALS IN SOUTH AFRICA* (1985) (discussing in detail the removal of Black South Africans from their land); Lauren G. Robinson, *Rationales for Rural Land Redistribution in South Africa*, 23 BROOK. J. INT'L L. 465 (1997) (providing a concise history of land removals in South Africa).

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<b>Property-induced invisibility applicable</b>	stances when it was, it was not adequate.	believed that non-whites were subhuman savages.	and subsequent Apartheid governments erected legal architecture to further systematically dispossess Blacks.	ter off than other unpropertied Blacks, but never as well off as similarly situated white land owners. Black land owners were part of a people who were made powerless.	ior and overpopulated, and hence poverty rampant.
<b>Property confiscated during war or social unrest</b>					
Tutsi and moderate Hutu in Rwanda <sup>60</sup> <b>Property-induced invisibility applicable</b>	Yes. There was a massive exchange of land from Tutsi to Hutu hands and, for the most part, compensation was never paid.	Yes. Tutsis and those who aided them were widely referred to as roaches in need of extermination.	Yes. The state broke down after Habyarimana was killed; consequently, the Hutu generals responsible for the massacre were the prevailing power structure at the time.	Yes. Both Hutus and Tutsis were poor, most living on less than \$1 per day. Tutsis were made especially powerless in the face of the Hutus who committed genocide.	Yes. Thousands died, those who survived were forced to flee and leave all of their possessions behind.

60. Hutu desire to confiscate Tutsi property was one impetus behind the 1994 killings and exacerbated the devastating after-effects of the genocide. See Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U. L. REV. 1221, 1249–50 (2000) (noting that some Hutu “pillaged, stole, ransacked, and appropriated property from homes in which Tutsi had been killed or from which they had fled”). See also MAHMOOD MAMDANI, *WHEN VICTIMS BECOME KILLERS: COLONIALISM, NATIVISM, AND THE GENOCIDE IN RWANDA* 197 (2001) (citing a USAID-commissioned study which attributes conflicts between neighbors to land scarcity, and concludes by saying “[d]isputes over land are reported to have been a major motivation for Rwandans to denounce neighbors during the ethnic conflicts of 1994”) (citations omitted); GERARD PRUNIER, *THE RWANDA CRISIS: HISTORY OF A GENOCIDE* 248 (1995) (noting while the desire to acquire Tutsi land was not the primary motivation behind the 1994 mass killings; there was “an element of material interest in the killings. . . . Villagers also probably had a vague hope that if things settled down after the massacres they could obtain pieces of land belonging to the victims, a strong lure in such a land-starved country as Rwanda”).

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Japanese in American internment camps during World War II <sup>61</sup> <b>Property-induced invisibility applicable</b>	Yes. Some property was restored or compensated through symbolic reparations, but most of it was not.	Yes. Their equal standing as law-abiding citizens was revoked, and they were dehumanized and forced to live in squalid internment camps based on their ethnicity and not any wrongdoing.	Yes. Internment was instituted by the US government. All three government branches were involved in authorizing the internment.	Yes. Those interned were of various socio-economic standings, but all were made powerless by the internment.	Yes. Many were robbed of their jobs and property, and thus were forced to rely on welfare for their basic sustenance and left economically vulnerable.
British Crown after the American Revolution <sup>62</sup> <b>Property-induced invisibility inapplicable</b>	Yes. Lands that once belonged to the British Crown were transferred to the administrators of the colonies after the Revolution and no compensation was paid for the lands.	Yes. Although American revolutionaries were fighting against a more powerful adversary that they respected and often tried to emulate, war is per se an attempt to dehumanize or kill the enemy.	Yes. When the lands were confiscated, America was not yet a state, but qualified as the prevailing power structure at the time because the revolutionaries had military control over many towns.	No. The British Crown was far from powerless before and after the American Revolution.	No. The loss of the American colonies did not make Britain a poor nation.

61. See generally PETER IRONS, *JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES* (1983); ERIC K. YAMAMOTO ET AL., *RACE, RIGHTS, AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT* (2001); Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933 (2004). See also Lika C. Miyake, *Forsaken and Forgotten: The U.S. Internment of Japanese Peruvians During World War II*, 9 ASIAN L.J. 163, 163–64 (2002) (describing the experiences of Japanese Peruvians during the War, their deportation following the war, and lack of reparations provided to them).

62. Property-induced invisibility is not applicable to the British Crown, but would be applicable to the Loyalists who fought in the war and, after their property was confiscated, were left powerless, poor, and dependent on the state for their basic needs. Confiscation of Loyalist property during the American Revolution began with the seizure of Tory assets in 1775, and later came to include confiscation of Loyalist land. While some loyalists were able to recover confiscated property through American courts following the war, most Loyalists “never attempted to recover any of their losses . . .” David E. Maas, *The Massachusetts Loyalists and the Problem of Amnesty, 1775-1790*, in *LOYALISTS AND COMMUNITY IN NORTH AMERICA* 72 (Robert M. Calhoon et al. eds., 1994). See also ADELE HAST, *LOYALISM IN REVOLUTIONARY VIRGINIA: THE NORFOLK AREA AND THE EASTERN SHORE* 181 (1982) (noting that as a result of a 1779 Act, British property became “vested in the commonwealth [of Virginia]”); ROBERT STANSBURY LAMBERT, *SOUTH CAROLINA LOYALISTS IN THE AMERICAN REVOLUTION* 239 (1987) (noting that the South Carolina law permitting the confiscation of British property stated that “the state could no longer protect the property of persons who had supported the Crown” because of prior British confiscation and destruction of South Carolina property).

	Property confiscations with no payment of just compensation	Executed such that dehumanization occurs	Perpetrated by the state or other prevailing power structure(s)	Adversely affecting powerless people(s) or people(s) made powerless by the act	Such that communities, individuals or their heirs are effectively left economically vulnerable and dependent on the state to satiate their basic needs
<b>Property confiscated by the state for a purported social purpose</b>					
White farmers after the 2002 land grab in Zimbabwe <sup>63</sup> <b>Property-induced invisibility applicable</b>	Yes. White-owned farms were targeted by the ZANU-PF and no compensation has been paid.	Yes. For years, blacks had been dehumanized by colonial and white settlers; the ZANU-PF-orchestrated land grabs were an attempt to turn the tables.	Yes. The state had direct involvement in the planning and execution of the land grabs.	Yes. White land owners were among the wealthiest people in Zimbabwe, but many were made powerless by the land grabs.	Yes. Those farmers who had no other assets on which to rely after their land was taken became economically vulnerable.
Expropriations of property in the U.S. under the "public use" clause for construction of privately owned developments. <sup>64</sup> <b>Property-induced invisibility inapplicable</b>	No. Just compensation is paid.	No. In the worst-case scenario, there may be collusion between local authorities and private developers, resulting in unjust enrichment but not dehumanization.	Yes. State powers of expropriation are used.	No. Owners receive just compensation.	No (conditional). Only renters who were paying below market rent prior to expropriation and are unable to find another apartment with reduced rent can be left economically vulnerable.

63. Zimbabwe President Robert Mugabe's Fast Track Land Reform program, which began in 2000, employed controversial legal and political tactics to expropriate land from white landowners and redistribute it to blacks. See Tom Tirivangani, LAW, LAND REFORM AND SOCIAL JUSTICE: A CASE FOR ZIMBABWE 156-66 (2004) (providing a detailed analysis of the political impetus and legislation behind the Fast Track program); Thomas W. Mitchell, *The Land Crisis in Zimbabwe: Getting Beyond the Myopic Focus Upon Black & White*, 11 IND. INT'L & COMP. L. REV. 587, 590 (2001) (providing a summary of Zimbabwe's land redistribution programs since Zimbabwe gained independence in 1980). See generally CATHERINE BUCKLE, *AFRICAN TEARS: THE ZIMBABWE LAND INVASIONS* (2001); ISAAC MAPOSA, *LAND REFORM IN ZIMBABWE: AN INQUIRY INTO THE LAND ACQUISITION ACT* (1992) COMBINED WITH A CASE STUDY ANALYSIS OF THE RESETTLEMENT PROGRAMME (1995); LUKE ZUNGA, *FARM INVASIONS IN ZIMBABWE: IS ZIMBABWE A DEMOCRACY?* (2003); *The Great Terrain Robbery: Plunder in Zimbabwe*, THE ECONOMIST, Aug. 17, 2002, at 45.

64. Supreme Court cases have interpreted the public use requirement broadly. Leading Supreme Court public use clause cases include: *Kelo v. City of New London*, 545 U.S. 469, 489-90 (2005) (holding that the taking of private property in order to facilitate development constituted a public use within the meaning of the Fifth Amendment); *Hous. Auth. v. Midkiff*, 467 U.S. 229, 239-42 (1984) (expounding upon the court and legislature's role in determining what constitutes public use); *Berman v. Parker*, 348 U.S. 26, 35 (1954) (discussing the court's role in determining what constitutes public use). For detailed discussion on the public use requirement, see, for example, Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 64-66 (1986).

	Property confiscations with no payment of just compensation	Executed such that dehumanization occurs	Perpetrated by the state or other prevailing power structure(s)	Adversely affecting powerless people(s) or people(s) made powerless by the act	Such that communities, individuals or their heirs are effectively left economically vulnerable and dependent on the state to satiate their basic needs
Eastern European and Central Asian property owners during Communism <sup>65</sup> <b>Property-induced invisibility applicable</b>	Yes. Property was confiscated and no compensation was paid.	Yes (conditional). Communism's purported goal was to create a just and equal society; however, in the face of resistance from private property owners during the transition, the government used violence or threatened to kill people for non-cooperation, showing sufficient evidence of dehumanization.	Yes. The communist state expropriated the land.	Yes. Many private property owners became politically and economically powerless after the expropriations, although they may have been powerful prior to them.	Yes. It is the nature of Communism that all property is state-controlled and everyone is forced to rely on the state for their basic sustenance.

