

THE PARADOXES OF RESTITUTION

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ABSTRACT

Restitution following mass dispossession is often considered both ideal and impossible. Why? This Article identifies two previously unnamed paradoxes that undermine the possibility of restitution: the time-unworthiness paradox and the collective responsibility paradox.

After developing these ideas, the Article examines them in the context of a particularly difficult and intractable case of dispossession and restitution. The Article draws upon interviews with restitution claimants whose stories reveal the paradoxes of restitution.

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I. THE PARADOXES OF RESTITUTION¹

A. Introduction

The restitution of property rights can pose an intractable challenge.² This Article identifies two previously unnamed paradoxes at the heart of restitution claims that often make restitution impossible. First, both dispossession and restitution depend on the social construction of rights-worthiness. Over time, people once considered unworthy of property rights “become” worthy of them. However, time also corrodes the practicality and moral weight of restitution claims. By the time the dispossessed “become” worthy of property rights, restitution claims are no longer practically or morally viable. This is the time-unworthiness paradox.

Second, restitution claims are undermined by the concept of collective responsibility. People are sometimes dispossessed because collective responsibility is unjustly imposed on them for wrongs committed by a few members of a group. But restitution may require the dispossession of innocent current occupiers of land—thus imposing a type of collective responsibility on them. Therefore, restitution can be seen as committing the very wrong it purports to right. This is the collective responsibility paradox.

Both paradoxes can be overcome, but only if we recognize the rights-worthiness of others before time fatally corrodes the viability of restitution. We must also draw a careful distinction between the imposition of collective rights-unworthiness, which results in the mass dispossession of others, and the voluntary acceptance of collective responsibility, which results in the restitution of others.

¹ Although “[t]he return of property, homes and land has been viewed as a means of redressing past injustice in many forms, ranging from communist nationalizations and colonial-era land confiscation to outright ethnic cleansing and war crimes,” there is no broad consensus on definitions of terms such as “restitution” and “reparations.” RHODRI C. WILLIAMS, INT’L CTR. FOR TRANSITIONAL JUSTICE, *Executive Summary to THE CONTEMPORARY RIGHT TO PROPERTY RESTITUTION IN THE CONTEXT OF TRANSITIONAL JUSTICE* (2007), available at http://www.lobkovi.cz/Rest_Pub_07.pdf. For purposes of this Article, restitution is a remedy for an unjust dispossession that includes either restoration to ownership of the specific property lost, or reparations in lieu of such ownership. Reparations can include monetary compensation, acknowledgements, apologies, symbolic gestures, and other amends. An unjust dispossession is a past dispossession of property rights that violates our contemporary norms of justice.

² See, e.g., LEILA HILAL, INT’L CTR. FOR TRANSITIONAL JUSTICE, *TRANSITIONAL JUSTICE RESPONSES TO PALESTINIAN DISPOSSESSION: FOCUS ON RESTITUTION* (Brookings-LSE Project on Internal Displacement, 2012), available at <http://ictj.org/sites/default/files/ICTJ-Brookings-Displacement-Palestine-CaseStudy-2012-English.pdf>; Charles Philpott, *Though the Dog is Dead, the Pig Must be Killed: Finishing with Property Restitution to Bosnia-Herzegovina’s IDPs and Refugees*, 18 J. REFUGEE STUD. 1 (2005); Deniz Senol Sert, *Cyprus: Peace, Return and Property*, 23 J. REFUGEE STUD. 238 (2010).

B. *The Social Construction of Property Rights-Unworthiness*

Restitution analyses usually take the injustice of past dispossessions of property as a given and focus on whether restitution is now possible.³ But previous generations did not consider those dispossessions unjust. Contemporary accounts show that mass dispossessions were often seen as a means of *righting* a wrong, by transferring property rights from people unworthy of them to people worthy of them.⁴ It is tempting to scoff at these accounts, crediting them to disingenuous greed. But it is a mistake to assume that accounts we find unlikely are disingenuous. We don't have to believe that previous generations acted justly to believe that *they* believed they acted justly. The question, then, is what has changed, that dispossessions that seem so clearly unjust now were not considered unjust then?

Perhaps today people are more just through a type of moral evolution, but that seems unlikely.⁵ If we are not more just, then perhaps our preferred techniques of injustice have changed, and we are no longer willing to commit massive dispossessions. But recent conflicts throughout the world clearly say otherwise.⁶ More likely, what has changed is neither our moral character nor

³ See, for example, the powerful opening words of Jeremy Waldron's *Superseding Historic Injustice*: "The history of white settlers' dealings with the aboriginal peoples of Australia, New Zealand, and North America is largely a history of injustice. People, or whole peoples, were attacked, defrauded, and expropriated; their lands were stolen and their lives were ruined. What are we to do about these injustices?" Jeremy Waldron, *Superseding Historic Injustice*, 103 ETHICS 4, 4 (1992), available at <http://www.polthought.cam.ac.uk/seminars/intros2008-2009/Waldron-Superseding-Historic-Injustice.pdf>.

⁴ For example, as Avery Kohler has demonstrated, contemporary accounts at the time that colonial powers were dispossessing indigenous peoples of enormous amount of land in North America and Australia make clear that for many influential thinkers of the time, "dispossession of itself is not wrong"; rather, "*resisting* dispossession is wrong." Avery Kohlers, *The Lockean Efficiency Argument and Aboriginal Land Rights*, 78 AUSTRALASIAN J. PHIL. 391, 391 (2000). Swiss Philosopher Emerich de Vattel, then regarded as perhaps the leading light in the growing field of international law, argued in his work *The Law of Nations* that indigenous people had no just claim to property against "other nations, more industrious and too closely confined." Stuart Banner, *Why Terra Nullius? Anthropology and Property Law in Early Australia*, 23 LAW & HIST. REV. 95, 100 (2005) (quoting EMERICH DE VATTEL, *THE LAW OF NATIONS* (1758)).

⁵ Of course, one need only look at the astonishing bloodletting in the past two decades in the former Yugoslavia and Rwanda to question whether our moral character is evolving.

⁶ See, e.g., ELIZABETH FERRIS & KIMBERLY STOLTZ, THE BROOKINGS INST., MINORITIES, DISPLACEMENT AND IRAQ'S FUTURE (2008), http://www.brookings.edu/~media/Files/rc/papers/2008/1223_minorities_ferris/1223_minorities_ferris.pdf (describing massive displacements resulting from Iraq war); John Hagan & Joshua Kaiser, *The Displaced and the Dispossessed of Darfur: Explaining the Sources of a Continuing State-Led Genocide*, 62 BRIT. J. SOC. 1 (2011) (describing massive dispossessions of residents of Darfur resulting from conflict with Sudanese government); Alexandre Kedar, *The Legal Transformation of Ethnic Geography: Israeli Law and the Palestinian Landholder 1948-1967*, 33 N.Y.U. J. INT'L L. & POL. 923 (2001) (describing Palestinian refugee crisis resulting from the 1948 and 1967 Israeli-Arab wars); THE MIDDLE EAST INST., *Iraq's Refugee and IDP Crisis*:

our willingness to commit mass dispossessions. Rather, what has changed is simply our belief about who is worthy of property rights-respect and who is not.

That belief has changed because it is socially constructed. A belief is socially constructed when it is dependent on the “role that that belief plays in our social lives”⁷ rather than the intrinsic characteristics of the object of that belief. For example, the belief that chickens, but not cats, have feathers is not socially constructed, because it is based on the intrinsic properties of cats and chickens. By contrast, the belief that chickens, but not cats, are appropriate to serve at a dinner party is socially constructed. That belief is not derived from the intrinsic characteristics of cats and chickens. It is derived from our social lives. Socially, we have constructed a typology of animals that are appropriate and inappropriate to serve at a dinner party. “Faced with a potentially confusing and ambiguous world, we construct cultural categories that impose method and coherence on our experiences and interactions. We then structure our behavior around these categories, to avoid disrupting our tacit agreements about who we are and what we are doing.”⁸ And it is not just the disapproval of others that constrains us from serving cats; we are also constrained by our personal, genuine belief that it is inappropriate to serve cats, because we have internalized that social construction.

We also socially construct typologies of people.⁹ The social function of such beliefs often is a justification for and reinforcement of dominance: “[g]roups and societies create myths and rationales that justify the dominance of some groups over others.”¹⁰ But it is important to emphasize that social construction is not a mechanism used self-consciously to establish dominance

Human Toll and Implications, VIEWPOINTS (2008); Rhodri C. Williams, *Post-Conflict Property Restitution and Refugee Return in Bosnia and Herzegovina*, 37 N.Y.U. J. INT’L L. & POL. 441 (2005) (discussing displacements resulting from Balkans conflict).

⁷ Paul A. Boghossian, *What is Social Construction?*, TIMES LITERARY SUPPLEMENT, Feb. 23, 2001, at 2 (2001); see also PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* (1991).

⁸ Mark C. Suchman, *On Beyond Interest: Rational, Normative and Cognitive Perspectives in the Social Scientific Study of Law*, 1997 WIS. L. REV. 475, 484 (1997).

⁹ See James D. Fearon & David D. Laitin, *Violence and the Social Construction of Ethnic Identity*, 54 INT’L ORG. 845, 848 (2000); see also Anne Schneider & Helen Ingram, *Social Construction of Target Populations: Implications for Politics and Policy*, 87 AM. POL. SCI. REV. 334 (1993). Scholars applying these insights have demonstrated that “gender roles are not inevitable but are rather the product of social forces,” and that racial categories “owe their existence more to their social function than they do to the scientific evidence.” Boghossian, *supra* note 7, at 2 (citing SIMONE DE BEAUVOIR, *THE SECOND SEX* (1953); K. ANTHONY APPIAH & AMY GUTMAN, *COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE* (1996)); Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994).

¹⁰ DESERVING AND ENTITLED: SOCIAL CONSTRUCTIONS AND PUBLIC POLICY 3 (Anne L. Schneider & Helen Ingram eds., State Univ. of New York Press 2005).

over some other; rather, it is a cognitive construct that makes an unequal state of relations between people seem *unconstructed* and “natural.”¹¹ Conversely, a state of social relations that does not reflect these constructions seems “unnatural.” Therefore, a re-arrangement of social relations to a state that reflects social constructions seems to be *righting* something that seems unnatural or wrong.

Property rights are dependent upon our socially constructed beliefs. For example, we socially construct what types of things may and may not be property. A window shopper on a city street effortlessly taps into these constructions. Without conscious thought, she knows that the items displayed in store windows may become her property, but the sidewalk on which she is standing may not. The jacket worn by a man who walks past may become her property, but the man himself may not—today. She may even know, without conscious thought, that the blood in her veins is her property, but the air in her lungs is not.

In addition to socially constructing what types of *things* may be property, we socially construct what types of *people* are worthy of property rights-respect. In some cases, people have been constructed as incapable of “properly” possessing property. In some cases, people have been constructed as “outsiders”—those outside the community of people to whom respect for property rights is due. Often, they have been considered both. Native Americans, for example, were considered both incapable of properly possessing property and outside the community of people to whom property rights-respect was due.

As self-evidently unjust as it may seem today that Native Americans were dispossessed of wide swaths of the continent, so did it once seem self-evidently unjust to European colonists that Native Americans possessed such huge tracts of land. First year Property students encounter that strange truth very early. In *Johnson v. M'Intosh*,¹² Justice John Marshall noted that because of the “character and habits” of the Native Americans, they could never be integrated into the community of Europeans, and therefore could never have the rights due to members of that community.¹³ Although in some circumstances “new and old members of the society mingle with each other” and “make one people,” Marshall wrote, Native Americans were “savages,” and thus not the type of people who must be included in the community of property rights-respect.¹⁴ Moreover, Native Americans did not possess property properly; to leave it with them would be “to leave the country a wilderness.”¹⁵

¹¹ *Id.*

¹² 21 U.S. 543 (1823).

¹³ *Id.* at 589.

¹⁴ *Id.* at 589–90.

¹⁵ *Id.* at 590.

Similarly, as Stuart Banner has documented through the diaries and correspondence of early European arrivals in Australia, the English settler community quickly decided that the Aboriginal people they encountered in Australia were not in the category of being worthy of property rights-respect.¹⁶ Instead, the settlers argued the Aboriginal people “lived an animal existence,” were “little better than the beasts,” and thus were no more entitled than animals and beasts to property rights.¹⁷ As Banner states, “If the Aborigines were still in the state of nature, then by definition they did not own their land,” and possession of vast swaths of land by such beings was an unnatural state of affairs that demanded righting.¹⁸

In the cases of both Native Americans and Aboriginal Australians, the European settlers disapproved of the apparently inefficient ways in which the original inhabitants used the land. But Europeans who actually used land inefficiently were not dispossessed; aboriginal people who actually used land efficiently were not able to avoid dispossession. They were dispossessed not because of a utilitarian assessment of their actual use of property, but rather because they were socially constructed as being not the type of people who were worthy of rights-respect.