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

	Property confiscations with no payment of just compensation	Executed such that dehumanization occurs	Perpetrated by the state or other prevailing power structure(s)	Adversely affecting powerless people(s) or people(s) made powerless by the act	Such that communities, individuals or their heirs are effectively left economically vulnerable and dependent on the state to satiate their basic needs
Slave owners in the Antebellum South after manumission <sup>66</sup> <b>Property-induced invisibility inapplicable</b>	Yes. In so far as slaves were property, emancipation deprived owners of property without just compensation.	No. It was a campaign of re-humanization of slaves rather than dehumanization of slave owners.	Yes. The Thirteenth Amendment mandated manumission.	Yes (conditional). Slaves were the most valuable asset of many slaveholders, so emancipation caused economic vulnerability. This was not the case if subsequent sharecropping arrangements reversed the negative economic effects of emancipation for former slaveholders.	Yes (conditional). If, without slave labor, the plantation went bankrupt, the owner was left unable to satiate his basic needs; but, again, subsequent sharecropping arrangements often prevented this.

1. *Confiscation or destruction of property from owner(s) with no payment of just compensation:*

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

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

2. *Executed such that dehumanization occurs:*

Pateman and Mills convincingly argue that removal from the social contract is predicated upon various forms of dehumanization. At its core,

[D]ehumanization involves denying a person "identity"—a perception of the person "as an individual, independent and distinguishable from others, capable of making choices"—and "community"—a perception of the other as "part of an interconnected network of individuals who care for each other." When people are divested of these agentic and communal aspects of humanness they are deindividuated, lose the capacity to evoke compassion and moral emotions, and may be treated as means toward vicious ends.<sup>67</sup>

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

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

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

The social contract is an agreement between a state and its citizens, so only state action or inaction (often in the form of structural inequality that it tolerates) can forcibly remove citizens and make them invisible. The state's responsibility for a person or community's invisibility is contingent upon its level of culpability. For example, during Hurricane Katrina, United States shores along the Gulf of Mexico were ravished, people were displaced or died, and billions of dollars worth of property was destroyed.<sup>69</sup> Hurricanes are an uncontrollable act of nature, but the

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67. Nick Haslam, *Dehumanization: An Integrative Review*, 10 PERSONALITY & SOC. PSYCHOL. REV. 252, 254 (2006) (quoting H. C. Kelman, *Violence Without Restraint: Reflections on the Dehumanization of Victims and Victimizers*, in VARIETIES OF PSYCHOHISTORY 301 (G.M. Kren & L.H. Rappoport eds., 1976)).

68. For example, when property is a constitutive part of someone's personhood, its confiscation may adversely affect their dignity, but does not necessarily result in dehumanization. For a longer discussion of the property as personhood idea, see Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 971-78 (1982). Locke also had a conception of property as personhood. He believed that property in things was based upon property in/ownership of one's self (that is, one's labor and work). Consequently, when a person mixes their labor with a thing, it becomes his. See LOCKE, *supra* note 33, at 101.

69. See generally MICHAEL E. DYSON, *COME HELL OR HIGH WATER: HURRICANE KATRINA AND THE COLOR OF DISASTER* (2006).

damage was deeply intensified by the fact that the state (both federal and local governments) knew the levees were faulty and furthermore, failed to respond adequately once the scale of the devastation became apparent.<sup>70</sup> Watching the post-hurricane chaos that erupted in the Superdome, it was evident that scores of people were dehumanized by the effect of state inaction. To the extent that the state had a duty to keep the levees in good condition and respond adequately but failed to do so, it is responsible for the invisibility although the hurricane was an act of God.

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

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

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

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

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

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

71. See AVRAHAM BARKAI, FROM BOYCOTT TO ANNIHILATION: THE ECONOMIC STRUGGLE OF GERMAN JEWS, 1933-1943, at 4-5 (William Templer trans., Univ. Press of New England 1989) (1987); FRANK BAJOH, 'ARYANISATION' IN HAMBURG: THE ECONOMIC EXCLUSION OF JEWS AND THE CONFISCATION OF THEIR PROPERTY IN NAZI GERMANY 1-7 (2002).

72. See LOCKE, *supra* note 33, at 278-84.

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

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

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

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

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

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

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73. Invisibility of other types could result, although the presence of an economic buffer prevents property-induced invisibility from occurring.

74. Property-induced invisibility occurs at the time of expropriation, but can persist over generations if the dispossessed's descendants never recover from the initial taking.

75. See PRUNIER, *supra* note 60, at 312–13.

ing skills, and the adeptness of the state at quelling discontent. Invisible people can react to their dehumanization and exclusion by either trying harder to conform to societal norms in hopes of gaining acceptance, or by rejecting societal norms and laws altogether.

By "passing" for a group that is accepted, some are able to eclipse the identity that causes their invisibility.<sup>76</sup> There are others who, while they do not deny the identity that is the source of their oppression, do become obsessed with conforming to societal standards in hopes of winning the respect of those in society who are visible.<sup>77</sup> This spectrum of oppressed people's reactions to their invisibility is the least threatening to societal stability.<sup>78</sup>

In contrast, there are those who have embraced their condition of invisibility and derive a certain freedom from it. Invisible people are not morally bound by a society's rules, since they are not part of the social contract (or are relegated to an inferior position therein).<sup>79</sup> A social contract only morally binds contracting parties; those outside of or subjugated by the contract may acquiesce or comply as they desire, but a moral imperative to do so is absent. For example, the legal system in South Africa during its Apartheid era codified Blacks as inferior human beings, explicitly excluded them from the democratic enterprise, and therefore failed to bind Blacks morally to the legal system of the time. Although Blacks may have conformed to a system that excluded them and considered them subhuman, they had no moral imperative to do so. A positive and negative freedom can arise from this lack of moral attachment to the existing system of rules.<sup>80</sup>

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76. "Passing" is when a person attempts to avoid or hide the source of their oppression by passing for another more accepted group. This is a mechanism people often use to eclipse their invisibility. In the Jim Crow South and Apartheid-era South Africa, blacks with lighter skin frequently tried to "pass" in society as white, thereby eluding altogether their source of oppression. For more on the phenomenon of passing, see generally GRAHAM WATSON, *PASSING FOR WHITE: A STUDY OF RACIAL ASSIMILATION IN A SOUTH AFRICAN SCHOOL* (1970); Amy Robinson, *It One to Know One: Passing and Communities of Common Interest*, 20 *CRITICAL INQUIRY* 715, 728 (1994).

77. See EVELYN BROOKS HIGGINBOTHAM, *RIGHTEOUS DISCONTENT: THE WOMEN'S MOVEMENT IN THE BLACK BAPTIST CHURCH 1880-1920*, at 187-88 (1993) (discussing how African American women conformed to societal standards to increase the visibility of their movement: "Although the Baptist church provided women an oppositional space in which to protest vigorously against social injustice," their movement to gain respectability ultimately "reflected and reinforced the hegemonic values of white America. . .").

78. There are also varieties of social myths that prevent people from rebelling and thus ensure societal stability. For instance, the myth of the divine right of kings (and divinely-sanctioned subservience of serfs) that dominated feudal times, or the myth that blacks are the cursed sons and daughters of Ham that God intended to be slaves. In many situations, people accept their station in society and the blatant injustices that go with it because they truly believe that their suffering is consistent with the will of God. Social myths lead people to accept their invisibility rather than engage in social struggle to become visible.

79. LOCKE, *supra* note 33, at 350. The moral legitimacy of social control is based upon the social contract. When the state removes individuals or communities from the social contract, it can no longer subject them to social control that is morally legitimate.

80. See Daniel Markovits, *Democratic Disobedience*, 114 *YALE L.J.* 1897, 1902 (2005).

A positive freedom results when people are not morally attached to a legal regime that renders them invisible, and they then use this freedom to violate laws in an attempt to inject a dose of morality into an ignoble society.<sup>81</sup> For instance, in the Jim Crow South, sit-ins violated the legal architecture of segregation in order to bring about a society where blacks were treated as equals instead of sub-persons. Brave individuals were able to transform their lack of moral adhesion to the laws that oppressed them into protest actions that served to subvert those very same laws. The exercise of positive freedom can entail a non-violent or violent strategy, so long as the intent is to bring about a more just world.

On the other hand, a negative freedom results when people use their lack of moral adhesion to engage in self-enrichment or morally dubious activities.<sup>82</sup> Through his protagonist in *Invisible Man*, Ralph Ellison articulates a possible reason one would engage in negative freedoms as follows: "Irresponsibility is part of my invisibility. But to whom can I be responsible, and why should I be, when you refuse to see me?"<sup>83</sup> Gangsters that terrorized South Africa's townships during Apartheid are a perfect example. The gangsters robbed people and engaged in a plethora of illegal activities. These young men lived under a system that sought to dehumanize them and hence had no moral imperative to abide by the immoral legal framework. However, they used this freedom as a license to escape all standards of comportment, even the morally legitimate, customary traditions that prevailed in the townships.

When either positive or negative freedoms arise, people are driven to the point at which they sincerely feel that they have little to lose in opposing the government and its laws.<sup>84</sup> Invisibility is most likely to result in increased enforcement costs or disorder when those made invisible either constitute a substantial portion of the population or are able to form coalitions and inspire others to take part in their protest actions.<sup>85</sup> Society

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81. *Id.* (arguing that the exercise of positive freedoms edifies democracy and that "political disobedience can provide for the broader political process by correcting democratic deficits in law and policy that inevitably threaten every democracy"); see also RONALD DWORKIN, *A MATTER OF PRINCIPLE* 105 (1985).

82. This is the conception of invisibility espoused by Glaucon in Book II of Plato's *Republic* in his attempt to explain the nature of justice. In the myth of Gyges, a shepherd discovers a gold ring that has the power to make him invisible. Invisibility allows Gyges to break the law with impunity. He uses his newly found power to seduce the queen, kill the king, and usurp his kingdom. He derives a negative freedom from his invisibility. See PLATO, *THE REPUBLIC* 37-71 (G.R.F. Ferrari ed., Tom Griffith trans., 2000) (360 B.C.).

83. ELLISON, *supra* note 28, at 14.

84. See also PATTERSON, *supra* note 30, at 2 ("[T]otal personal power taken to its extreme contradicts itself by its very existence, for total domination can become a form of extreme dependence on the object of one's power, and total powerlessness can become the secret path to control of the subject that attempts to exercise such power." (quoting GEORG HEGEL, *THE PHENOMENOLOGY OF THE MIND* 228-40 (J.B. Ballice trans., Swann Sonnenschein 1910) (1807))).

85. At one end of the spectrum, there is full compliance with the law, and at the other end, there are unmet expectations and chaos. In between these two extremes is a space where prevalent property-induced invisibility, at the very least, causes the cost of enforcing property rights to increase. The misaligned expectations caused by property-induced invisibility can be rectified through restoration of property. See Leonid Polishchuk, *Distribu-*

functions under the status quo only so long as the majority of people adhere to the established rules and those who do not can be contained. Containment depends upon the state's ability to meet the expectations of the majority. Bentham rightly argued that,

To the extent laws are concordant with expectations, one may hypothesize that they will be willingly complied with by a substantial number of people. The fact that laws are rooted in common expectations thus facilitates willing compliance; the latter in turn, fosters respect for the law and law-makers. Compliance on a large scale helps legitimation of law and the authority of the law-makers.<sup>86</sup>

To the extent that the state is unable to meet the majority's expectations and secure their willing compliance with the law, it can use its police power to force those exercising negative and positive freedoms to comply.<sup>87</sup> The cost of enforcing property rights will increase in proportion to the extent the police power must be invoked.<sup>88</sup> There may come a point, however, at which the state's military prowess and social institutions cannot contain disobedient populations, and disorder will prevail. That is, while the fabric of society can withstand losing a few threads, there comes a certain point when a frayed fabric can do nothing but fall apart.<sup>89</sup> To prevent this, the state must transform and thus legitimize the property status quo.<sup>90</sup>

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tion of Assets and Credibility of Property Rights 3 (Mar. 2, 2004) (unpublished manuscript), available at [http://harrisschool.uchicago.edu/Academic/workshops/polecon\\_archive.asp](http://harrisschool.uchicago.edu/Academic/workshops/polecon_archive.asp) ("[T]he cost of enforcement of property rights is observed to be positively correlated with the inequality of their allocation in the society. . . . Destitution provokes attempts on others' property, partly for a lack of socially productive alternatives, partly because those undertaking such attempts have little to lose.").

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

87. Perceptions of illegitimacy that can ignite social mayhem are suppressed through the criminal justice system, where the focus is to maintain the status quo through social control. For a review of the social control theories underlying criminal law, see DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY* 3-22 (1990); RICHARD QUINNEY, *CRITIQUE OF LEGAL ORDER: CRIME CONTROL IN CAPITALIST SOCIETY* 51-55 (1974) (arguing that through class repression, the criminal justice system is intended to maintain the status quo); Donald Black, *Crime as Social Control*, 48 AM. SOC. REV. 34-45 (1983); Allen E. Liska, *A Critical Examination of Macro Perspectives on Crime Control*, 13 ANN. REV. SOC. 67, 67-88 (1987).

88. See Tyler, *supra* note 20, at 376 ("The use of power, particularly coercive power, requires a large expenditure of resources to obtain 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 decisions made and rules enacted by others are in some way right or proper and ought to be followed."); see also, Morris Zelditch, *Processes of Legitimation: Recent Developments and New Directions*, 64 SOC. PSYCHOL. QUARTERLY, 4, 4-6 (2001).

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

90. Many scholars have noted that land reform can prevent revolution and as well as other forms of political instability. See, e.g., SAMUEL P. HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* 375 (1968); B. Curtis Eaton & William D. White, *The Distribution of Wealth and the Efficiency of Institutions*, 29 ECON. INQUIRY 336, 336 (1991) ("We find circumstances in which redistribution of wealth is Pareto optimal and in which increasing sanctions against theft to their maximum level is not."); Herschel Grossman, *Production,*

### III. RESTORATION

Under international law, a person who has property confiscated has various rights to the return of her property.<sup>91</sup> Because property-induced invisibility is not only caused by the confiscation of property, the mere return of property will not be sufficient to correct it. Dehumanization and exclusion are central to property-induced invisibility. A society that is committed to the process of moral regeneration must find a way to include victims in the democratic project to affirm their humanity. A society can do this by giving invisible people or communities asset-based choices, which facilitate active participation in the remedial process and bring dignity to those formerly dehumanized.

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

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*Appropriation, and Land Reform*, 84 AM. ECON. REV. 705, 711 (1994); Karl Moene, *Poverty and Landownership*, 82 AM. ECON. REV. 52, 52 (1992); Edward N. Muller et al., *Land Inequality and Political Violence*, 83 AM. POL. SCI. REV. 577, 579–86 (1989); Bruce Russett, *Inequality and Instability: The Relation of Land Tenure to Politics*, 16 WORLD POLITICS 442, 453 (1964); cf. T. David Mason, “Take Two Acres and Call Me in the Morning”: Is Land Reform a Prescription for Peasant Unrest?, 60 J. POL. 199 (1998) (noting the ineffectiveness of land reform when accompanied by a rise in state violence aimed at repression); Manus Midlarsky, *Rulers and Ruled: Patterned Inequality and the Onset of Mass Political Violence*, 82 AM. POL. SCI. REV. 491, 504 (1988).

91. See SCOTT LECKIE, *New Directions in Housing and Property Restitution*, in RETURNING HOME: HOUSING AND PROPERTY RESTITUTION RIGHTS OF REFUGEES AND DISPLACED PERSONS 3 (Scott Leckie ed., 2003); Scott Leckie, *Housing and Property Issues for Refugees and Internally Displaced Persons in the Context of Return: Key Considerations for UNHCR Policy and Practice*, REFUGEE SURV. Q. No. 3 2000, at 5–63. International human rights provisions entitling individuals to property restoration include: (1) the right to restoration of housing, land or property, see *Report of the Committee on the Elimination of Racial Discrimination*, ¶ 2(c), U.N. Doc. A/51/18 (Aug. 16, 1996) (“All such refugees and displaced persons have, after their return to their homes of origin, the right to have restored to them property of which they were deprived in the course of the conflict and to be compensated appropriately for any such property that cannot be restored to them.”); (2) the right of those displaced to return to their homes and places of habitual residence in their country should they so wish, see U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on Prevention of Discrimination & Prot. of Minorities, *Housing and Property Restoration in the Context of the Return of Refugees and Internally Displaced Persons*, ¶ 1, U.N. Doc. E/CN.4/Sub.2/Res/1998/26 (Aug. 26, 1998) (“The Sub-Commission on Prevention of Discrimination and Protection of Minorities . . . [r]eaffirms the right of all refugees, as defined in relevant international legal instruments, and internally displaced persons to return to their homes and places of habitual residence in their country and/or place of origin, should they so wish.”); *Report of the Committee on the Elimination of Racial Discrimination*, ¶ 2(a), U.N. Doc. A/51/18 (Aug. 16, 1996) (“All such refugees and displaced persons have the right freely to return to their homes of origin under conditions of safety.”); (3) the right to compensation for land lost as the result of a forced eviction, see U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on Prevention of Discrimination & Prot. of Minorities, *Expert Seminar on the Practice of Forced Evictions*, ¶ 24, U.N. Doc. E/CN.4/Sub.2/1997/7 (July 2, 1997) (Section 24 provides that “[a]ll person[s] subjected to any forced eviction . . . should have a right to compensation for any losses of land or personal, real or other property or goods . . .”); and (4) the state’s obligation to make reparation for injury, see U.N. GAOR Int’l L. Comm’n, Responsibility of States for Internationally Wrongful Acts, Art. 31, 34–37, U.N. Doc. A/56/10, ch. IV.E.1 (2001) (Article 31, Section 1 provides that “[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.” Article 34 provides that “[f]ull reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction either singly or in combination.”).

ing a relationship to society,<sup>92</sup> while restoration is the return of property that emphasizes rebuilding a relationship to society through asset-based choices.<sup>93</sup> Reparation, as opposed to restoration, is currently the goal in various programs designed to restore past rights in property.<sup>94</sup> If return of the stolen property is not possible (for example, if a bona fide purchaser is in possession of the property), then the judge or administrator often orders the state to provide monetary compensation, or sometimes alternative land, if available.<sup>95</sup> The judge or administrator chooses the appropriate remedy. While this approach is effective in achieving reparations, it fails to capitalize upon a prime opportunity to restore a person or community's relationship to society.