Similarly, it was a commonplace of American slavery jurisprudence that slaves were unworthy of property rights-respect—it was said that a slave, *being* property, could not *own* property.¹⁹ From the perspective of the dominant white society, slavery was merely the “natural place” for black people who had “no rights which the white man was bound to respect.”²⁰ As the Supreme Court explained in its *Dred Scott* decision, at the time the Constitution was adopted, “no one thought of disputing, or supposed to be open to dispute,” that whites were worthy of rights-respect, and blacks were not.²¹ Because socially constructed beliefs seem like objective, natural facts, European settlers acted upon them “habitually . . . without doubting for a moment the correctness of this opinion.”²²

The critical role of “outsiderness” in constructions of property rights-worthiness is starkly demonstrated by the contrasting treatment of restitution

¹⁶ See Banner, *supra* note 4, at 101–02.

¹⁷ *Id.* at 104, 109 (quoting JOSEPH ORTON, ABORIGINES OF AUSTRALIA 3 (1836), available at http://digital.slv.vic.gov.au/view/action/singleViewer.do?dvs=1381266718140~296&locale=en_US&metadata_object_ratio=10&show_metadata=true&preferred_usage_type=VIEW_MAIN&frameId=1&usePid1=true&usePid2=true).

¹⁸ Banner, *supra* note 4, at 110.

¹⁹ See A. Leon Higginbotham, Jr., *The Ten Precepts of American Slavery Jurisprudence: Chief Justice Roger Taney’s Defense and Justice Thurgood Marshall’s Condemnation of The Precept of Black Inferiority*, 17 CARDOZO L. REV. 1695, 1697 (1996).

²⁰ *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1856).

²¹ *Id.*

²² *Id.*

claims by Japanese-Americans and Japanese-*Latin*-Americans. Even before World War II, first generation Japanese-American immigrants in Washington and California were not allowed to own land under those states' "alien land acts."²³ As is now well-known, during the War, Japanese-Americans living on the west coast of the United States were forced from their homes into internment camps.²⁴

But the story of Japanese-*Latin*-Americans interned in the United States is still practically unknown. In 1942, in Bolivia and Peru, approximately two thousand Japanese-*Latin*-Americans who had lived in those countries for decades were rounded up, handed over to the United States military, and transported to internment camps in Texas and Louisiana.²⁵ Several decades after World War II, the socially constructed view of Japanese-Americans as outsiders unworthy of rights-respect had changed. In 1988, Congress passed the Civil Liberties Act, by which (as amended in 1992) each Japanese-American detained during the War received a payment of \$20,000, some internees received compensation for property losses, and the United States formally apologized for the internments.²⁶ But the Japanese-*Latin*-Americans who were kidnapped and interned were excluded under the Act. They, unlike Japanese-Americans, were still socially constructed as "outsiders."²⁷

Socially constructed beliefs change over time.²⁸ That is particularly so with regard to beliefs about who is worthy of rights and who is not. If today we

²³ The California Alien Land Law of 1913, which was targeted at Japanese immigrants, prevented non-citizens from owning land in California; because Japanese immigrants could not become citizens under federal law, they could not own land under California law. See Rose Cuisson Villazor, *Rediscovering Oyama v. California: At the Intersection of Property, Race and Citizenship*, 87 WASH. U. L. REV. 979 (2010). As Justice Murphy acknowledged in his concurrence in *Oyama v. California*, the case that ultimately struck down the alien land laws, the purpose of those laws was to "drive out" the Japanese from California. *Oyama v. California*, 332 U.S. 633, 657 (1948) (Murphy, J., concurring); see also Keith Aoki, *No Right to Own? The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment*, 40 B.C. L. REV. 37 (1998); Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 OR. L. REV. 261, 274 (1997).

²⁴ The relocations were carried out under Executive Order 9066, with the acquiescence of the Supreme Court in its notorious *Korematsu* decision, which upheld the criminal conviction of Fred Korematsu for refusing to report for deportation to the camps. *Korematsu v. United States*, 323 U.S. 214 (1944).

²⁵ See *Mochizuki v. United States*, 43 Fed. Cl. 97, 99–106 (1999).

²⁶ MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS* 100 (1998).

²⁷ Eventually some of the kidnapped Japanese-*Latin*-Americans reached a settlement with the United States government. *Mochizuki*, 43 Fed. Cl. at 98. Under the terms of the settlement, each member of the plaintiff class received \$5,000.

²⁸ "The socially constructed concept of law changes over time, and is best understood as emerging through a process of continuous construction and reconstruction." Frederick Schauer, *The Social Construction of the Concept of Law: A Reply to Julie Dickson*, 25 OXFORD J. LEGAL STUD. 493, 498 (2005), available at <http://www.jstor.org/www.libproxy.wvu.edu/stable/3600679>.

are revolted by the idea that Native Americans, aboriginal Australians, Japanese-Americans, and others are unworthy of property rights, where once we were not, it can only be because our socially constructed beliefs about rights-worthiness have changed. When the social construction of property rights-worthiness changes, it is not just that the dispossessed are *now* considered worthy of property rights-respect; it is that they are now considered as having been worthy in the *past*, at the time of their dispossession.

This is true even if socially constructed rights-unworthiness is rooted in blame, whether appropriate or misplaced.²⁹ The intensity with which we regard someone as blameworthy often changes over time.³⁰ As Jules Coleman explains, even if one is truly blameworthy for some act, such that ascriptions of blameworthiness are apt when the act is committed, it seems natural and just to regard the blameworthy with less resentment and indignation as time passes.³¹ Applying Coleman's insight in the context of dispossession, we can say that even if our socially constructed beliefs about property rights-worthiness are the result of resentment and indignation, over time we can and should expect that resentment and indignation to fade. As a result, we can and should expect the claims of the dispossessed to resonate with more moral force over time. That is, of course, even more true if we now view the previous determination of unworthiness as unfair or incorrect.

C. *The Time-Unworthiness Paradox*

Time corrodes the viability of restitution claims. In simple, practical terms, time seriously deteriorates the functional capacity of legal institutions, which "typically deal with claims by well-identified victims against well-identified wrongdoers."³² Evidence disappears; historical accounts become less reliable; parties and witnesses die, and secondary parties with more tenuous connections to wrongful acts take their place.

As time passes, courts must engage in increasingly speculative projections from a counterfactual past (imagining the wrongful dispossession did not occur) into an imaginary present (a world in which the wrongful dispossession has not occurred), which they are then asked to actually create by re-arranging social relations. But courts simply cannot know what would have

²⁹ "Reputations for deservedness are not always permanent, and entitlements do change. Circumstances may change, thereby discrediting previous ways of thinking about issues." Helen M. Ingram & Anne L. Schneider, *Introduction* to *DESERVING AND ENTITLED: SOCIAL CONSTRUCTIONS AND PUBLIC POLICY* 8 (Helen M. Ingram & Anne L. Schneider eds., State Univ. of New York Press 2005).

³⁰ See generally Jules Coleman & Alexander Sarch, *Blameworthiness and Time* 3 (Yale Law Sch. Pub. Law Working Paper No. 214, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1646949.

³¹ *Id.*

³² ALFRED L. BROPHY, *REPARATIONS PRO & CON* 99 (2006).

happened had some event in history been other than it was, without assuming that no intervening events would have occurred.³³

In addition, courts must “make guesses about the way in which free will would have been exercised” in the legitimate disposition of the property had the rightful owner not been dispossessed.³⁴ And each succeeding generation of rightful possessors has its own free will to exercise. If, for example, each succeeding potential rightful possessor of the property might have legitimately disposed of it in one of ten ways, then by the third generation of ownership there are already one thousand possibilities of disposition. According to Jeremy Waldron, a claimant to such property today must reasonably contend, in a manner that satisfies some objective standard of evidence, that out of thousands of possibilities for the legitimate disposition of the property, it would have come to them.³⁵

Of course, not all possibilities of legitimate disposition are equally likely, and we should not let the possibility that a rightful possessor might have made some unpredictable, whimsical choice relieve us of the burden of reconstructing, based on the best evidence we have, what the possessor most likely would have done as far as we can tell.³⁶ And, even if we can say little else with specificity, we should at least be able to say, as Waldron does, that “if the injustice had not taken place, the descendants of those who suffered it would be better off than they are and descendants of those who perpetrated it would be somewhat worse off than they are.”³⁷

In addition to practical difficulties, the relative moral weight of restitution claims may diminish over time for several reasons. Waldron has argued that “some rights are capable of ‘fading’ in their moral importance by virtue of the passage of time and by the sheer persistence of what was originally a wrongful infringement.”³⁸ The fact that a person wrongfully dispossessed once had a morally justifiable claim does not necessarily mean that she still does: a past unjust act may become a presently just circumstance.³⁹

For example, distributive concerns may undermine the relative moral weight of restitution claims. In Janna Thompson’s words, “Fulfilling reparative

³³ Waldron, *supra* note 3, at 8; Gregory S. Alexander, *The Limits of Property Reparations* (Cornell Law School Research Paper Series, Paper No. 24, 2003), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=404940.

³⁴ Waldron, *supra* note 3, at 10.

³⁵ *Id.*

³⁶ *But cf. id.* at 10.

³⁷ *Id.* at 11.

³⁸ *Id.* at 15 (citing such doctrines as adverse possession, prescription, and statutes of limitation).

³⁹ *Id.* at 24. In Waldron’s formulation, the relative moral weight of a restitution claim may in fact be “superseded” when “changing circumstances can have an effect on ownership rights notwithstanding the moral legitimacy of the original appropriation.” *Id.*

obligations may clash with a duty to make our society more equitable for all citizens.”⁴⁰ The present day needs of a population dependent upon the just distribution of resources might take precedence. As Waldron says,

If an individual makes a claim to the exclusive use or possession of some resources in our territory, then the difficulty of sustaining that claim will clearly have some relation to the level of our concern about the plight of other persons who will have to be excluded from the resources if the claim is recognized.⁴¹

Waldron’s concern, understandably, is “to focus upon present and prospective costs—the suffering and deprivation over which we still have some control.”⁴² Of course the impulse to focus on suffering and deprivation that we can still prevent is not necessarily incompatible with restitution. All depends upon the facts. But according to Waldron, “[i]t is the impulse to justice now that should lead the way in this process, not the reparation of something whose wrongness is understood primarily in relation to conditions that no longer obtain.”⁴³

The relative moral strength of restitution claims may also diminish over the course of time for reasons personally tied to the lives of the former and current possessors. To the extent that property rights arise through the importance “of an object to the identity of the possessor,” the longer one possesses property, the deeper that tie may become.⁴⁴ Sometimes “a person works with an object, shaping and modifying it, so that it becomes imbued with part of her personality; it comes to contain a part of herself.”⁴⁵ On the other hand, “if the object is taken out of one’s hands for a long enough period, the intimacy of that relation may evaporate.”⁴⁶

Similarly, moral claims about the role of property in preserving the owner’s autonomy diminish over time. As Waldron argues, “If something was taken from me decades ago, the claim that it now forms the center of my life and that it is still indispensable to the exercise of my autonomy is much less credible.”⁴⁷ Conversely, claims of the wrongful or secondary possessor about the centrality of the object to her autonomy grow more credible. Succeeding generations of secondary possessors may generate legitimate expectations with

⁴⁰ JANNA THOMPSON, TAKING RESPONSIBILITY FOR THE PAST: REPARATION AND HISTORIC INJUSTICE xi (2002).

⁴¹ Waldron, *supra* note 3, at 20.

⁴² *Id.* at 26.

⁴³ *Id.* at 27.

⁴⁴ *Id.* at 16.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 18–19.

regard to their ownership of the property. People who are themselves innocent possessors of property wrongfully acquired by their predecessors-in-interest “organize their lives and their economic activity” in the belief that the property is, and will continue to be, theirs.⁴⁸ That expectation may reasonably invoke our sympathies, particularly if the wrongfully dispossessed are now dead and therefore seem beyond harm.