In order to restore an individual or community's relationship to society, the restorative process must be asset-based, driven from the bottom-up, and defined by choice. To facilitate the process, the legislature can devise and authorize a standard list of assets from which dispossessed popula-

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92. In the legal literature, the definition for reparations is consistent, although subtle differences exist. *See, e.g.,* Charles J. Ogletree, Jr., *The Current Reparations Debate*, 36 U.C. DAVIS L. REV. 1051, 1055 (2003) (emphasizing four features of reparations: "1) a focus on the past to account for the present; 2) a focus on the present, to reveal the continuing existence of race-based discrimination; 3) an accounting of past harms or injuries that have not been compensated; and 4) a challenge to society to devise ways to respond as a whole to the uncompensated harms identified in point '3'"); Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 691 (2003) (noting that: "[p]aradigmatic examples of reparations typically refer to schemes that (1) provide payment (in cash or in kind) to a large group of claimants, (2) on the basis of wrongs that were substantively permissible under prevailing law when committed, (3) in which current law bars a compulsory remedy for the past wrong . . . , and (4) in which the payment is justified on backward-looking grounds of corrective justice, rather than forward looking grounds such as the deterrence of future wrongdoing.").

93. *See* John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 6 (1999) (emphasizing the following objectives of restorative justice: "restoring property loss, restoring injury, restoring a sense of security, restoring dignity, restoring a sense of empowerment, restoring deliberative democracy, restoring harmony based on a feeling that justice has been done, and restoring social support"); John Braithwaite, *A Future Where Punishment Is Marginalized: Realistic or Utopian?*, 46 UCLA L. REV. 1727, 1743 (1999) (describing restorative justice as "a process of bringing together the individuals who have been affected by an offense and having them agree on how to repair the harm. . . . The purpose is to restore victims, restore offenders, and restore communities in a way that all stakeholders can agree is just."); David Dolinko, *Restorative Justice and the Justification of Punishment*, 2003 UTAH L. REV. 319, 319 ("Restorative justice . . . involves the victim, the offender, and the community in a search for solutions which promote repair, reconciliation, and reassurance." (quoting HOWARD ZEHR, CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE 181 (1990))); Mark S. Umbreit, *Holding Juvenile Offenders Accountable: A Restorative Justice Perspective*, JUV. & FAM. CT. J., Spring 1995, at 31, 32 ("Rather than defining 'the state' as the victim, restorative justice theory views criminal and delinquent behavior as first a conflict between individuals. . . . [B]oth victim and offender are placed in active problem solving roles.");

94. This is the case in South Africa, Germany, and the Czech Republic. *See* Michael L. Neff, Comment, *Eastern Europe's Policy of Restoration of Property in the 1990s*, 10 DICK. J. INT'L L. 357, 364-73 (1992) (discussing restoration policy in East Germany and the Czech Republic); Foster, *supra* note 65, at 621, 626-41 (1996) (discussing restoration programs in the Baltic States); *infra* Part IV and accompanying discussion about the South African LRP.

95. *See generally*, Neff, *supra* note 94, at 364-73.

tions can choose.<sup>96</sup> For example, the dispossessed should be able to choose, *inter alia*, return of expropriated property (if possible), a cash payment, an asset account applicable to education, health, housing or retirement, free vocational training or higher education for two generations, priority within an established housing program, or highly subsidized access to credit.<sup>97</sup> The standard list of assets should be tailored to the economic, social, political, and historical realities of each country. The standard list, however, is not enough. The dispossessed should also be allowed to suggest completely self-styled remedies. The state is not expected to give effect to every asset-based option proposed, but rather only those that are reasonable and within its budgetary restraints. Determining what is reasonable should be part of a consultative process involving the state and the dispossessed, supported by their civil society representatives.

It is important to note that there is a difference between restoration and redistribution. Restoration is one type of redistributive program. Restoration is a one-time event that occurs within a specified timeframe. It is an attempt to correct past wrongs by returning to a prior status quo perceived to be more just, or creating a new status quo predicated upon correcting specific past wrongs. Redistribution is an ongoing process that involves a transfer of wealth from the haves to the have-nots, thereby creating a social safety net.<sup>98</sup> Redistribution, however, results in a new status quo *not necessarily designed to correct past wrongs*. Redistributive programs and policies are the only practical alternative in situations where inadequate records make it impossible to determine who is eligible for restoration.<sup>99</sup>

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

97. The best form of reparations will not always be in monetary form. See William Bradford, *Beyond Reparations: An American Indian Theory of Justice*, 66 OHIO ST. L.J. 1, 6-7 (2005) (noting that "[n]on-monetary modes of redress may be more effective in inducing the national government to accept moral responsibility, in restoring the dignity and autonomy of injured groups, and in healing, reconstituting, and relegitimizing the nation"); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 391 (1987) (noting that appropriate reparations might include "[m]oney for education, housing, medical care, food, job training, cultural preservation, recreation and other pressing needs of victim communities [that] will raise the standard of living of victim groups, promoting their survival and participation").

98. For an intriguing view of redistribution, see Arthur Cockfield, *Income Taxes and Individual Liberty: A Lockean Perspective on Radical Consumption Tax Reform*, 46 S.D. L. REV. 8, 65 (2001) ("Redistribution of wealth and the accompanying high levels of taxation also help to promote the view that all (or almost all) benefit from capitalist taxation systems; this is an important norm that continually needs to be communicated to citizens in order to legitimize social institutions protecting private property. As such, payments toward redistribution of wealth can be seen by the taxpayer as just another payment to the state for protection of the security of the individual's person, the main goal of Lockean private property.").

99. I purposefully use the word "impossible" as opposed to "difficult." It is always difficult to sort out issues related to past violation of rights, but the restoration programs in South Africa and Eastern Europe prove that it is not impossible. For example, a state must decide how many years can pass before a dispossession claim is null and void. Once the

The most important difference between restoration and redistribution is that the former connects directly to a past violation of rights. Restoration is largely protected from political vicissitudes and a claimant that successfully traverses the established judicial or quasi-judicial process is entitled to it.<sup>100</sup> Conversely, politics more profoundly affects redistribution. For instance, while one political administration acknowledged and defended redistributive welfare programs, such as Affirmative Action, because they ameliorate past wrongs, another denied the connection altogether and cancelled the programs.<sup>101</sup> Affirmative Action programs were subject to cancellation because the beneficiaries did not have a right to the benefits. In contrast, restoration restores a past legal right in property and cannot be withdrawn without some judicial or quasi-judicial review.

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

#### A. THE IMPORTANCE AND LIMITS OF CHOICE

Although what makes us human is a complex convergence of factors, at least one pronounced and critical thread in this multifaceted tapestry is the ability to have and make simple choices that determine the trajectory of one's life.<sup>102</sup> Dehumanization, which is a defining feature of property-

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

100. This is the case with affirmative action programs in the United States. See Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. ANN. SURV. AM. L. 497, 499 (2003) (noting that "as [Affirmative Action] loses support in legislatures, reparations offers the hope of a different language for talking about many of the same issues").

101. See *id.* at 498–501.

102. Many of the most prominent philosophers have acknowledged the importance of choice and autonomy. See generally JOHN RAWLS, *A THEORY OF JUSTICE* (1971) (emphasizing that the principles of autonomy and choice require that individuals who act as representatives for the larger population have one job: to choose principles of justice). The works of Hobbes, Locke, Rousseau, and other social-contract theorists also emphasize the importance of choice and autonomy because they premise their work on the fact that individuals choose to enter into a social contract with the state. See generally LOCKE, *supra* note 33; THOMAS HOBBS, *LEVIATHAN* (A. P. Martinich ed., Broadview Press 2002) (1651); JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (Maurice Cranston trans., Penguin Books 1968) (1762); but cf. BENTHAM, *supra* note 11, at 72–74, 81–82. Nozick recognizes choice as a defining feature of humanity and states that, "[a] person's shaping his life in accordance with some overall plan is his way of giving meaning to his life; only a being

induced invisibility, is based on the underlying notion that the subject lacks a threshold level of capacity to fully participate in society. The establishment of choice-based remedies is predicated on the countervailing assumption that a person does indeed have the capacity to navigate her life and determine her actions. Restorative policies cannot afford to remain unduly rigid by failing to offer meaningful choices. Instead, these policies must allow people to exercise their volition by choosing the mode of restoration that best fits their idiosyncratic situation to the extent possible, and this will do a significant amount of work in restoring an invisible community or individual's relationship to society.

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

There may be practical restraints to providing a full array of choices. While cash distributions give communities and individuals maximum choice, many nations, especially poor ones, must focus on in-kind options because they do not have the ability to give cash payments without printing additional money, thereby triggering inflation.<sup>108</sup> In addition, due to financial constraints, a nation may have to limit in-kind benefits to those

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with the capacity to so shape his life can have or strive for meaningful life." NOZICK, *supra* note 33, at 50.

103. AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 54-87 (1999).

104. *Id.*

105. *Id.*

106. *Id.* "[F]reedom is concerned with processes of decision making as well as opportunities to achieve valued outcomes." *Id.* at 291.

107. See *Libertarianism*, <http://en.wikipedia.org/wiki/Libertarianism> (last visited Aug. 20, 2007). See generally Hillel Steiner, *A Libertarian Quandary*, 90 *ETHICS* 257 (1980).

108. A cash payment may also be a more politically volatile option. If a government's restorative agenda has a critical amount of opposition, then payoffs in the form of in-kind services may be easier to sell to the public because the costs are less obvious.

that have low marginal costs.<sup>109</sup> Beyond practical constraints on choice, the state may restrict the choices given to dispossessed populations in order to achieve the larger goal of legitimizing the property status quo. For instance, the state should disallow cash payments if they do not increase the well-being of recipients in the long-term, such that the legitimacy of property institutions is greatly increased.