However, while it is undoubtedly true that the interests of the dead are less pressing than the needs of the living, it is also true that property law has long recognized and protected the interests of the dead as a means of giving fulfillment to their lives’ work. Property rights are uniquely and particularly designed to reach forward in time, past the lives of their current possessors, to affect the lives of others.⁴⁹ It is impossible to harm one generation through dispossession but not another, and it is impossible to benefit one generation through expropriation but not another. Through the facility of the estate, the dead are entitled to some form of life after death. The dead’s call upon us is particularly strong with regard to the transfer of their lives’ work to those they loved: “[e]ntitlements that result from expressions of love and concern intrinsic to family relationships or friendships ought to be regarded with considerable respect [I]t is a desire to give meaning to the future-directed activities of a life.”⁵⁰ Thus, it is not enough to answer that the wronged are dead. Physically, people may be past, but their legal being—their will—is present through the institution of property. If, by refusing restitution claims, we deny the interests of the dead in conveying their lives’ work to their loved ones, then we are—in a sense—denying them the limited present-life to which they are still entitled.

Finally, we may believe that the moral obligation to provide restitution weakens as degrees of separation are added between the dispossessor and the dispossessed. Thompson, for example, argues that “moral duties” arise between people “because they are in a special relationship”⁵¹ and exist only between “particular individuals or groups at particular periods of time.”⁵² If, over time, the relationship between the possessor and the dispossessed becomes too attenuated—for example, where the parties are merely members of groups, some of whose members benefitted from dispossession, on the one hand, and some of whose members suffered from dispossession, on the other—obligations arising from injustice become “historical” rather than present. Obligations are

⁴⁸ *Id.* at 16.

⁴⁹ For example: the idea of the will, at its essence, is that the will of the deceased survives her death and controls the disposition of her property. *See* RAY D. MADOFF, IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD 57 (2010).

⁵⁰ THOMPSON, *supra* note 40, at 123.

⁵¹ *Id.* at x.

⁵² *Id.*

historical when those who are supposed to be responsible for keeping the promise, honouring the contract, paying the debt, or making reparation are not the ones who made the promise or did the deeds, but their descendants or successors. In many cases those to whom historical obligations are supposed to be owed are not the victims themselves, but their descendants or successors.⁵³

By the time restitution claims are based on historical obligations, under Thompson's definition, their relative moral weight may have diminished fatally.⁵⁴ Hanoch Dagan calls the two fundamental and potentially insurmountable questions that arise when obligations become historical the "Why you?" and "Why me?" questions: Why are *you* entitled to restitution? And why should *I* have to provide it?⁵⁵

The intersection of the two dynamics analyzed so far—the changing social construction of property rights-worthiness, and the corrosive effects of time on the viability of restitution claims—creates a powerful paradox that seriously compromises the potential of restitution as a remedy for mass dispossessions. The two dynamics occur simultaneously: as the construction of rights-unworthiness is changing so that those once considered unworthy of property rights are becoming worthy of them, the viability of restitution claims is corroding. Restitution cannot occur until enough time passes that socially constructed views of unworthiness change, but the passage of time makes restitution claims untenable. This is the time-unworthiness paradox: *only the passage of time makes restitution possible, but the passage of time makes restitution impossible.*

That is the bitter legacy, for example, of Native American claims to land from which they were (now admittedly) unjustly dispossessed. In a series of cases starting in the 1920s and culminating recently, United States federal courts recognized that several Native American tribes had been unlawfully dispossessed of their lands, but held that too much time had passed for their claims to be viable. In *Sherrill*, the United States Supreme Court reiterated the difference between the existence of a right to land and the means to "vindicate that right."⁵⁶ The Court held that because there had been "development of every

⁵³ *Id.* at 10.

⁵⁴ The argument is compelling, but it is worth recalling that through the doctrine of covenants and servitudes, we create and enforce obligations that attach to land; their entire purpose is to "run with the land" rather than with the lives of people. These obligations are not tied to any being, whether living or legal. People may be past, but the land is not; and if their obligations are bound into the land itself, then their obligations are not past either.

⁵⁵ Hanoch Dagan, *Restitution's Realism* 17 (Tel Aviv Univ. Law Faculty, Working Paper No. 67, 2008).

⁵⁶ *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 210 (2005) (quoting *Oneida Indian Nation v. Cnty. of Oneida*, 199 F.R.D. 61, 90 (N.D.N.Y. 2000)).

type imaginable” in the 200 intervening years since the tribes were unlawfully deprived of their land, restoration was “impracticab[le].”⁵⁷ In other words, by the time Native Americans were considered worthy of property rights-respect, it was too late to restore their property rights to them. That is the effect of the time-unworthiness paradox.

However, even if we acknowledge that someone was wronged, that does not necessarily imply that we are the ones who must put things right. No form of restitution will be provided unless the current possessors of property conclude that they have some responsibility to provide it. This problem inevitably leads to a second apparent paradox that undermines restitution claims: the concept of collective responsibility.

D. The Collective Responsibility Paradox

“Collective responsibility,” as the term is typically used, refers to moral blameworthiness located in a group for actions taken by some group members. As Marion Smiley puts it, “[I]t is the moral blameworthiness of the collective itself, rather than that of its members, that constitutes collective moral responsibility.”⁵⁸ Responsibility for wrongs committed by some members of the group attaches to all members without regard for their individual moral blameworthiness.⁵⁹ Most moral philosophers and legal systems reject the concept of collective responsibility as inherently unjust.⁶⁰

Mass dispossessions often result from the unjust imposition of collective responsibility. But mass restitution would require a type of collective responsibility imposed on current possessors, resulting in their dispossession, regardless of whether they as individuals committed any wrongful act. In other words, undoing the injustice of the imposition of collective responsibility would require the imposition of collective responsibility. This is the collective responsibility paradox.

The time-unworthiness paradox compounds the problem. That is because the people who cause a mass dispossession don’t consider it unjust, and thus don’t consider themselves morally bound to undo it. Over time, the

⁵⁷ See *id.* at 210–11, 219.

⁵⁸ Marion Smiley, *Collective Responsibility*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2011), available at <http://plato.stanford.edu/entries/collective-responsibility/>.

⁵⁹ *Id.*

⁶⁰ As Margaret Gilbert says, “What does the blameworthiness of the collective’s act imply about the personal blameworthiness of any one member of that collective? From a logical point of view, the short answer is: *nothing*. Everything depends upon the details of a given member’s particular situation.” Margaret Gilbert, *Who’s to Blame? Collective Moral Responsibility and its Implications for Group Members*, 30 MIDWEST STUD. IN PHIL. 94, 109 (2006). H. D. Lewis argues that the entire concept of collective responsibility is not only unjust, but “barbarous.” Smiley, *supra* note 58 (citing H.D. Lewis, *Collective Responsibility*, 23 PHIL. 3, 3–6 (1948)).

social construction of unworthiness changes, so that the following generations—the secondary possessors—consider the dispossession unjust. But because they didn't cause the dispossession, they reject the imposition of collective responsibility and thus do not consider themselves morally bound to restore property rights to the dispossessed.

That is particularly true where a new political order emerges, and new legal institutions are put into place. Those changes can, in the minds of secondary possessors, break the link with past wrongs that would require the assumption of collective responsibility to right them. If that dynamic prevails, then the wronged will remain wronged, and injustice will become a permanent facet of that society.

The first step in overcoming the collective responsibility paradox is to distinguish between two very different acts: the imposition of rights-unworthiness and the assumption of collective responsibility to make amends. This is not a matter of semantics; it is simply more accurate and useful to say that mass dispossessions result not from the imposition of collective responsibility, but from the imposition of collective rights-unworthiness. We should reclaim the term “collective responsibility” to mean the voluntary assumption of responsibility by a society to undo harm.

Understood in this way, collective rights-unworthiness is imposed upon others unjustly, resulting in their dispossession; collective responsibility, by contrast, is just if it is voluntarily accepted by a society, resulting in the restitution of others. A society can assume collective responsibility to overcome the unjust effects of the imposition of collective rights-unworthiness. By carefully distinguishing between those acts, we overcome the apparent—but only apparent—paradox of “collective responsibility” with regard to restitution claims.

As Margaret Gilbert explains, there is a subtle but critical distinction between what she describes as “backward-looking” and “forward-looking” claims of responsibility.⁶¹ A backward-looking claim might be characterized as “we are responsible for what happened.”⁶² That is a claim that secondary possessors often naturally reject. But a forward-looking claim, by contrast, might be characterized as “[t]hough we are *not* morally responsible for what happened, we *are* morally responsible for ameliorating its effects.”⁶³ Dispossession may be a past injustice of which the present possessor is innocent, but continuing to enjoy the fruits of that injustice is a present harm for which the present possessor is partly responsible. Conceived in this way, responsibility is not imposed on innocent heirs by the past; it is imposed by present possessors on themselves.

⁶¹ Gilbert, *supra* note 60, at 94.

⁶² *Id.*

⁶³ *Id.*

II. THE PARADOXES OF RESTITUTION IN ACTION

The paradoxes of restitution can be observed in action. In the twentieth century, what is now the Czech Republic endured several rapid and disruptive changes in political regimes. The result was repeated, massive dispossessions of property rights. Since 1992, the Czech Republic has been engaged in an intensive and controversial program of restitution with regard to some who were dispossessed—but not others. To bring this story into relief, we can examine the stories of three Czech restitution claimants. The ordinary and extraordinary tales of these claimants reveal a great deal about who receives restitution and who does not, in the Czech Republic and far beyond.

A. *The Czech Republic's Traumatic Century*

In the early twentieth century, the Austro-Hungarian Empire controlled central Europe.⁶⁴ Within that empire were the lands that would eventually comprise the Czech Republic. Following the dissolution of the Austro-Hungarian Empire in the aftermath of World War One, Czech and Slovak nationalists successfully persuaded the victorious allied powers to recognize Czechoslovakia, a new country comprised in the majority of their two national identities.⁶⁵ Czechoslovakia was a multi-ethnic country, populated primarily by people who identified ethnically as Czechs in regions known as Bohemia and Moravia, as Slovaks in Slovakia, and as Germans in the lands bordering Germany and Austria, commonly referred to as the Sudetenland.⁶⁶ Prague, the capital city, had an ethnically diverse population of Czechs, Germans, and a significant Jewish community.⁶⁷

The years between 1918 and the mid-1930s were marked by tension within Czechoslovakia between the ethnic Czechs and ethnic Germans.⁶⁸ With the rise of German nationalism that both propelled and resulted from the rise of Nazism in Germany, those tensions increased.⁶⁹ The Nazis' avowed goal of expanding the German state to encompass all lands occupied by ethnic Germans in Europe posed a direct threat to Czechoslovak sovereignty, particularly in the Sudetenland, where ethnic Germans were in the majority.⁷⁰ At the infamous Munich Conference in 1938, France and Britain told Germany's Nazi government that they would not go to war to prevent the

⁶⁴ A HISTORY OF THE CZECH LANDS (Jaroslav Pánek & Oldřich Tůma, eds., 2009).

⁶⁵ *Id.* at 397–400.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ ZDENĚK BENEŠ ET AL., FACING HISTORY: THE EVOLUTION OF CZECH-GERMAN RELATIONS IN THE CZECH PROVINCES, 1848–1948, at 88 (Zdeněk Beneš & Václav Kural, eds., 2002).

⁶⁹ A HISTORY OF THE CZECH LANDS, *supra* note 64, at 419–20.

⁷⁰ *Id.* at 424.

German occupation of the Sudetenland, despite France's treaty obligations to Czechoslovakia. In return, Germany promised that it would take only the Sudetenland and no more of Europe.⁷¹ The German military crossed the Czechoslovak border unopposed on October 1, 1938, and occupied the Sudetenland border region. It was welcomed by many ethnic Germans in the region.⁷²

Czechoslovak President Edvard Beneš went into exile.⁷³ On March 15, 1939, Hitler summoned Beneš's successor, President Emil Hácha, to Berlin and presented him with an ultimatum: allow German forces to occupy the entire Czech lands unopposed or Prague would be bombed that day.⁷⁴ Hácha ordered the Czech military to stand down, and on the morning of March 16, 1939, the entire Czech Republic was occupied.⁷⁵

Nazi Germany granted independence to Slovakia and reconstituted the Czech lands as a "protectorate" of the German state: the Protectorate of Bohemia and Moravia.⁷⁶ Non-Jewish ethnic Germans who had been Czechoslovak citizens were made citizens of the Reich instead.⁷⁷ Ethnic Czechs were disenfranchised, and some were made forced laborers.⁷⁸ Ultimately, according to Hitler's original plan, about half of the ethnic Czechs were to be "Germanized"; the remainder was to be expelled to the east. However, that plan was never implemented, presumably due to the fortunes of war.⁷⁹ Within the Protectorate, many ethnic Germans assumed positions of power.⁸⁰

The Nazis sent tens of thousands of Czechoslovak citizens who were Jews, Roma, homosexuals, communists, and perceived opponents of the Nazis (including both ethnic Czechs and ethnic Germans) to labor and concentration camps at Terezín, Lety, and Buchenwald—and many ultimately to death at Auschwitz and Birkenau.⁸¹ Their property was expropriated.⁸² The Nazis also

⁷¹ *Id.* at 429, 435.

⁷² *Id.* at 435–38.

⁷³ *Id.* at 440.

⁷⁴ *Id.* at 442.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ BENEŠ, *supra* note 68, at 122.

⁷⁸ See BENJAMIN FROMMER, NATIONAL CLEANSING: A RETRIBUTION AGAINST NAZI COLLABORATORS IN POSTWAR CZECHOSLOVAKIA 17 (2005).

⁷⁹ See BENEŠ ET AL., *supra* note 68, at 179.

⁸⁰ István Pogány, *International Human Rights Law, Reparatory Justice and the Re-ordering of Memory in Central and Eastern Europe*, 10 HUM. RTS. L. REV. 397, 419 (2010).

⁸¹ BENEŠ ET AL., *supra* note 68, at 188.

⁸² FROMMER, *supra* note 78, at 16–17.

murdered many people, including hundreds of children, as a deterrent against, and in retribution for, opposition and resistance activities.⁸³

In April and May, 1945, after seven years of occupation, German forces were driven from Czechoslovakia, primarily by the Soviet army.⁸⁴ President Beneš's government-in-exile returned.⁸⁵ In the post-War chaos, Beneš ruled by a series of Decrees that are now known collectively as the "Beneš Decrees."⁸⁶ In relevant part, the Beneš Decrees: (a) expropriated the property of all ethnic German Czechoslovaks;⁸⁷ (b) stripped all ethnic German Czechoslovaks of their citizenship⁸⁸ unless they could prove that they had either actively supported the Republic and resisted the occupation, or had been persecuted by the occupation government;⁸⁹ (c) rendered void property transactions that occurred "under the pressure of the [o]ccupation or of

⁸³ Most infamously, in revenge for the assassination of SS Reichsprotektor Reinhard Heydrich (convener of the infamous Wannsee Conference on the "final solution" for European Jews, and the highest ranking Nazi official assassinated anywhere during the war) by the Czech resistance, the entire village of Lidice was destroyed. Every male aged 15 and over was shot. Every woman was sent to a concentration camp, where half died. Eighty-eight of the 105 children were murdered; 17 were considered Aryan enough to merit adoption by German families and shipped off to Germany. Many of those children were not found until years after the war, some with no memory of their former lives and families. Every building in the village was burned, every grave disinterred, every tree cut down, and the ground was covered with soil. Today the site of the former village is a memorial. BENEŠ ET AL., *supra* note 68, at 176–77; FROMMER, *supra* note 78, at 19; *see also* Branik Ceslav & Carmelo Lisciotto, *The Massacre At Lidice*, HEART (2008), <http://www.holocaustresearchproject.org/nazioccupation/lidice.html>.

⁸⁴ *See* FROMMER, *supra* note 78.

⁸⁵ The United States Third Army drove the German army from and occupied parts of the eastern Czech lands, but the Soviets liberated and occupied a much larger portion of the Czech lands, including Prague. *See id.*

⁸⁶ *Id.* at 31.

⁸⁷ D. 12/1945, June 21, 1945, Concerning the Confiscation and Expeditious Redistribution of the Agricultural Property of Germans, Hungarians, and Also Traitors and Enemies of the Czech and Slovak Nations, SBÍRKA ZÁKONŮ (SB.), art. 1, para. 1(a) (CZECH) (decree of then President of the Czech Republic, Edvard Beneš).

⁸⁸ D. 33/1945, Aug. 2, 1945, Concerning the Regulation of Czechoslovak State Citizenship of Person of German and Hungarian Nationality, SBÍRKA ZÁKONŮ (SB.), art. 1, para. 2 (CZECH) (decree of then President of the Czech Republic, Edvard Beneš).

⁸⁹ *Id.* at art. 2, para. 1. As early as 1943, while still in exile, Beneš had proposed to the Soviets a ten-point plan that included stripping ethnic Germans of their Czech citizenship following liberation. *See* BENEŠ, *supra* note 68, at 185–86.

national, racial or political persecution”;⁹⁰ and (d) expropriated the property of all business that collaborated with occupation forces.⁹¹

Ethnic German Czechoslovaks faced violent reprisals and forced relocations.⁹² These occurred in two phases. The “wild transfer,” as it is now known, occurred immediately after the war. Carried out by hastily formed groups of militias and vigilantes, and sometimes also organized by the Czechoslovak army or police, the “wild transfer” often took the form of simple mass murder.⁹³ There are no exact figures available, but most historians agree that at least 25,000 ethnic Germans were killed.⁹⁴ Many were simply massacred.⁹⁵ Many died on forced marches or in camps.⁹⁶ Those who did not die were forcibly expelled into Germany.⁹⁷

The most horrific irony was undoubtedly reserved for ethnically German Jews returning to Czechoslovakia from the Nazi concentration and death camps. As ethnic Germans, they too were rounded up, killed, or placed into camps.⁹⁸ Thousands were forcibly expelled—into Germany, the country that had recently been totally committed to exterminating them.⁹⁹ It was not until September of 1946, sixteen months after the end of the war, that the Czechoslovak government ordered a halt to the forcible expulsion of ethnic German Jews.¹⁰⁰

Following the “wild transfer,” expulsions became more systematic, but no systematic effort was ever made to distinguish between ethnic Germans who supported the occupation and those who did not. By 1948, approximately three

⁹⁰ D. 5/1945, May 19, 1945, Invalidity of Certain Property Transactions at the Time of Loss of Freedom and on the National Administration of the Property Assets of Germans, Hungarians, Traitors and Other Collaborators and Certain Organisations and Institutions, art. 1, para. 1 (CZECH) (decree of then President of the Czech Republic, Edvard Beneš).

⁹¹ See D. 108/1945, Oct. 25, 1945, Concerning Confiscation of Enemy Property and Funds of National Renewal, Part I, art. 1, para.1–2 (CZECH) (decree of then President of the Czech Republic, Edvard Beneš).

⁹² FROMMER, *supra* note 78.

⁹³ There were, according to Czech historians, “numerous acts of violence, murders, mob justice, lynchings, and several mass murders of the German population intentionally organised by the army.” BENEŠ ET AL., *supra* note 68, at 221.

⁹⁴ *Id.* at 182–83.

⁹⁵ From May through July of 1945, in Postoloprty, 763 ethnic German Czechoslovaks were murdered; in Horní Moštěnice, 265 (including 74 children); in Ústí nad Labem, between 80–100, many of whom were thrown from the town bridge into the Elbe River, where they drowned. See *id.* at 222.

⁹⁶ *Id.* at 229.

⁹⁷ See FROMMER, *supra* note 78, at 31.

⁹⁸ See BENEŠ ET AL., *supra* note 68, at 229.

⁹⁹ See *id.*

¹⁰⁰ *Id.* at 228.

million ethnic German Czechoslovaks had lost all property rights and had been—to use a modern term—“ethnically cleansed” from Czechoslovakia.¹⁰¹

On February 25, 1948, the Czechoslovak communist party, having gained a substantial representation in the Czechoslovak parliament democratically, seized control of the government. The Czechoslovak communist government began a massive program of nationalization and collectivization, dispossessing the bourgeois and petit bourgeois of private property rights.¹⁰² “[E]xpropriation and nationalization of private property was one of the most important features of installing the communist system in the Czech Republic,” and “almost the entire economy was brought into state or quasi-state ownership forms.”¹⁰³ By the end of communist rule in Czechoslovakia in 1989, property in private hands produced less than 5% of its gross domestic product.¹⁰⁴

The Czechoslovak communist government was totalitarian and authoritarian, brutally repressing all forms of dissent and democratic expression through clandestine surveillance, harassment, imprisonment, and physical violence.¹⁰⁵ Dissidents were harassed, arrested, interrogated, imprisoned, exiled, and in some cases executed.¹⁰⁶ People from middle-class backgrounds and dissidents were forced into low-skill labor jobs and their children were denied secondary and higher education.¹⁰⁷

The communist government ruled for 41 years. In November 1989, it was driven from power in the wake of the popular uprising known as the Velvet Revolution. Dissidents led by long-imprisoned human rights advocate Václav Havel came to power.

¹⁰¹ Many Czechs bristle at that term, but if ethnic cleansing has any meaning, then it must include the forced expulsion of hundreds of thousands of people based solely on their ethnicity as part of a policy of removing all people of that ethnicity from a country. Even if we assume that as many as three-quarters of the 3,000,000 ethnic German population of pre-war Czechoslovakia supported the occupation, and even if we pretend that denying those 2,250,000 people a trial before expropriating their property, stripping their citizenship, and forcibly expelling them from the country was justifiable under the circumstances, that leaves another 750,000 people who were expelled from the country and lost their property rights without legal process, not based on their behavior, but based solely on their ethnic identity. By any reasonable definition, that is ethnic cleansing. For further discussion on the definition of ethnic cleansing, see Andrew Bell-Fialkoff, *A Brief History of Ethnic Cleansing*, FOREIGN AFF., Summer 1993, at 110, available at http://hmb.utoronto.ca/hmb303h/weekly_supp/week-04-05/bellfialkoff_ethnic_cleansing.pdf.

¹⁰² A HISTORY OF THE CZECH LANDS, *supra* note 64, at 505–06.

¹⁰³ 4 JAN URBAN, PRIVATIZATION AND INSTITUTIONAL REFORMS IN CZECH REPUBLIC: STUDY IN INSTITUTIONAL ECONOMICS 14 (2005).

¹⁰⁴ *Id.* at 18.

¹⁰⁵ See Václav Havel, *Power of the Powerless*, in THE POWER OF THE POWERLESS: CITIZENS AGAINST THE STATE IN CENTRAL-EASTERN EUROPE 10 (John Keane ed., 1985); see also A HISTORY OF THE CZECH LANDS, *supra* note 64, at 502, 508.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

B. *The Paradoxes of Restitution in the Czech Republic*

Havel was determined to confront the past truthfully.¹⁰⁸ As part of its attempt to emerge from the nightmare of its post-Nazi and post-totalitarian communist history, Czechoslovakia began to craft a restitution program for the return of property to the dispossessed.¹⁰⁹ In 1990 and 1991, Czechoslovakia enacted “radical” and sweeping restitution programs that went far beyond the programs enacted by many other Eastern Bloc countries to return private property expropriated by the communist regime.¹¹⁰

The first of these statutes was entitled the “Law on Relieving the Consequences of Some Property Injustices” and is now commonly known as the Small Restitution Law.¹¹¹ It took effect in October 1990 and allowed restitution of a limited set of small businesses.¹¹² The second and more comprehensive statute was entitled the “Law on Extrajudicial Rehabilitation” and informally as the Second Restitution Law.¹¹³ The Second Restitution Law

¹⁰⁸ In the opening words of his first address to the nation as President, on New Year’s Day 1990, Havel set the tone for his administration’s commitment to truth:

For forty years you heard from my predecessors on this day variations on the same theme: how our country was flourishing, how many million tons of steel we produced, how happy we all were, how we trusted our government, and what bright prospects were unfolding in front of us. I assume you did not propose me for this office so that I, too, would lie to you.

Václav Havel, President, Czech Republic, New Year’s Address to the Nation, 1990 (Jan. 1, 1990), available at <http://chnm.gmu.edu/1989/items/show/111>.

¹⁰⁹ David Roman & Susanne Y. P. Choi, *Forgiveness and Transitional Justice in the Czech Republic*, 50 J. CONFLICT RESOL. 339, 347 (2006). In addition to the return of property confiscated by the fascist and communist regimes, political prisoners were released and compensated, political convictions were abrogated, students expelled for political reasons were re-admitted, workers fired for political reasons were re-employed, and compensation was paid to the heirs of political prisoners who were executed or died in prison. *Id.* Under the communist regime, between 250,000 and 300,000 people were convicted of political crimes. *Id.* at 346 n.15. Around 235 of these people were executed, and between 4,000 and 6,000 political prisoners died in custody “under unclear circumstances.” *Id.* at 346 n.14.

¹¹⁰ Pogány, *supra* note 80, at 412. These laws were called the “1991 Law on Extrajudicial Rehabilitation” and the “Law on the Revision of Ownership Relations to Land and Other Agricultural Property.” *Id.*; Andrzej K. Koźmiński, *Restitution of Private Property: Re-Privatization in Central and Eastern Europe*, 30 COMMUNIST & POST-COMMUNIST STUD. 95, 99 (1997) (calling the Czech restitution scheme “the most radical” and “broadest in scope” in Central and Eastern Europe).