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

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109. For example, assume that providing subsidized credit costs \$8000 and that tuition for a government-funded vocational school is also \$8000, but the government's marginal cost of admitting one more student is \$200. In this example, despite the fact that the access to subsidized credit is important, providing free education is the type of in-kind option that would be more practical for the government to offer.

110. See ROBERT WAGMAN, *INSTANT MILLIONAIRES: CASHING IN ON AMERICA'S LOTTERIES* 71-116 (1986); see also Ellen Goodstein, *Eight Lottery Winners who Lost Their Millions*, MSN MONEY, <http://articles.moneycentral.msn.com/SavingandDebt/SaveMoney/8lotteryWinnersWhoLostTheirMillions.aspx> (last visited Aug. 20, 2007); *Reversal of Fortune* (Showtime documentary broadcast Dec. 15, 2006) (experimenting by giving a homeless man with no drug or mental problems \$100,000 to see what he would do with the money; within a short amount of time, he lost it all).

111. See Cheryl Walker, *Misplaced Agrarianization? Reflections on Ten Years of Land Restitution*, 72 *SOCIAL RESEARCH* 647, 663 (2005).

112. Interview with Tozi Gwanya, Chief Land Claims Commissioner (SA), in Pretoria, S. Afr. (Jan. 11, 2006).

113. *Id.*

114. *Id.*

115. *Id.*

dissipating their new wealth due to short-term exigencies. If there is no long-term improvement in one's welfare, the perceived legitimacy of land arrangements will not be altered.

Choices should be restored at the level of the individual when the land in question is individually owned, and at the communal level for communally-owned land. For example, through a just and culturally relevant process, a community can decide, among other things, that the harm was intergenerational, such that one generation should not have the ability to dissipate the assets received.<sup>116</sup> The group may decide that lands acquired through the restoration process can be occupied, but may not be sold without the approval of the group. Although restraints on alienation will truncate each individual beneficiary's spectrum of choices, these restraints are a tool to ensure respect of the collective choice, which will move the community towards visibility. The outvoted members of the group, however, may remain invisible, and this is particularly problematic if they are a historically marginalized sub-group. In order to ensure that sub-groups do not remain invisible, restoration programs must allow people to opt out of the group and receive their pro rata share, so that if people feel that they are being ignored or marginalized, they can choose to either exit or remain part of the group and advocate for change from within.<sup>117</sup>

#### B. THE IMPORTANCE OF ASSET OWNERSHIP

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

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

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

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

nomically.<sup>118</sup> Property-induced invisibility will persist for generations if people are not able to rebound economically from the initial confiscation.<sup>119</sup> Asset transfers will afford people the opportunity to re-build their wealth and move beyond their economic dependence on the state for basic needs.

Also, given that exclusion is a defining feature of property-induced invisibility, assets are crucial because they promote economic and political inclusion. On the political front, assets increase poor people's stakeholding and thereby, their investment and participation in the democratic process. This is demonstrated, in part, by the fact that, controlling for relevant factors, property owners vote more often than non-property owners.<sup>120</sup> Asset ownership can also help to overcome barriers that prevent people from being more involved in the democratic process, such as lack of time and economic dependence.<sup>121</sup> Economically, by providing people with capital that they can leverage for productive investments, as-

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118. See MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 5-6 (1995) ("Just as blacks have had 'cumulative disadvantages,' many whites have had 'cumulative advantages.' Since wealth builds over a lifetime and is then passed along to kin, it is, from our perspective, an essential indicator of black economic well-being. By focusing on wealth we discover how black's socioeconomic status results from a socially layered accumulation of disadvantages passed on from generation to generation."). See generally JOHN A. BRITAIN, *THE INHERITANCE OF ECONOMIC STATUS* (1977).

119. Intergenerational justice, also commonly known as intergenerational equity, is the idea that present generations bear some moral obligation toward past and future generations. See George Sher, *Ancient Wrongs and Modern Rights*, in *JUSTICE BETWEEN AGE GROUPS AND GENERATIONS* 48, 59 (Peter Laslett & James S. Fishkin eds., Yale Univ. Press 1992) (distinguishing between "ancient" wrongs, which "call for no significant amounts of compensation," and "the vast intermediate class of wrongs . . . committed one or more generations ago," which "do call for some compensation"); Hanoch Dagan, *Restoration and Slavery: On Incomplete Commodification, Intergenerational Justice, and Legal Transitions*, 84 B.U. L. REV. 1139, 1162 (2004) (arguing for the "descendibility of wrongful enslavement claims"); Lawrence B. Solum, *To Our Children's Children's Children: The Problems of Intergenerational Ethics*, 35 LOY. L.A. L. REV. 163, 174 (2001).

120. See Bernadette Atuahene, *Land Titling: A Mode of Privatization with the Potential to Deepen Democracy*, 50 ST. LOUIS U. L.J. 761, 775-77 (2006). Those with no property, in theory, also have a strong incentive to participate in the lawmaking process because they are reliant on government largess and should hence want a voice in how it is distributed. In reality, though, poor people are less likely to vote than those with property. See JENNIFER DAY & KELLY HOLDER, *VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2002: POPULATION CHARACTERISTICS* 8 (U.S. Census Bureau, 2004).

121. Atuahene, *supra* note 120, at 775-77 (arguing economic dependence can lead to a compromised ability to exercise one's political rights and thereby prevent people from fully participating in democratic institutions). For example, during the Civil Right Movement, black sharecroppers often could not exercise their constitutional right to vote because landowners threatened to evict them from the land if they did. The sharecroppers' economic dependence lead to a lack of political independence. Property ownership can afford an individual a measure of economic and thereby political independence. *Id.* at 771-72. See also BRUCE ACKERMAN & ANNE ALSTOTT, *THE STAKEHOLDER SOCIETY* 185 (1999) (arguing that although democratic participation requires time, the financial security that flows from property ownership, gives the stakeholder time to participate: "[M]odern stakeholding will create a certain space for civic reflection in millions of lives now dominated by economic anxiety. Fewer Americans will be living on the economic edge; stakeholders will have more energy left to turn their attention to larger things, including the fate of the nation.").

sets allow those once excluded from effectively participating in the capitalist economy to participate.<sup>122</sup>

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

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

History reveals numerous incidences in which property was confiscated in such a manner that individuals and communities were removed from the social contract and thus rendered invisible. There is, however, a paucity of cases in which governments have taken action to correct past expropriation of property rights.<sup>131</sup> South Africa is one of them. More significantly, South Africa's land policy states that it is committed to a

122. See HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000); see also, Atuahene, *supra* note 120; Bernadette Atuahene, *Legal Title to Land as an Intervention Against Urban Poverty in Developing Nations*, 36 GEO. WASH. INT'L L. REV. 1109, 1116-18 (2004).

123. MICHAEL SHERRADEN, *ASSETS AND THE POOR: A NEW AMERICAN WELFARE POLICY* 148 (1991).

124. Assets do this by serving as a bulwark against income shocks and thereby maintain a family's social and economic health until income flows recommence. "[B]ecause economic worries are a major contributor to a cluster of psychological and social problems associated with unemployment, the family is also more likely to bear the wounds of mental depression, rage, marital breakup, child and spouse abuse, alcohol and drug use, and so forth." *Id.* at 149.

125. Assets give people a larger stake in the future. Also, asset management requires long term thinking and planning. *Id.* at 151.

126. For example, for many Americans, home ownership is the most common way to build wealth. Through homeownership, people have an incentive to learn about real estate markets and capital investments generally. They also have an incentive to acquire home improvement skills. *Id.* at 156-57.

127. *Id.* at 158-59 ("In poor households, people spend their time in a wide diversity of tasks because they do not have sufficient assets to enable greater focus and specialization. . . . Many people forego opportunities for specialized education and training because they have to feed their families.").

128. High risks bring high rewards, but many people are not in a position to take risks because they have nothing to fall back on. Assets provide the security that places people in a position to take social or psychological risks. *Id.* at 159-60.

129. Assets allow greater strength, control, and security. They provide greater power in social and economic negotiations. In addition, with assets, people have a higher incentive and greater resources to participate in the political process. *Id.* at 161-67.

130. *Id.* at 166 ("[A]ssets also increase the welfare of offspring. Assets provide an intergenerational connection that income and consumption cannot provide.").

131. See generally *WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE* (Roy Brooks ed., 1999).

program that moves beyond the limited emphasis on return of property, and is invested in the larger project of restoring invisible peoples' relationships to society.<sup>132</sup> As such, the country ideally serves to further explore the conceptions of property-induced invisibility and restoration developed in this Article.

#### A. PROPERTY-INDUCED INVISIBILITY IN SOUTH AFRICA

##### 1. *Historical Context of Property-Induced Invisibility*

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

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

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132. The government has declared that freedom and agency are indispensable elements of the restorative process. See DEPARTMENT OF LAND AFFAIRS, WHITE PAPER ON SOUTH AFRICAN LAND POLICY § 2.1 (1997) [hereinafter WHITE PAPER].

133. See DEPARTMENT OF LAND AFFAIRS, OUR LAND: THE GREEN PAPER ON SOUTH AFRICAN LAND POLICY 37 (1996) [hereinafter GREEN PAPER].

134. For the definition of property induced invisibility, see *infra* Part II and accompanying discussion.

135. See GREEN PAPER, *supra* note 133, at 37.

136. PLATZKY & WALKER, *supra* note 59, at 88.

137. *Id.* at 89.