¹¹¹ Jiří Pehe, *Legal Difficulties Beset the Czech Restitution Process*, in 3 RADIO FREE EUROPE/RADIO LIBERTY RESEARCH REPORT No. 28, at 6 (1994); George E. Glos, *Restitution of Confiscated Property in the Czech Republic*, CZECHOSLOVAK SOC’Y OF ARTS AND SCI., <http://www.svu2000.org/issues/glos.htm> (last visited Oct. 3, 2013).

¹¹² Pehe, *supra* note 111.

¹¹³ *Id.*

applied to all types of property other than agricultural land.¹¹⁴ A third statute, the Law on the Revision of Ownership Relations to Land and Other Agricultural Property (“The Land Law”), applied to agricultural land and operated under the same general criteria as the Second Restitution Law.¹¹⁵

Extraordinarily, the preferred remedy under these laws was specific restoration of the actual property taken, unless the property (1) had been significantly improved upon and (2) was in the hands of private possessors who were themselves innocent of any wrongdoing with regard to the seizure of the property.¹¹⁶ If the property was in the hands of the government, then former owners were entitled to have the property itself back even if it had been significantly improved upon, provided they paid the value of the improvements to the government. The Czechoslovak government committed itself to compensating former owners who could not qualify for specific restoration. Moreover, the government committed itself to compensating innocent current possessors in cases where specific restoration could occur.¹¹⁷ The restitution laws reached descendants beyond those recognized in Czechoslovak intestacy laws, allowing claims by even grandnieces and grandnephews of the dispossessed.¹¹⁸ In essence, Czechoslovakia had made an amazing commitment: it would compensate both innocent current possessors whose land was restored to its previous owners and previous owners (or their descendants) who could not qualify for restoration.

For a country newly emerging from decades of economic stagnation and regression, this commitment was both radical and perilous. Restitution was not, after all, necessary to the transition from a socialist economy to a capitalist one. “[P]rivatization was seen as a key method to achieve transition to a market economy,” but privatization does not require restitution, and, in fact, the two can be at odds.¹¹⁹ The purpose of privatization is to transfer property into private hands, from which it will presumably be deployed rationally in the interest of profit, and therefore efficiently.¹²⁰ The purpose of restitution, by contrast, is returning property into the hands of its previous possessors or their heirs, regardless of whether it can be presumed it will subsequently be deployed rationally and efficiently. Privatization quickly resolves uncertainties about property rights, allowing private transactions and investment to proceed. The restitution process, which often involves competing claims and requires judicial or administrative decision-making, can prolong and even create

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *See id.* at 6–7.

¹¹⁷ *See id.* at 7.

¹¹⁸ 4 URBAN, *supra* note 103, at 26.

¹¹⁹ *Id.* at 14.

¹²⁰ *Id.* at 22.

uncertainties, delaying or preventing private transactions and investment, particularly in a country without an experienced independent judiciary.¹²¹ Privatization results in capital flow *to* the state, from private hands, through the auction and direct sale process. The Czech restitution process, by contrast, resulted in the flow of both physical property and capital *from* the state, into private hands. Compared to other transitional Central and Eastern European countries emerging from communist rule, the Czech commitment to restitution was much greater.¹²²

Czechs and Slovaks favored restitution over privatization because it “was argued to foster historical justice by returning unjustly expropriated property.”¹²³ Although aware of the economic burden that the country was assuming through its restitution program, Václav Havel stated that for the people of Czechoslovakia, restitution was a moral issue rather than an economic one: “There was a deep longing for property restitution . . . [T]here were tens if not hundreds of thousands of tradesmen and small businessmen for whom the communist program of nationalization had been a catastrophe. The trauma they had experienced after 1948 was clearly passed from generation to generation”¹²⁴ The restitution laws manifested “the general will to right those earlier economic wrongs.”¹²⁵ Then-Finance Minister, now President Václav Klaus—in exceedingly rare agreement with Havel—said, “[I]f there is a restitution, the price tag is not important. It is a moral question.”¹²⁶

In total, almost four million of the ten million people in the Czech Republic were directly affected by the restitution program. More than 10% of the value of all government-owned assets was directly restored to individual claimants.¹²⁷ The estimated total value of property restored and compensation paid under these laws was 10.7 billion dollars, an astonishing 42% of the Czech Republic’s gross domestic product in 1991.¹²⁸

But although the 1990–91 laws were notable for the depth of their commitment to restitution, they were also notable for what they did *not* do. First, they applied only to property expropriations that occurred after February

¹²¹ *Id.* at 28.

¹²² *Id.* at 26–27. Hungary provided only compensation rather than restoration, and not until 1995. Poland has still not enacted a comprehensive restitution program.

¹²³ *Id.* at 26.

¹²⁴ VÁCLAV HAVEL, *TO THE CASTLE AND BACK* 269 (Vintage Canada 2006) [hereinafter *TO THE CASTLE AND BACK*].

¹²⁵ *Id.*

¹²⁶ Anna Gelpern, *The Law and Politics of Reprivatization in East-Central Europe: A Comparison*, 14 U. PA. J. INT’L BUS. L. 315, 359 (1993) (quoting Peter S. Green, *Czechoslovak Restitution Could Cost \$11 Billion*, UPI, Feb. 21, 1991).

¹²⁷ 4 URBAN, *supra* note 103.

¹²⁸ *Id.*

25, 1948, the day the communists seized power.¹²⁹ Moreover, claimants had to have both Czech citizenship and permanent residence in the country.¹³⁰ By excluding those who had lost their property before 1948, those who were no longer resident in Czechoslovakia, and those who were not citizens, the 1990–91 laws deliberately and obviously excluded ethnic Germans who had been stripped of their property rights and citizenship and expelled between 1945 and 1948.

In 1991, the laws were amended to allow restitution for victims of racially motivated confiscations under the Nazis if they had not previously received restitution. In 1992, the restitution program was expanded again, with a new law for the first time providing for restitution of some property seized from ethnic Germans between 1945 and 1948.¹³¹ In order to make a successful claim under the 1992 law, claimants were required to demonstrate that (1) they were permanent residents of Czechoslovakia; (2) they were Czechoslovak citizens at the time they were dispossessed, and at the time of their claim for restitution; and (3) they had retained Czechoslovak citizenship immediately after the occupation by proving active loyalty during it.¹³²

The number of claimants who could satisfy these criteria was exceedingly small. During the ethnic cleansing of 1945–48, very few had been given the opportunity to retain their citizenship by proving active loyalty during the occupation. Even among those few who did, some were no longer residents in or citizens of the country. Calls by ethnic Germans to expand the criteria for restitution were denounced or ignored.

But as important as the corrosive effects of time are for explaining why restitution is impossible under some circumstances, those effects cannot account fully for the refusal of Czechs to reconstitute ethnic Germans dispossessed between 1945 and 1948. That must be true, because the Czechs have enacted restitution schemes for people dispossessed by the Nazi government between 1939 and 1945 and by the communist regime between 1948 and 1989. Because the Czechs have voluntarily assumed the burdens of restitution for dispossessions that occurred both before and after 1945–1948, time alone cannot explain the failure of Czechs to provide restitution for ethnic Germans.

Just as those once considered unworthy of property rights-respect can “become” worthy of them, people once considered worthy can become unworthy. Nazi ideology depended upon a re-casting of some beings as

¹²⁹ Pogány, *supra* note 80, at 412.

¹³⁰ Pehe, *supra* note 111, at 6–13. Claims were also limited to natural persons. Therefore, entities such as churches could not seek restitution under the 1990–91 laws. After two decades of negotiations, the government reached an agreement for the return of most church property in 2011.

¹³¹ See Human Rights Comm., Commc'n No. 747/1997, *Des Four Walderode v. Czech Republic*, U.N. Doc. CCPR/C/73/D/747 (1997), [hereinafter *Des Four Walderode*].

¹³² *Id.* at para. 2.3.

Untermenschen (sub-humans) who unjustly were occupying *Lebensraum* (living space) needed by those who were fully human.¹³³ Sub-humans, according to Nazi ideology, included Jews, Roma, and Slavs.¹³⁴ Those sub-humans occupied vast swaths of Central and Eastern Europe.¹³⁵ That badly needed living space should be occupied by sub-humans seemed a gross injustice to Nazi ideologues, and taking it from them seemed a restoration of “natural” order.¹³⁶

But in bitter irony, outrages perpetrated by Nazi occupiers and collaborators may have triggered in many Czechs a new socially constructed belief about the rights-unworthiness of ethnically German Czechoslovaks—regardless of whether they participated in any wrongful acts. It is important to note the distinction between criminal guilt and rights-unworthiness. Criminal guilt calls for punishment, but punishment was not the motivating force behind the ethnic German dispossessions. Those ethnic Germans whom the Czechs believed were guilty of actual crimes, and therefore should be punished, were indeed punished—through lynchings, executions, or prison. But dispossession resulted regardless of criminal guilt. After all, even ethnic Germans who had proven they were not guilty of disloyalty were stripped of the right to possess property. If innocence did not restore property rights, then criminal culpability did not take property rights away. Rather, ethnic Germans were considered unworthy of property rights on the basis of their ethnicity alone.

Throughout the 1990s, Czech resistance to restitution claims by ethnic Germans remained adamant. Sometimes, that resistance stretched the boundaries of the rule of law or broke through them entirely. The Ministry of the Interior established a special secret police unit code-named “Property” to monitor and disrupt restitution claims by ethnic Germans. The “Property” unit wiretapped phone calls and monitored e-mail conversations between restitution claimants and their attorneys, a practice later declared illegal by the Constitutional Court.¹³⁷ Many restitution claimants are firmly convinced they were subjected to much more clandestine surveillance and interference than has yet been acknowledged.¹³⁸

In 1997, Germany and the Czech Republic issued a joint declaration by which they pledged, essentially, to agree to disagree about restitution for expellees, but not to let that disagreement stand in the way of their

¹³³ See WOODRUFF D. SMITH, *THE IDEOLOGICAL ORIGINS OF NAZI IMPERIALISM* (Oxford Univ. Press 1986).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ See Jan Richter, *Constitutional Court Rules Restitution Lawyer's Wiretapping Illegal*, RADIO PRAHA, (Oct. 18, 2007, 3:26 PM), <http://www.radio.cz/en/section/curraffrs/constitutional-court-rules-restitution-lawyers-wiretapping-illegal>.

¹³⁸ See discussion *infra* Parts II.C.1, II.C.3.

relationship.¹³⁹ The Czech government expressed regret over the expulsions, stating:

[T]he Czech side regrets that, by the forcible expulsion and forced resettlement of Sudeten Germans from the former Czechoslovakia after the war as well as by the expropriation and deprivation of citizenship, much suffering and injustice was inflicted upon innocent people, also in view of the fact that guilt was attributed collectively.¹⁴⁰

Despite that regret, further restitution reforms were not forthcoming.

The Czech restitution program has clearly demonstrated two things. First, the Czechs are committed to restitution even at enormous cost, if they consider the dispossessions at issue unjust. Second, in the post-war years, the Czechs did not consider the post-war dispossessions of ethnic Germans—regardless of their individual guilt or innocence—unjust. The Czechs no longer considered ethnic Germans worthy of rights-respect. They saw them as outside the bounds of community to whom such respect was due.

In 2002, the Czech government produced a textbook entitled *Facing History* to be used in Czech schools to explain the expulsions.¹⁴¹ It is a remarkable, if inadvertent, testament to the struggle over the meaning of the Czech Republic's post-war history. It is co-authored, but each chapter appears to have been written by a different author, and the author of each chapter is not identified. Some chapters are starkly and soberly honest and do exactly what the title of the document promises.¹⁴² Others employ a twisted logic that would have made the worst communist-era apparatchik proud.¹⁴³ As a result, *Facing History* does not so much sum up Czech history with regard to ethnic Germans as capture the struggle over that history. It is a little like an archaeological

¹³⁹ GERMAN-CZECH DECLARATION ON MUTUAL RELATIONS AND THEIR FUTURE DEVELOPMENT (Jan. 21, 1997), available at http://eudocs.lib.byu.edu/index.php/Czech-German_Declaration.

¹⁴⁰ *Id.* at § III.

¹⁴¹ BENEŠ ET AL., *supra* note 68. The title page of *Facing History* contains this note about its origin: “The text of *Facing History* is based on information material [sic] produced for teachers under the title *Odsun-Vertreibung. Transfer Němců z Československa 1947 (Odsun-Vertreibung. The Transfer of the Germans from Czechoslovakia 1947)* published for the Ministry of Education, Youth and Physical Training of the Czech Republic by the SPL – Práce and Albra publishing houses.” *Id.*

¹⁴² I interviewed one of the authors of *Facing History*, Professor Jan Kuklík, Jr., as part of my research for this Article. I did not ask him to identify which parts he authored, but Professor Kuklík has shown an admirable commitment to facing uncomfortable historical truths.