138. See Thoko Didiza, Minister for Agric. & Land Affairs, The Importance of a Successful Land Reform Programme in South Africa, Opening Address at the National Land

In order to more thoroughly institutionalize the separate development policy, the 1950 Group Areas Act and the Black Resettlement Act of 1954 were passed, which both sought to eradicate "black spots" in urban areas.<sup>139</sup> Blacks who owned property in areas newly declared as white were forcibly removed.<sup>140</sup> The 1964 Bantu Laws Amendment Act intensified Black land loss by giving the government legal license to remove Africans from any town or white farming area at any time.<sup>141</sup> All of these laws were part of the legal architecture intended to sequester Blacks in the homelands and deprive them of any possibility of acquiring or sustaining rights in land.

In addition to the scores of individuals and communities who were dispossessed before 1960, "[t]he Surplus People Project . . . estimated that 3,548,900 people were removed between 1960 and 1983: 1,702,400 from the towns, 1,129,000 from farms, 614,000 from black spots, and 103,500 from strategic and developmental areas."<sup>142</sup> Property-induced invisibility will persist for those dispossessed Blacks and their descendants who have been unable to recover from the original theft and thus remain economically vulnerable without land or other assets.

As a result of continuous legal land dispossession, whites who constituted less than ten percent of the population upon independence in 1994 owned eighty-seven percent of the country's land, while Blacks owned a mere thirteen percent.<sup>143</sup> Because there has been no significant transformation of property arrangements since liberation, the perception commonly held by the Black majority is that the status quo of property ownership is illegitimate because the racially imbalanced property distribution is a direct result of past colonial and Apartheid-era theft. Before any commitment to significant protection for private property can gain widespread purchase among the Black majority, something must be done to assuage the profound sense of illegitimacy that pervades perceptions of present land arrangements. If nothing is done, then one can expect the present disregard for property rights to continue.

## 2. *Consequences of Property-Induced Invisibility*

Nationally, sixty-eight percent of crimes are property-related.<sup>144</sup> In the

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Tenure Conference (Nov 26, 2001), *available at* <http://www.info.gov.za/speeches/2001/011128946a1002.htm>. The homelands were purportedly self-governing, but in reality, traditional chiefs were hand picked by the Apartheid government to rule the Bantustans and were given power that far exceeded their traditional authority. *See also* GREEN PAPER, *supra* note 133, at 9.

139. *See* Didiza, *supra* note 138.

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

141. *Id.* at 199.

142. *Id.* at 194.

143. Daniel Owen, Land Reform—Running Out of Time, THE PROGRESSIVE REP., <http://www.progress.org/land16.html> (last visited Sept. 22, 2007).

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

country's urban centers, electric fences, private security guards, high security walls, and alarm systems are the norm because of the high theft rates.<sup>145</sup>

Also, land invasions are on the rise. Upon independence in 1994, grassroots groups organized around the constitutional mandate to restitute and redistribute land. The government, thus far, has not been able to make the constitutional mandate a reality, so many of these groups are now beginning to employ extra-legal strategies to achieve land equity. For instance, organizations such as the Landless People's Movement ("LPM") organize communities to reclaim land through illegal occupation.<sup>146</sup> Founded in 2002, the LPM claims upwards of 100,000 members.<sup>147</sup> In the eyes of the poor landless masses in South Africa, the LPM has the moral high ground, though it advocates illegal actions, because it is somewhat akin to the United States civil rights organizations that engaged in illegal sit-ins during the 1960s.<sup>148</sup> Sit-ins violated the illegitimate but legal architecture of segregation, just as land invasions violate property laws that uphold a distribution of property widely perceived to be illegitimate.

In the face of increasing land invasions and high property-theft rates, the obvious question becomes whether South Africa will end up in chaos like Zimbabwe. After all, the unequal, illegitimate distribution of land in Zimbabwe was one major impetus behind the war veteran occupation of white farms and ensuing chaos that erupted in 2002.<sup>149</sup> The little known fact, however, is that there has been more farm-related violence in South Africa than in Zimbabwe.<sup>150</sup> South Africa's commitment to the rule of law is the only thing preventing a reproduction of the Zimbabwe crisis.<sup>151</sup>

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

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RICA (1994/1995 to 2003/2004), available at [http://www.capecgateway.gov.za/eng/pubs/public\\_info/C/86878/1](http://www.capecgateway.gov.za/eng/pubs/public_info/C/86878/1).

145. Statistics show that a murder was committed every half hour, so there is no mystery as to why people live in fear. See CRIME SHOWDOWN IN THE WILD SOUTH, GUY ARNOLD, THE NEW SOUTH AFRICA 83 (2000).

146. The LPM demands "an end to evictions, whether on farms or in informal and other settlements, and a process of transferring land to those residing and working on it. The movement has targeted land occupations as one method of redistributing land through the self-activity of the landless, and has identified unproductive, unused or underused land and land belonging to abusive farmers as the focus for initial redistribution." See STEPHEN GREENBERG, THE LANDLESS PEOPLE'S MOVEMENT AND THE FAILURE OF POST-APARTHEID LAND REFORM 2 (Ctr. for Civil Soc'y Research Report No. 25, Dec. 2004).

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

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

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

150. See *More Squeeze than Grab, Land Reform in South Africa: Don't Expect Zimbabwe-style Invasions in South Africa*, ECONOMIST, Jan. 17, 2004, at 50, 50, available at <http://www.highbeam.com/doc/1G1-112346471.html>.

151. *Id.*

high rate of invisibility, especially property-induced invisibility, that persists in the country. To end this backlash against property rights, the government must work to instill a sense of legitimacy in present property arrangements through restoration. In their article about countries in transition, Eric Posner and Adrian Vermeule have noted that “[w]hen historical property rights have more legitimacy than the distribution existing at the time of transition, restitution programs channel claims into the legal system that might otherwise destabilize the market by posing a political threat to the security of post-transitional property rights.”<sup>152</sup> If nothing is done to address the ongoing effects of past theft in South Africa, then political unrest will reign supreme.<sup>153</sup> The Land Restitution Program (“LRP”) is South Africa’s attempt to address past theft.

## B. REFORMING THE LAND RESTITUTION PROGRAM

### 1. *The Land Restitution Program and its Challenges*

Under the LRP, only those dispossessed of a right in land after 1913 will receive compensation.<sup>154</sup> This particular date was chosen for several reasons. First, although Black land dispossession began prior to 1913,

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152. Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 761, 789 (2004).

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

154. (1) A person shall be entitled to restoration of a right in land if-
- (a) he or she is a person dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; or
  - (b) it is a deceased estate dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; or
  - (c) he or she is the direct descendant of a person referred to in paragraph (a) who has died without lodging a claim and has no ascendant who-
    - (i) is a direct descendant of a person referred to in paragraph (a); and
    - (ii) has lodged a claim for the restoration of a right in land; or
  - (d) it is a community or part of a community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; and
  - (e) the claim for such restoration is lodged no later than 31 December 1998.
- (2) No person shall be entitled to restoration of a right in land if-
- (a) just and equitable compensation as contemplated in section 25 (3) of the Constitution; or
  - (b) any other consideration which is just and equitable, calculated at the time of any dispossession of such right, was received in respect of such dispossession.
- (3) If a natural person dies after lodging a claim but before the claim is and-
- (a) leaves a will by which the right or equitable redress claimed has been disposed of, the executor of the deceased estate, in his or her capacity as the representative of the estate, alone or, failing the executor, the heirs of the deceased alone; or
  - (b) does not leave a will contemplated in paragraph (a), the direct descendants alone, may be substituted as claimant or claimants.
- (4) If there is more than one direct descendant who have lodged claims for and are entitled to restoration, the right or equitable redress in question

South Africa was not one country until after the Boer War in 1910. Thus, the 1913 law was the first major piece of legislation that allowed the newly formed South African state to legally dispossess Blacks of their land.<sup>155</sup> Second, the absence of written records, coupled with the passage of time, makes it extremely difficult to verify claims of dispossession before 1913.<sup>156</sup> Third, "most deep historical claims are justified on the basis of membership in a tribal kingdom or chiefdom. The entertainment of such claims would serve to awaken and/or prolong destructive ethnic and racial politics."<sup>157</sup> Fourth, "the members of ethnically defined communities and chiefdoms and their present descendants have increased more than eight times in this century alone and are scattered."<sup>158</sup> Fifth, "large parts of South Africa could be subject to overlapping and competing claims where pieces of land have been occupied in succession by, for example, the San, Khoi, Xhosa, Mfengu, Trekkers and British."<sup>159</sup> As a result of these complications, compensation is provided for dispossession that occurred because of the Native Land Act and subsequent laws.

The LRP has several challenges. First is the issue of landowners who currently have valid title to property that was stolen in the past but are not implicated in the original theft. While this buyer in due course has a valid expectation to maintain her land, there are other valid, competing expectations at play—namely, the expectation that when something is illegally or immorally expropriated, it should be returned.<sup>160</sup> Under no circumstance is the uncompensated taking of land from an innocent buyer in due course justified.<sup>161</sup> Nevertheless, the taking of land using the state's powers of eminent domain is a valid mechanism for restructuring property arrangements to increase their legitimacy in society. There

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shall be divided not according to the number of individuals but by lines of succession.