¹⁴³ For example, one author defends the decree stripping ethnic Germans of their citizenship by arguing it “freed them from their duty to the State.” BENEŠ ET AL., *supra* note 68, at 239.

tablet that captures the transition between one language and another.¹⁴⁴ It is a remarkable artifact of the transition between what I have described in the introduction as the first two acts of the restitution drama. But if the document is a testament to transition, it can only be so because things are changing.

These changes are evident in longitudinal survey data. In 2002 and 2007, the Center for Public Opinion Research at the Institute of Sociology at Charles University in Prague surveyed over 1,000 Czechs aged 15 and older about their views on the post-war expulsions and expropriations.¹⁴⁵ In response to a question asking whether the post-war expulsions and expropriations were “just” or “unjust,” the responses in 2002 and 2007 show interesting changes:

	2002	2007
Just	60%	48%
Unjust	26%	28%
Don't know	14%	24%

In response to a question asking whether the Beneš Decrees should be repealed,¹⁴⁶ the responses were:

	2002	2007
No	67%	52%
Yes	5%	11%
Don't Know	28%	37%

Obviously, while there is still significant resistance to the idea that the expulsions and expropriations were unjust, and that the Beneš Decrees should be repealed, there is also notable movement as well. By 2007, significantly more Czechs seemed to be questioning the justice of the expulsions and dispossessions, even if they were not ready to decide yet that they were unjust. In fact, by 2007, less than half of those surveyed were willing to say that the

¹⁴⁴ It would be interesting to know what Czech schoolchildren who read it make of it. If they aren't perplexed, it can only be because they already sense the struggle in the society over the post-war history.

¹⁴⁵ Veřejnost o odsunu a Benešových dekrettech [PUBLIC ABOUT WITHDRAWAL AND THE BENEŠ DECREES], Centrum pro výzkum veřejného mínění Sociologický ústav AV ČR, v.v.i. [hereinafter PUBLIC ABOUT WITHDRAWAL AND THE BENEŠ DECREES].

¹⁴⁶ *Id.* The question of whether the Beneš Decrees should be repealed may have been complicated in the public mind by the *Dreithaler* decision, in which the Constitutional Court held that the Decrees were now inoperative and thus without current effect. See Timothy William Waters, *Remembering Sudetenland: On the Legal Construction of Ethnic Cleansing*, 47 VA. J. INT'L. L. 63, 116–17 (2006) (“[T]he universally accepted Czech view is that those acts were discrete in time, and since there will be no additional acts relying on the Decrees, they lie dormant.”). In light of that ruling, some Czechs may have concluded that repealing the Beneš Decrees was unnecessary, even if they found them unjust.

expulsions and expropriations were just.¹⁴⁷ Similarly, from 2002 to 2007, the respondents who believed the Beneš Decrees should not be repealed dropped by 15%; about half of that percentage thought they should be repealed, and the other half didn't know. Interestingly, the 2007 survey also reveals significant differences of opinion among different age demographics.¹⁴⁸ In response to the question whether the expulsions and expropriations were just or unjust, age data revealed the following:

	Age 30 or younger	Age 60 or older
Just	33%	60%
Unjust	17%	32%
Don't Know	50%	8%

These data suggest that younger Czechs, compared to the older generation, are much less committed to the idea that the expulsions and expropriations were just. Hard data are not available after 2007, but there is much anecdotal evidence that the significant change underway between 2002 and 2007 has continued and increased in the years since.

It is possible that younger Czechs were simply ignorant of the issue. But there is good reason to doubt it. In recent years, media coverage of the once-taboo expulsions has increased enormously.¹⁴⁹ For the first time, Czech television showed documentary footage of the murders during the expulsions.¹⁵⁰ National news sources have reported about death marches during the expulsions and interviewed survivors.¹⁵¹ Prominent coverage was given to the uncovering of mass graves of murdered ethnic Germans.¹⁵² The nation was riveted when a criminal investigation was launched into the murders of five

¹⁴⁷ PUBLIC ABOUT WITHDRAWAL AND THE BENEŠ DECREES, *supra* note 145.

¹⁴⁸ *Id.*

¹⁴⁹ See Sarah Borufka, *Police Uncover Human Bones at Alleged Site of Sudeten German Mass Murder*, RADIO PRAHA (Aug. 17, 2010, 1:30 PM), <http://www.radio.cz/en/section/curaffrs/police-uncover-human-bones-at-alleged-site-of-sudeten-german-mass-murder> (“For a long time, the expulsion of Sudeten Germans was a taboo subject in the Czech Republic, but that is now slowly changing.”).

¹⁵⁰ See Jan Richter, *Documentary to Show Post-War Mass Murder of German Civilians in Prague*, RADIO PRAHA (May 6, 2010), <http://www.radio.cz/en/section/curaffrs/documentary-to-show-post-war-mass-murder-of-german-civilians-in-prague>.

¹⁵¹ See Jan Richter, *Marie Ranzenhoferová – A Survivor of the 1945 Brno Death March*, RADIO PRAHA (May 12, 2010, 3:33 PM), <http://www.radio.cz/en/section/czechstoday/marie-ranzenhoferova-a-survivor-of-the-1945-brno-death-march>.

¹⁵² See Bára Procházková, *Graves Ought to Have Crosses and Names*, RESPEKT.CZ (April 29, 2011), <http://respekt.ihned.cz/respekt-in-english/c1-51724590-graves-ought-to-have-crosses-and-names>.

ethnic German children and the murderers were named.¹⁵³ An unflinching novel about the expulsions (*Peníze od Hitlera*, or *Money from Hitler*) won the country's most prestigious literary prize. A play based upon the novel entered the repertoire of the small but influential Švandovo Theatre—in a country in which the power of literature and theater is difficult to overestimate.¹⁵⁴ Plans are underway to open the first museum about the ethnic Germans and their fate, and the proposed museum has received national media attention.¹⁵⁵ American historian Benjamin Frommer's account of the executions of ethnic German prisoners after convictions before rudimentary citizen tribunals was translated into Czech and published in the Czech Republic.¹⁵⁶ And recently, a new display was added to the Terezín concentration camp, describing the internment of ethnic Germans there after the War.¹⁵⁷ All of this would have been unthinkable in the not-too-distant past.

The increased interest in the expulsions was caused in part by the Czech Republic's accession to the European Union in 2004. That process gave the expelled and their heirs occasion to tell the world what happened. Although no European Union government favored linking the Czech Republic's accession to its repudiation of the Beneš Decrees and restitution of the expropriated property, the accession process at the very least helped start the

¹⁵³ See Ian Willoughby, *Czech Police Investigation Names Two Responsible for June 1945 Murder of Sudeten Germans*, RADIO PRAHA (June 2, 2009, 4:50 PM), <http://www.radio.cz/en/section/curaffrs/czech-police-investigation-names-two-responsible-for-june-1945-murder-of-sudeten-germans>.

¹⁵⁴ See David Vaughn, *Radka Denemarková and the Importance of Digging Up Skulls*, RADIO PRAHA (Jan. 17, 2010, 2:01 AM), <http://www.radio.cz/en/section/books/radka-denemarkova-and-the-importance-of-digging-up-skulls>; see also *Money from Hitler*, ŠVANDOVO THEATRE, <http://www.svandovodivadlo.cz/index.php?cmd=event.detail&id=1522&lang=en> (last visited Sept. 27, 2013). The dissident movement during the communist times was dominated by theater and literary figures including Václav Havel himself, who enjoyed world-wide critical acclaim as a playwright before becoming known as a human rights advocate. *Id.*

¹⁵⁵ See Ian Willoughby, *Plans Underway for First Czech Museum Dedicated to Former German Speaking Minority*, RADIO PRAHA (Sept. 16, 2010, 2:46 PM), <http://www.radio.cz/en/section/curaffrs/plans-underway-for-first-czech-museum-dedicated-to-former-german-speaking-minority>. The museum will be built in Ústí nad Labem, the same town where in June 1945, ethnic Germans were thrown from the bridge to their deaths. *Id.*

¹⁵⁶ See Chris Johnstone, *Executing Justice in the Retributions after WWII*, RADIO PRAHA (Nov. 7, 2010, 2:01 AM), <http://www.radio.cz/en/section/books/executing-justice-in-the-retributions-after-wwii> (interviewing Benjamin Frommer about his book, *National Cleansing: Retribution Against Nazi Collaborators in Postwar Czechoslovakia*).

¹⁵⁷ In both 2010 and 2011, I accompanied a group of American law students through a tour of Terezín. By happenstance, we were accompanied by the same tour guide in both years. In both years, the tour ended within fifty yards of a small building that houses the memorial to the ethnic Germans internees. In neither year was the memorial, or the fact that ethnic Germans were held captive there, mentioned on the tour. But in 2011, unlike 2010, the guide encouraged us to explore the small building and suggested that we would find more history of the camp there.

public conversation.¹⁵⁸ President Klaus recently re-fueled the conversation by refusing to ratify the Lisbon amendments to the European Union treaty, which guarantee property and other rights for citizens of Union countries, unless the Czech Republic could adopt a protocol stating expressly that the amendments did not create a justiciable right of action.¹⁵⁹ Klaus openly admitted he wanted the protocol in order to prevent restitution claims by the expelled.¹⁶⁰

The change is also due in part to the active work of non-governmental organizations such as AntiKomplex, a group of young scholars who are intent on restoring to the Czech Republic part of the rich culture it lost because of the expulsions.¹⁶¹ AntiKomplex has taken upon itself the remarkable task of entering dozens of small villages ethnically cleansed between 1945 and 1948 to facilitate discussions in public fora about what happened.¹⁶² It has helped several towns in the former Sudetenland establish memorials to the expelled and killed.¹⁶³ It also made extensive presentations in schools throughout the region, and held festivals celebrating ethnic German and Czech culture. AntiKomplex's name is suggestive of its purpose: to help overcome the psychological complex that burdens both the dispossessed and the dispossessors, as well as their heirs.¹⁶⁴

The polling data showing changing views among Czechs, and the vastly greater attention paid to the expulsions in the Czech media, suggest that the social construction of unworthiness is changing in the Czech Republic with regard to the ethnically German Czechoslovaks who were dispossessed.

C. *Three Restitution Stories*

1. Karel Des Fours Walderode and Johanna Kammerlander

Born in 1904, Karel Des Fours Walderode came from an aristocratic family and lived on a substantial rural estate.¹⁶⁵ He was a resident of Bohemia and became a Czechoslovak citizen when the country came into existence in 1918.¹⁶⁶ A census taken that year attempted to determine the ethnicity of

¹⁵⁸ See Waters, *supra* note 146, at 65.

¹⁵⁹ *Czechs Might Delay Croatia's EU Entry*, PRAGUE DAILY MONITOR (June 29, 2011), <http://praguemonitor.com/2011/06/29/in-czechs-might-delay-croatias-eu-entry>.

¹⁶⁰ *Id.*

¹⁶¹ Interview with Ondřej Matějka, Manager of AntiKomplex, in Prague, Czech Republic (June 2011) (on file with author).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Interview with Johanna Kammerlander, in Prague, Czech Republic (July 2011) (on file with author).

Czechoslovakia's inhabitants. Ethnicity was determined by reference to inhabitants' first language.¹⁶⁷ As a child, Walderode grew up speaking Czech, German, and French.¹⁶⁸ When the census-taker asked Karel's father what the boy's first language was, his father explained that the Karel spoke three languages equally well.¹⁶⁹ The census-taker insisted that he needed to record a first language for purposes of the census, so his father proposed a test: they would place an apple on the table, call Karel in and ask him in Latin (which he had also studied) what the object was.¹⁷⁰ Whichever language he answered in would be his first language, and thus his ethnicity, for purposes of the census.¹⁷¹ Karel identified the object in German: "Apfel."¹⁷² That moment had a profound effect on his life.