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

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

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

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

161. When there is a taking, the majority of states agree that some form of compensation is due. See IAN BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 509 (6th ed. 2003) (Under international law "[a] considerable number of states insist that expropriation can only take place on payment of adequate, effective compensation. In practice deferred payments are regarded as sufficient provided effective compensation takes place. The requirement of promptness has become subordinated to the other conditions and also to economic realities relating to payment of large sums. . . . The majority of states accept the principle of compensation, but not on the basis of the 'prompt, adequate, and effective formula.'") (internal citations omitted).

is extensive literature concerning the virtues and vices of land reform, which reveals that restructuring the property status quo using the powers of eminent domain can increase efficiency, promote equality, and buttress democracy.<sup>162</sup>

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

A third issue raised is the notion that restoration requires one to make morally arbitrary distinctions that have potentially life changing consequences and hence, the distinctions are unjust. For instance, choosing *who* will benefit and *what* violations are covered in the LRP involves morally arbitrary distinctions that have changed the course of many lives.<sup>165</sup> Only those who were dispossessed of a "right in land or portion of land dispossessed after 19 June 1913 as a result of past racially discriminatory laws or practices" are eligible to participate in the LRP.<sup>166</sup> On what moral basis are those dispossessed the day before (on June 18, 1913),

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162. See generally RUSSELL KING, *LAND REFORM: A WORLD SURVEY* (1977); ROY L. PROSTERMAN & JEFFREY M. RIEDINGER, *LAND REFORM AND DEMOCRATIC DEVELOPMENT* (1987); Timothy Besley & Robin Burgess, *Land Reform, Poverty Reduction, and Growth: Evidence from India*, 115 Q. J. ECON. 389 (2000); Eduardo Flores, *Issues of Land Reform*, 78 J. POL. ECON. 890 (1970); Moene, *supra* note 90.

163. Posner & Vermeule, *supra* note 152, at 785-86.

164. *Id.* at 785.

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

166. See the LRA, *supra* note 154.

or even earlier, left out? By what moral standard is compensation offered for property dispossession rather than other injustices that occurred under Apartheid such as death, torture, or loss of employment?

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

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

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

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

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167. For a contrary argument, see John Elster, *On Doing What One Can: An Argument Against Post-Communist Restitution and Retribution*, E. EUR. CONST. REV., Summer 1992, at 15, 15.

168. Compare *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 (1982), with *Penn Central Transp. Co. v. N.Y. City*, 438 U.S. 104, 130–31 (1978).

169. See *supra* note 90.

170. See generally Ronald Coase, *The Problem of Social Costs*, 3 J. L. & ECON. 1 (1960) (theorizing that if there are zero transaction costs, the efficient outcome will occur regardless of legal entitlement because those who value the resource most will purchase it).

171. Polishchuk, *supra* note 85, at 5.

Polishchuk further argues that "[c]redibility of existing property rights is . . . critically important for efficient deployment of privately owned resources."<sup>172</sup> Without credibility, present owners will use resources to protect their property from extralegal expropriation rather than investing them efficiently, and trade will be suppressed.<sup>173</sup> One critical source of the lack of credibility, widespread property-induced invisibility, would be untouched without government involvement.

Sixth, critics may claim that the LRP is faced with insurmountable barriers that exist because different property systems from different eras must be taken into consideration. In South Africa, European settlers and indigenous Africans have had fundamentally different conceptions of ownership. At the point of expropriation, African norms were dominant, so people had occupancy and cultivation rights allocated by traditional leaders, which were based on need and availability.<sup>174</sup> At the point of compensation through the LRP, however, individuals and communities are given title to land in fee simple, because the prevailing norm is the European notion of ownership.<sup>175</sup> What was taken and what is being restored are two different things.

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

A seventh critique is that past wrongs should not feature prominently in a new social contract because efforts to redress wrongdoing that occurred under an invalid and presently defunct contract can undermine the new regime. While South African society can enter a new social contract, it does not start at ground zero. There are certain institutions, processes, and status quos established by previous contracts that a society inherits and brings into the new one.<sup>176</sup> Only if the new political dispensation's break from the past is credible can its new beginning be credible. The South African government's commitment to restoration sends a message

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172. *Id.*; see also William H. Riker & David L. Weimer, *The Political Economy of Transformation*, in MODERN POLITICAL ECONOMY: OLD TOPICS, NEW DIRECTIONS 80, 94 (Jeffrey S. Banks & Eric A. Hanushek eds., 1995).

173. Polishchuk, *supra* note 85, at 9.

174. See THOMPSON, *supra* note 140, at 163; Heinz Klug, *Defining the Property Rights of Others: Political Power, Indigenous Tenure and the Construction of Customary Land Law*, 35 J. LEGAL PLURALISM 119, 119-21 (1996).

175. See generally Klug, *supra* note 174.

176. The South African government clearly recognizes the connection between past injustices and the new social contract. See WHITE PAPER, *supra* note 132 § 3.17.3 ("Considering the fact that more than 3.5 million people and their descendants have been victims of racially based dispossession and forced removal during the apartheid era, it is clear that a mammoth responsibility rests on the shoulders of the state to give effect to restitution of land rights.").

that it is committed to protecting everyone's property (both white and Black), and this commitment is a credible signal that the new regime has done away with the old social contract, which prioritized the rights of whites.

Eighth, critics may also suggest that changed circumstances can void an individual or community's claim to restoration.<sup>177</sup> This argument suggests that we do not know what would have happened to property but for the original theft. The individual may have lost the property due to a natural disaster or bad investments, or alternatively, she might have doubled the value of her asset. Thus, the goal of restoration cannot be to restore a victim to the state she would have been in today but for the act. This would merely be an exercise in conjecture with no basis in fact because it is impossible to know exactly how history would be altered.<sup>178</sup>

Jeremy Waldron argues that:

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

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177. Jeremy Waldron, *Settlement, Return, and the Supersession Thesis*, 5 THEORETICAL INQUIRIES L. 237, 240 (2004).

178. The present standard is to restore a victim to the state she would have been in but for the act. "The essence of the law of restitution is that it enables a plaintiff to be restored to the position which he or she occupied before the occurrence of a particular event, where that event is of a type which triggers a restitutionary response." Graham Virgo, *What is the Law of Restitution About?*, in *RESTITUTION PAST, PRESENT AND FUTURE* \_\_\_\_ (Cornish et al. eds., 1998). See also *Factory at Chorzów (F.R.G. v. Pol.)*, 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13) ("The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."). Waldron thinks that the present standard is an untenable counterfactual. See Jeremy Waldron, *Redressing Historic Injustice*, 52 UNIV. TORONTO L.J. 135, 144 (2002) ("How can we know what would have happened if some event that in fact did occur had not taken place?"); Jeremy Waldron, *Superseding Historic Injustice*, 103 ETHICS 4, 8 (1992).

remedy.<sup>179</sup>

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

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

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

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

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179. Waldron, *supra* note 178, at 244–45 (emphasis added).

180. This is one example Waldron gives to explain why it is the case that “in certain sequences of circumstances, dispossession may not continue to count as an injustice even though the events that led to it undoubtedly were an injustice.” *Id.*

181. For more about the inheritance argument, see generally Bernard Boxill, *A Lockean Argument for Black Reparations*, 7 J. ETHICS 63 (2003).

182. See *supra* note 65 and accompanying text.

183. Interview with Maureen Tong, Chief Operations Officer of Housing Department (SA), in Capetown, S. Afr. (Sept. 13, 2006).

184. See Former Highlands Residents: *Ex parte In re Ash v. Dep't of Land Affairs* 2000 (Zall) 5A (LCC) (S. Afr.).

185. *Id.*

Lastly, one may argue that the LRP resurrects a past status quo, which can be non-egalitarian or illegitimate. However, restoration requires that the past status quo, or the new one created based on past rights, be significantly more legitimate than the present one. Due to the intensification of law-based, racially discriminatory land dispossession after 1913, the pre-1913 property status quo—although not perfect—is widely thought to be more legitimate than the one that existed at independence in 1994.<sup>186</sup> In order to increase the perceived legitimacy of land arrangements resulting from the LRP, the government decided to treat women and men equally in the restoration program,<sup>187</sup> despite patriarchal land traditions that existed during the period eligible for compensation (1913-94).

## 2. *Who Should Benefit from the Land Restitution Program?*

I have argued that a state committed to restoring past rights in land must, as a baseline, address property-induced invisibility. Addressing property-induced invisibility requires the state to prioritize those who, as a result of past theft, are presently economically vulnerable and dependent on the state for their most basic needs. South Africa has committed a substantial amount of resources to its LRP, and thus has been able to include a wide swath of people in the program, including those who were economically vulnerable at the time of confiscation, those who are still economically vulnerable, and those who were never made economically vulnerable as a consequence of the confiscation. Consequently, the baseline has been exceeded because there are resources available for those who were subject to property-induced invisibility and those who were not.

South Africa's expansive definition of a right in land is how it managed to ensure that a wide population benefits from its LRP. A right in land is any right in land whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question.<sup>188</sup>

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186. Increasing the legitimacy of land arrangement is one of the objectives of South African land policy. However inadequate settlements may be, compared to the injustices of the past, it is essential that they are perceived as the most equitable that can be achieved in the circumstances.

187. South Africa cannot honor the prevailing system of land ownership at the time of expropriation. For instance, if land was taken from a Zulu tribe after 1913, then each member of the tribe will receive their pro rata share of the resources allocated. The chief is stripped of his traditional control over land. Contrary to the system of land ownership existing at the time of expropriation, the chief and the single mother are placed on an equal plane. While this is not in line with tradition, leveling the playing field is essential for rectifying property-induced invisibility. When land is taken as part of a larger strategy of dehumanization, the re-humanization process cannot recreate hierarchies that undermine equality.

188. Restitution of Land Rights Act of 1994 ch. I § 1(xi). It is important to note that the racial discrimination must have had a "direct divestitive effect," and thus the focus is on the "re-vesting of a right lost," rather than redistribution based on need. See M.D.