With the Nazi occupation, because he had been identified as an ethnic German, Walderode was automatically made a citizen of the German Reich.¹⁷³ During the occupation, Walderode's father died and he inherited the family property.¹⁷⁴ According to the testimony of several ethnic Czechs, Walderode secretly supported Czech resistance activities by allowing resistance groups to store weapons on his estate, where the Nazis were unlikely to search, and to listen clandestinely to radio broadcasts there.¹⁷⁵ Walderode was also given a position with an arms manufacturer. However, Protectorate authorities grew suspicious of him. He was fired from his position and drafted into the Wehrmacht as a common soldier instead.¹⁷⁶ Walderode completed basic training and was about to leave for combat in North Africa when, for reasons that were never explained, he received a second draft notice.¹⁷⁷ Walderode guessed that his personnel record had been filed under both "W" for Walderode and "D" for Des Fours, but regardless of the reason for the mistake, he was somehow drafted twice.¹⁷⁸ Hoping to avoid combat in North Africa, Walderode took a risk and reported for basic training again.¹⁷⁹ His gamble paid off. The mistake was not caught, and this time, because he was fluent in several

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

languages, Walderode was assigned to an interpreter's company.¹⁸⁰ While working as an interpreter for a Protectorate Tribunal, Walderode passed confidential information to Czech defendants, according to the testimony of those he aided.¹⁸¹

When German forces were driven from Czechoslovakia, Walderode stayed behind and was arrested.¹⁸² However, Walderode was neither stripped of his citizenship nor expelled from Czechoslovakia because, with the testimony of ethnic Czechs in the resistance, he was able to prove that he had actively resisted the occupation, as required under the Beneš Decrees.¹⁸³ Nonetheless, under those same Decrees, all of his real property was permanently expropriated, solely because of his German ethnicity.¹⁸⁴

Following the communist takeover in 1948, Walderode was targeted. He was, after all, an aristocrat who had just proven his loyalty to the government the communists had overthrown. In 1949, he was warned that he was about to be arrested and fled the country.¹⁸⁵ As a consequence of leaving the country without permission, he was stripped of his citizenship by the communist regime.¹⁸⁶ Without other assets, he went to the last property still in his legal possession: a plot of land in rural Sardinia, which according to family legend had been won in a card game.¹⁸⁷ He lived there for 16 years before settling in Vienna.¹⁸⁸ After the Velvet Revolution, Walderode returned to Prague as a permanent resident. After having been stripped of citizenship by the communist regime for fleeing the country in 1949, he re-obtained citizenship in 1992.

Walderode appeared to be one of the exceedingly rare ethnic Germans who could meet the stringent requirements for restitution under the 1992 restitution laws: he was a permanent resident of the country, he had been a citizen when he was dispossessed, he was a citizen at the time he would submit a claim, and he had retained his citizenship immediately after the occupation by proving his active loyalty during it. Therefore, in November 1992, he submitted his claim for restitution. His claim was approved by the Land Office¹⁸⁹ on

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Des Fours Walderode, *supra* note 131, at para. 2.2.

¹⁸⁴ *Id.*; Interview with Johanna Kammerlander, *supra* note 166.

¹⁸⁵ Interview with Johanna Kammerlander, *supra* note 166.

¹⁸⁶ Des Fours Walderode, *supra* note 131, at para. 2.2.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* The administrative entity under the Czech Minister of Agriculture was empowered by the 1992 law to decide such claims.

March 10, 1993.¹⁹⁰ On September 29, 1993, Walderode's property was restored to him, 48 years after it had been seized under the Beneš Decrees.

Walderode's restitution was the subject of intense political controversy. In particular, then Prime Minister, now President Václav Klaus was outraged by the Walderode decision. Klaus wrote to the Land Office stating that Walderode's restitution was "legal" but "unacceptable" and must be overturned.¹⁹¹ When the Land Office refused to overturn its decision, Klaus's Minister of Agriculture annulled it, purportedly because of doubts about Walderode's permanent residence in the Czech Republic.¹⁹²

Walderode appealed the annulment to the Czech High Court, but just two weeks after he filed the appeal, while it was still pending, the Czech Parliament amended the 1992 restitution law, adding a new requirement for claimants: not only must a claimant currently be a citizen of the Czech Republic, but his citizenship must have been *uninterrupted* between 1945 and 1990. Walderode could not qualify for restitution under the amended law, because his citizenship had been stripped by the communist government while he was in exile.¹⁹³ The law was commonly referred to as *Lex Walderode* in the press because it was understood as having been created specifically to render Walderode ineligible for restitution.¹⁹⁴ On March 3, 1996, the Land Office applied *Lex Walderode* to Walderode's claim.¹⁹⁵ At age 92, Walderode's property was again taken from him.¹⁹⁶

Walderode then petitioned the United Nations Human Rights Committee for redress.¹⁹⁷ He argued that the Czech Republic had violated his civil and political rights to equal protection under Article 26 of the International

¹⁹⁰ *Id.* In 1993, through what is commonly known as the Velvet Divorce, Czechoslovakia divided itself into two countries: the Czech Republic and the Slovak Republic. The restitution programs continued in both countries following the division.

¹⁹¹ See Des Fours Walderode, *supra* note 131, at para. 2.4. President Klaus has become a favorite among some legal scholars in the United States because of his embrace of neo-classical law and economics. For example, he recently gave the keynote address at a conference celebrating the birthday of University of Chicago law professor Gary Becker. See Václav Klaus, President, Czech Republic, Keynote Address at the University of Chicago Law School Conference Honoring Gary S. Becker (Feb. 11, 2011), available at <http://www.klaus.cz/clanky/2769>. During his speech, Klaus spoke of the need for minimum state intervention into private affairs. *Id.*

¹⁹² Interview with Johanna Kammerlander, *supra* note 166. Walderode's residency had not previously been a controversial matter, and the basis of the Minister's alleged doubts was unexplained.

¹⁹³ Des Fours Walderode, *supra* note 131, at para. 2.3, 2.7.

¹⁹⁴ *Id.* at para. 2.7.

¹⁹⁵ *Id.* at para. 2.7.

¹⁹⁶ *Id.* at para. 2.7, 3.1; Interview with Johanna Kammerlander, *supra* note 166.

¹⁹⁷ Des Fours Walderode, *supra* note 131.

Covenant on Civil and Political Rights.¹⁹⁸ While waiting for the Committee's decision,¹⁹⁹ Karel Des Fours Walderode died.²⁰⁰ His case was continued by his widow, Johanna Kammerlander.²⁰¹

In 2000, the Human Rights Committee held that the *Lex Walderode's* requirement of citizenship—let alone uninterrupted citizenship—was a violation of Article 26's requirement of equal protection and nondiscrimination.²⁰² It stated that the Czech Republic should provide Kammerlander with “prompt restitution of the property in question or compensation therefor.”²⁰³ Armed with that decision, Kammerlander petitioned the Czech Constitutional Court to overturn the Land Office decision revoking Walderode's restitution award.²⁰⁴

Reviewing Kammerlander's petition, the Czech Constitutional Court disagreed with the Human Rights Committee that *Lex Walderode* violated the Czech Republic's obligations under international law, but ruled that it could not be applied retroactively to claims that had been filed before *Lex Walderode* was passed—in other words, *Lex Walderode* could not be applied to Walderode's own restitution claim.²⁰⁵ In addition, the Czech Constitutional Court held that the permanent residency requirement—which the Minister of Agriculture had used to annul Walderode's initial restitution award—was invalid.²⁰⁶ As a result, the Czech Constitutional Court held that Walderode's restitution claim was still viable, but Kammerlander would have to follow the normal appeals process for Land Office decisions through the Czech court system.²⁰⁷ Twenty years after they were first submitted Karel Des Fours Walderode's claims are still winding their way through Czech courts.

¹⁹⁸ *Id.* at para. 1. Better known as the Helsinki Accords, the Covenant was signed in 1975 by the United States, the Soviet Union, and most other European countries (as they existed at that time). In return for recognition of permanent boundaries and economic cooperation, the signatories pledged to honor certain civil and political rights. The Accords played an important role in the fall of the Czechoslovak communist regime; dissidents gained significant political and moral sympathy by arguing that their only request was that the communist regime honor the commitments it had made under the Accords. *Id.*

¹⁹⁹ Decisions by the UNHRC are known as “communications.”

²⁰⁰ Des Fours Walderode, *supra* note 131, at para. 1; Interview with Johanna Kammerlander, *supra* note 166.

²⁰¹ Des Fours Walderode, *supra* note 131, at para. 1.

²⁰² *Id.* at para. 8.3.

²⁰³ *Id.* at para. 9.2.

²⁰⁴ Interview with Johanna Kammerlander, *supra* note 166.

²⁰⁵ Des Fours Walderode, *supra* note 131, at para. 2.7 & 8.3; Interview with Johanna Kammerlander, *supra* note 166.

²⁰⁶ Des Fours Walderode, *supra* note 131, at para. 5.9.

²⁰⁷ Interview with Johanna Kammerlander, *supra* note 166.

2. Robert Brok

Robert Brok was 22 years old when the Nazis arrived in Prague. Because he was a Jew, his property was immediately expropriated.²⁰⁸ His family's business was given to a privately-owned company that manufactured tires for the *Wehrmacht*.²⁰⁹ Like most of Prague's Jews, Brok was shipped to the Terezín concentration camp.²¹⁰ Terezín was a holding pen behind the façade of a ghetto, used by the Nazis as a way station on the tracks to extermination.²¹¹ Like most of Terezín's inmates, Brok was eventually shipped to Auschwitz.²¹² Unlike most Czechoslovak Jews sent to Auschwitz, Robert Brok returned.²¹³ He survived for one very specific reason: he was number 724 on Oskar Schindler's famous list of forced laborers.²¹⁴

Upon his return, Brok discovered that his family's property had been seized by the Czechoslovak government from the company to which the Nazis had given it.²¹⁵ Brok tried to recover the property under two legal theories. First, he argued that because it had been taken from him because of racial persecution, it was a void transfer under the Beneš Decrees.²¹⁶ Second, Brok argued that the Beneš Decrees had rendered the transfer of his property to the collaborationist tire manufacturer void, and therefore rendered void the Beneš government's expropriation of the property from that manufacturer.²¹⁷ He lost in a decision affirmed by the Czechoslovak Supreme Court.²¹⁸ The Court held that the Beneš Decrees were not intended to render void expropriations by the Czechoslovak government; they were intended to divest collaborators.²¹⁹ Because Brok's former property had been expropriated by the Czech

²⁰⁸ *Id.* at 4.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ A HISTORY OF THE CZECH LANDS, *supra* note 64, at 444.

²¹² Of the approximate 139,000 inmates of Terezín, some 87,000 were shipped to camps in the east, primarily to Auschwitz and Treblinka. Of the remaining 53,000, 34,000 died at Terezín before they could be shipped elsewhere. Patrick Macklem, *Rybná 9, Praha 1: Restitution and Memory in International Human Rights Law*, 16 EUR. J. INT'L L. 1, 4–5 (2005).

²¹³ According to best estimates, approximately 1,500 inmates from Terezín shipped to Auschwitz survived the war. *Id.* at 5.

²¹⁴ On Schindler's List, he is identified as a Czech Jew manual laborer named "Robert Brock." SCHINDLER'S LIST, <http://www.oskarschindler.com/list.htm> (last visited Sept. 29, 2013).

²¹⁵ Human Rights Comm., Commc'n No. 774/1997, *Brok & Broková v. Czech Republic*, U.N. Doc. CCPR/C/73/D/774/1997 [hereinafter *Broková*]; Macklem, *supra* note 212, at 8.

²¹⁶ *Broková*, *supra* note 215, at para. 2.2.

²¹⁷ *Id.* at para. 2.2–2.3.

²¹⁸ *Id.* at para. 2.3.

²¹⁹ *Id.* at para. 2.4.

government from a collaborationist entity, it was now outside the scope of the restitution provision of the Beneš Decrees.

Before Brok could find redress, the communists seized power. Communist governments were not known for their sympathy to arguments that the state should transfer property to private parties. The communist regime assigned the lower floors of Brok's former property to a state-owned company.²²⁰ The upper floors, where Brok and his family had lived, were converted into rooms for renting.²²¹ Robert Brok rented and lived in the room that had been his parents' bedroom.²²²

Under the communist government, Brok's status as the child of a middle class family severely limited his employment and education options.²²³ Moreover, he was a Jew in a country infected with Stalinist anti-Semitism.²²⁴ He was allowed to perform only unskilled labor.²²⁵ After drifting through a variety of manual labor jobs, Brok eventually became a doorman at a hotel directly across from his former property.²²⁶

Immediately after the fall of the communist regime, the building was sold to private investors under the laws of privatization for small businesses.²²⁷ The new owners of the building raised the rent.²²⁸ Brok could no longer afford his room, and he gave it up.²²⁹

In 1992, Brok made a claim for restitution of his family's property.²³⁰ He lost. Like the court that had denied Brok's claim 40 years earlier, the court now held that the 1991 racial persecution amendment to the restitution laws was intended to provide restitution of property seized by the Nazi Protectorate government, not property seized by the post-War Beneš government under the Beneš Decrees.²³¹ Because Brok's property had been seized from collaborators under the Beneš Decrees, the court held it was ineligible for restitution under

²²⁰ Macklem, *supra* note 212, at 9.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ Igor Lukes, *Robert Slansky: His Trials and Trial 2* (Cold War Int'l History Project, Working Paper No. 50, 2011); see TIMOTHY SNYDER, *BLOODLANDS: EUROPE BETWEEN HITLER AND STALIN* 364–65 (2010). In 1951, after Stalin's direct intervention, eleven Jewish former high-ranking Czechoslovak communist party officials were tried for treason in a show trial laced with unabashed anti-Semitism. They were executed. *Id.*

²²⁵ Macklem, *supra* note 212, at 7.