The LRP received broad political support because it benefits the pre-1913 Black elite who owned land, as well as those of humble means with mere occupancy rights.<sup>189</sup>

The LRP, however, does not place limits on how much an individual or community can claim, so it is possible for a member of the past Black elite to receive R2,000,000, while a former labour tenant receives R200. Insofar as the LRP perpetuates these glaring inequalities, the process and result are less likely to be viewed as legitimate. In order to reduce inequalities, it is advisable for South Africa to provide full compensation up to a certain amount, partial compensation for amounts above this, and an upper limit on the amount of compensation people can receive.<sup>190</sup> In order to mitigate inequality, the Hungarian government followed a similar path in their reparations program.<sup>191</sup> They compensated in full up to HUF 200,000 (\$2,300), and the remainder was compensated on a sliding scale, but compensation could not exceed HUF 5,000,000 (\$57,600) per piece of property and per former owner.<sup>192</sup>

It would not be fair, however, for the past Black elite to receive less than the full market value for land expropriated pre-1994, while present landowners (mostly white) receive full compensation if their land is expropriated through the state's power of eminent domain post-1994. The weight of reducing inequality must be borne by both the past Black elite, as well as the present white elite. Section 25 of the Constitution takes this into account by making the fair market value applicable to post-1994 expropriations only the starting point for just compensation calculations.<sup>193</sup> The award can be adjusted depending upon the following equitable factors: "the current use of the property; the history of the acquisition and use of the property; the market value of the property; the extent of direct

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SOUTHWOOD, THE COMPULSORY ACQUISITION OF RIGHTS BY EXPROPRIATION, WAYS OF NECESSITY, PRESCRIPTION, LABOUR TENANCY AND RESTORATION 234, 247 (2000). The right in land "may have been established by occupation of the land for a substantial period. It is not limited to a right recognised by law. It is not limited to ownership rights, and it may include certain long-term tenancy rights and other occupational rights." WHITE PAPER, *supra* note 132 § 4.14.2.

189. Deborah James et al., *(Re)constituting Class?: Owners, Tenants and the Politics of Land Reform in Mpumalanga* 31 J. S. AFR. STUDIES 825, 841 (2005) (There is "a recognition, among those owners who have derived financial benefit from 'selling' land, that the restitution process, although beneficial only to a few, had been undertaken with the electoral backing of the broader population: 'We got this land back through other people's votes'"); see also Walker, *supra* note 111, at 647 ("The restitution of land rights act was the first piece of transformative legislation to be passed—amid a standing ovation—by South Africa's newly democratized Parliament in November 1994.").

190. The threshold should vary depending upon whether the claim is urban/rural or a group/individual claim.

191. Hungary's scheme provides partial compensation in the form of vouchers. See Cheryl W. Gray, Rebecca J. Hanson & Michael Heller, *Hungarian Legal Reform for the Private Sector*, 26 GEO. WASH. J. INTL. L. & ECON. 294, 309 (1992); Michael Heller & Christopher Serkin, *Private Law: Revaluing Restitution: From the Talmud to Postsocialism*, 97 MICH. L. REV. 1385, 1402 (1999); Neff, *supra* note 94, at 373–75 (1992).

192. Gray, Hanson & Heller, *supra* note 191, at 309; Heller & Serkin, *supra* note 191, at 1402; Neff, *supra* note 94, at 374.

193. *Supra* notes 184–85 and accompanying text.

state investment and subsidy in the acquisition and beneficial capital improvement of the property; the purpose of the expropriation.”<sup>194</sup> The present landowning white population must help shoulder the burden of legitimizing property rights alongside the past Black elite.

### 3. *How Should the Process Unfold?*

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

#### a. Transparency and Rule of Law are Crucial

Racist land laws served as the foundation upon which the Apartheid state was constructed and hence, reversing the effects of these laws is an essential element in the present, ongoing deconstruction of that white supremacist state. An important part of the deconstructionist project is the property clause of the Constitution.<sup>197</sup> That clause takes into account the

194. *Id.*

195. See generally CHARLES VILLA-VICENCIO & WILHELM VERWOERD, *LOOKING BACK REACHING FORWARD: REFLECTIONS ON THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA* (2000); RICHARD A. WILSON, *THE POLITICS OF TRUTH AND RECONCILIATION IN SOUTH AFRICA: LEGITIMIZING THE POST-APARTHEID STATE* (2001). See also Theunis Roux, *Land Restitution and Reconciliation* (Nov. 2006), available at [http://www.saifac.org.za/docs/2006/Land%20Restitution%20and%20Reconciliation%20in%20South%20Africa\\_dftz.pdf](http://www.saifac.org.za/docs/2006/Land%20Restitution%20and%20Reconciliation%20in%20South%20Africa_dftz.pdf) (suggesting that the Truth and Reconciliation process should have dovetailed with the LRP).

196. American blacks are a minority and are politically and economically marginalized. In contrast, Blacks in South Africa are the majority and hence, politically empowered, but economically marginalized. Reversing invisibility in South Africa must focus on economic inclusion, where a two-prong approach may be more appropriate for American blacks.

197. See S. AF. CONST. 1996 BILL OF RIGHTS § 25 (“No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. 2. Property may be expropriated only in terms of law of general application: a. for a public purpose or in the public interest; and b. subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court. 3. The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including; a. the current use of the property; b. the history of the acquisition and use of the property; c. the market value of the property; d. the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and e. the purpose of the expropriation. 4. For the purposes of this section; a. the public interest includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources; and b. property is not limited to land. 5. The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis. 6. A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the

pervasive property theft that occurred in South Africa's tumultuous past, while setting the stage for a future where equality and dignity are paramount. The LRP is transparent and comports with the Constitution. In fact, although the Constitution allows expropriation, LRP officials are taking an extremely cautious approach and have for the most part relied on a market-driven willing seller/willing buyer approach. The government did not initiate its first formal proceeding to expropriate white farms until 2007.<sup>198</sup>

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

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

#### b. Providing Asset-Based Choices Is Critical

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

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

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extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress. 7. A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress. 8. No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1). 9. Parliament must enact the legislation referred to in subsection (6).").

198. Michael Wines, *South Africa to Seize 2 White Owned Farms*, N.Y. TIMES, Oct. 10, 2006, at A13; *First White Owned Farms Expropriated*, Feb. 14, 2007, <http://iafrica.com/news/sa/628569.htm>.

199. TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 162 (1990) (arguing that the normative rather than instrumentalist perspective better captures why people obey the law: From the normative perspective "people react to social experiences in terms of the fairness of the outcomes they receive (distributive justice), and the fairness of the procedures by which those outcomes are arrived at (procedural justice).")

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

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

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

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

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200. See WHITE PAPER, *supra* note 132 § 4.14.4.

201. *Id.* § 4.14.1.

202. *Id.*

203. *Id.*

204. Walker, *supra* note 111, at 662.

driven remedies as contemplated in the White Paper, because the only options contemplated were return of the land, alternative land, or financial compensation.<sup>205</sup> There were no innovative in-kind options offered, such as access to highly subsidized credit, free vocational training, or any other options claimants may have desired.<sup>206</sup>

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

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

There have been a few rural examples of self-styled remedies where beneficiaries were allowed to exercise their agency.<sup>213</sup> A community in Putfontein, which is located in the Guateng region, leveraged their money to construct a housing development.<sup>214</sup> A community in Queen-

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205. *Id.*

206. *Id.*

207. Didiza, *supra* note 138.

208. *Id.*

209. See Interview with Tozi Gwanya, *supra* note 112.

210. *Id.* See also Interview with Blessing Mphela, Land Claims Commissioner for Guateng and North West, in Pretoria, S. Afr. (Jan. 11, 2006) (expressing the view on the matter that "issues around remedies were not well thought out").

211. In general, in order to allow for creative asset-based choices, restoration programs require a sophisticated, efficient, and non-corrupt bureaucracy. The problem is that transitional or developing governments who most need restoration programs often do not have developed bureaucracies or suffer from high rates of corruption. See generally, SHAUKAT ALI, CORRUPTION: A THIRD WORLD PERSPECTIVE (1985); DAVID J. GOULD, BUREAUCRATIC CORRUPTION AND UNDERDEVELOPMENT IN THE THIRD WORLD: THE CASE OF ZAIRE (1980); STEPHEN KOTKIN & ANDRÁS SAJÓ, POLITICAL CORRUPTION IN TRANSITION: A SKEPTICS HANDBOOK (2002).

212. Walker, *supra* note 111, at 648.

213. One critique proffered by an opposition party is that restoration monies are being used to provide services that the government is suppose to provide anyway. However, many of the projects the communities are pursuing were not the local government's priority list. By using restoration monies, communities are able to make their priorities come to fruition because they are able to leverage their monies to receive additional monies from the government. Interview with Tozi Gwanya, *supra* note 112.

214. *Id.*

stown, which is located in the Eastern Cape, received half of their award in money paid to eligible households, while the other half was used for three development projects that would benefit all members of the community—a community center, an old-age home, and an indoor sports center.<sup>215</sup> Finally, a community in Keiskamahoek also split the funds: Half of the money was received in financial compensation, while the other half was invested in community development projects, which included building three extra classrooms in the local school, repairing the central road, and creating a forestry project to expand the forest.<sup>216</sup>

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

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

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

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215. The Department of Social Development and the local municipality contributed to the development projects. *Id.*

216. *Id.*

217. Walker, *supra* note 111, at 658.

218. *Id.* at 649.

219. *Id.*

## V. CONCLUSION

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

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