²²⁶ *Id.*

²²⁷ *Id.* at 11.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Broková, supra* note 215, at para. 2.4.

²³¹ *Id.*

the 1991 amendment.²³² Under the court's reasoning, a person whose property was seized by the Nazis because of his race could receive restitution—unless, in the meantime, the Nazis had given it to a collaborator, from whom it was seized under the Beneš Decrees. Brok appealed to the Czech Constitutional Court, arguing that if the lower court's interpretation of the law was correct, then the law violated his constitutionally protected property rights.²³³ The Court rejected that claim on the basis that he had no property rights to violate in the absence of a successful restitution claim.²³⁴

Robert Brok died shortly after the Constitutional Court's ruling.²³⁵ His wife and son brought his case to the United Nations Human Rights Committee.²³⁶ The Committee held that the law impermissibly discriminated between claimants whose property had been seized by the Nazis and given to collaborators (and subsequently seized under the Beneš Decrees), and those whose property was seized by the Nazis but not given to collaborators.²³⁷ The Committee stated that the Czech government must either restore the property to the Broks, or compensate them.²³⁸ It did neither. Today, Robert Brok's former property houses a bar on the lower floor and, on the upper floors, a strip club called "Nasty's Kabaret and Show Dance" that caters to English and American tourists.

3. The Schwarzenbergs

Schwarzenberg Palace stands adjacent to Prague Castle, on a hill high above the Vltava River. The Schwarzenbergs were an immensely wealthy and powerful noble family in the Hapsburg line, ethnically German but resident in the Czech lands for generations, whose noble titles had been stripped upon the dissolution of the Austro-Hungarian Empire, but whose wealth and influence remained.²³⁹ In the inter-war years, the palace was the property of Adolph Schwarzenberg.²⁴⁰ Adolph Schwarzenberg was one of the largest private

²³² *Id.*

²³³ Macklem, *supra* note 212, at 12.

²³⁴ *Id.* at para. 2.6.

²³⁵ *Id.* at para. 1.

²³⁶ Macklem, *supra* note 212, at 12.

²³⁷ *Broková*, *supra* note 215, at para. 7.4.

²³⁸ *Id.* at para. 9.

²³⁹ Among the properties owned by the Schwarzenbergs in addition to the Schwarzenberg Palace in Prague was the famous castle at Český Krumlov. *Court Enables Czech Heiress to Reopen Restitution Claims*, PRAGUE DAILY MONITOR (Feb. 2, 2011), <http://praguemonitor.com/2011/02/02/court-enables-noble-heiress-reopen-restitution-claims>.

²⁴⁰ Interviews with Alžběta Pezoldová, in Prague, Czech Republic (May 2009 & June 2010) (on file with author) [hereinafter Pezoldová Interview].

landowners in the country, and sat on the board of the powerful Bohemia Bank.²⁴¹

Adolph Schwarzenberg despised the Nazis.²⁴² In the wake of the occupation, he resigned his position on the board of Bohemia Bank in protest against its 'Aryanization' policy, under which Jewish employees were fired and the accounts of Jewish customers were frozen.²⁴³ He went into exile, eventually arriving in the United States.²⁴⁴ There he provided support to Jan Masaryk, the former Czechoslovak Foreign Minister also living in exile in the United States. In retaliation, all of his properties in the Protectorate, including Schwarzenberg Palace, were expropriated by the Nazi regime.²⁴⁵ His adult son Jindřich was arrested by the Germans in 1943 and sent to Buchenwald concentration camp, where he remained until 1944.²⁴⁶

Upon restoration of the Czechoslovak government, under the Beneš Decrees, Adolph and Jindřich Schwarzenberg were stripped of their citizenship because of their German ethnicity. Their properties were expropriated.²⁴⁷ Adolph Schwarzenberg challenged both his loss of citizenship and the expropriation, arguing that he was not ethnically German and had been actively loyal to the Republic throughout the occupation.²⁴⁸ Jan Masaryk, who had resumed his duties as Foreign Minister, testified to Schwarzenberg's loyalty.²⁴⁹ Schwarzenberg won, but his property was not returned pending the government's appeal. In April 1947, the Czechoslovak parliament passed a law known colloquially as *Lex Schwarzenberg*, because it targeted the Schwarzenberg properties specifically.²⁵⁰ It expropriated the Schwarzenberg properties without compensation and without means of redress.²⁵¹ However, because the Schwarzenberg properties had already been expropriated under the Beneš Decrees, the Czechoslovak government was concerned that *Lex Schwarzenberg* might not be effective. Therefore, on January 30, 1948, the Czechoslovak parliament revoked the confiscation under the Beneš Decrees, purportedly leaving them expropriated under *Lex Schwarzenberg* instead.²⁵²

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ Human Rights Comm., Commc'n No. 757/1997, *Pezoldová v. Czech Republic*, U.N. Doc. CCPR/C/75/D/757/1997 [hereinafter *Pezoldová*].

²⁴⁸ *Pezoldová* Interview, *supra* note 240.

²⁴⁹ *Id.*

²⁵⁰ *Id.*; *Pezoldová*, *supra* note 247, at para. 2.3.

²⁵¹ *Pezoldová*, *supra* note 247, at para. 2.3–2.7.

²⁵² *Id.* at para. 2.3.

Three weeks later, the communists seized power. The communist takeover spelled the end of any hope of restitution for the Schwarzenbergs. Adolph and Jindřich Schwarzenberg, as remnants of the Austrian-Hungarian nobility, were obvious enemies to the communist regime.²⁵³ They lived in exile for the remainder of their lives. Adolph died in 1950.²⁵⁴

Jindřich had a daughter, Alžběta, who was born and raised in Vienna. Jindřich also adopted his nephew Karel Schwarzenberg as his male heir.²⁵⁵ Jindřich died in exile in 1965.²⁵⁶

From his home in Austria, Karel Schwarzenberg became a stalwart and much-respected supporter of Czech dissidents during the communist era.²⁵⁷ In 1977, he became the leader of the International Helsinki Foundation, an NGO dedicated to monitoring states' compliance (or, rather, lack of compliance) with the civil and political rights provisions of the 1975 Helsinki Accords.²⁵⁸ Karel Schwarzenberg became a close ally and supporter of Václav Havel in the years preceding the Velvet Revolution.²⁵⁹ When Havel became President in 1989, he chose Schwarzenberg as his chancellor.²⁶⁰

Following the enactment of the 1990–91 restitution laws, Alžběta Pezoldová (*neé* Schwarzenberg) sought restitution of the Schwarzenberg properties. She argued that the properties had been seized by the Nazis due to the political persecution of her father and grandfather.²⁶¹ Her claim was rejected. The Czech courts concluded that the Schwarzenberg properties had not been seized under the Beneš Decrees and, therefore, were not eligible for restitution under laws enacted to undo expropriations made under them. Rather, the Schwarzenberg properties were expropriated under *Lex Schwarzenberg*, to which the restitution laws did not apply.²⁶²

²⁵³ Moreover, the Schwarzenbergs' most active supporter, Foreign Minister Jan Masaryk, was found dead at the base of the Foreign Ministry within two weeks of the communist takeover. Masaryk had refused to resign his post. Jan Velinger, *The Life and Death of Jan Masaryk*, RADIO PRAHA (July 14, 2004), <http://www.radio.cz/en/section/czechs/the-life-and-death-of-jan-masaryk>. His death was declared a suicide by the communist government. *Id.*

²⁵⁴ Pezoldová Interview, *supra* note 240.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ JERI LABER, COURAGE OF STRANGERS: COMING OF AGE WITH THE HUMAN RIGHTS MOVEMENT 341 (2002).

²⁵⁸ DANIEL C. THOMAS, THE HELSINKI EFFECT: INTERNATIONAL NORMS, HUMAN RIGHTS, AND THE DEMISE OF COMMUNISM 4 (2001).

²⁵⁹ LABER, *supra* note 257, at 328.

²⁶⁰ *Id.* at 336.

²⁶¹ Pezoldová Interview, *supra* note 240.

²⁶² Pezoldová, *supra* note 247, at para. 2.7–2.11.

Pezoldová brought her case before the United Nations Human Rights Committee.²⁶³ She made two arguments. First, she argued that applying *Lex Schwarzenberg* to her family alone made her unequal before the law in violation of Article 26 of the International Covenant on Civil and Political Rights. Second, she argued that she had been denied access to the relevant files that would permit her to prove her family's property was seized under the Beneš Decrees. That meant she had been denied equal access to a remedy for the violation of her rights, also in violation of Article 26.²⁶⁴ The Czech government did not deny that she had been denied access to the relevant files.²⁶⁵

The Committee held that because Pezoldová had been denied access to the files, her right to access to justice had been violated under Article 26.²⁶⁶ The Committee held that she should be permitted to file a new claim for restitution even though the time for such claims had passed, and this time be given access to files which might show whether the property had actually been seized first under the Beneš Decrees or *Lex Schwarzenberg*.²⁶⁷ Alžběta Pezoldová continues to pursue her restitution claim.

III. OVERCOMING THE PARADOXES OF RESTITUTION

At first blush, it might seem unlikely to hope that a society would voluntarily assume responsibility to end the present continuation of past injustices—but it has happened repeatedly. Following the collapse of communism, the Czech Republic did it as a “moral matter” for those socially constructed as worthy of property rights-respect. Similarly, South Africa has adopted an extensive restitution program after the fall of the apartheid regime, even though the post-apartheid democratic government was most certainly not causally responsible for the massive dispossessions that occurred under apartheid. Germany has also shown continued commitment to making amends voluntarily for the crimes of its Nazi government.²⁶⁸

Each of these states has voluntarily accepted collective responsibility to undo past harms through restitution because doing so is central to its vision of itself as a liberal democratic state committed to justice. Such states can shape their moral identities by altering present relationships that have been determined by past injustices, so that historical effects that undermine their present moral aspirations are eliminated as far as possible. The willingness of a

²⁶³ *See id.*

²⁶⁴ *Id.* at para. 3.6, 7.1.

²⁶⁵ *Id.* at para. 11.4.

²⁶⁶ *Id.* at para. 11.6.

²⁶⁷ *Id.* at para. 12.2.

²⁶⁸ Elazar Barkan, *Between Restitution and International Morality*, 25 *FORDHAM INT'L L.J.* S-46, S-47 (2001).

society to define itself through the voluntary acceptance of collective responsibility—in essence to state, “through his act, we define our moral identity”—both embodies and reinforces an ethic of civic and moral responsibility that benefits society itself.

In order for restitution to become possible, then, the dispossessed must “become” rights-worthy before too much time passes. In order for the dispossessed to become rights-worthy, those who have been placed outside the category of rights-respect must be welcomed inside it instead. We can help that process by promoting the rights-worthiness of the dispossessed.

The process of promoting rights-worthiness is similar in many ways to what post-conflict literature identifies as “social reconciliation.”²⁶⁹ Social reconciliation programs “seek to promote tolerance and create ‘mutual respect.’”²⁷⁰ As time passes and the intensity of anger and sharpness of traumatic memory fades, the social construction of rights-worthiness changes. As that happens, it becomes possible to engage in processes of reconciliation; as the processes of reconciliation occur, the rights-worthiness of the other is promoted. They become mutually reinforcing dynamics. In this way, social reconciliation is a necessary antecedent to property rights restitution.

Often the first step in the process of social reconciliation is establishing a means of avoiding further violence. However, where the conflict is further in the past and where ethnic cleansing has removed one group from a society, there is no danger of immediate violence. Thus one “advantage”—if that word can be used in this context—of mass dispossessions of ethnic cleansing is that the potential for immediate future violence is vastly reduced. On the other hand, the particularly poisonous residue of ethnic cleansing is that it can make a community based in reconciliation almost impossible, because it destroys the basis of community—the presence of the other.

The processes of reconciliation can take several forms that are context-specific; an instructive example is the experience of Japanese-Americans. As the intensity of anger and trauma faded over time, a concerted effort of political and legal advocacy on behalf of Japanese-Americans was begun. From that effort, consciousness about the treatment of Japanese-Americans was raised in the general population, which fueled a process of reassessment of their rights-worthiness. As Martha Minow recounts, “The political movement for reparations and the legal struggle to undo the convictions for individuals such as Fred Korematsu occasioned national debate and education. Museums held exhibits and offered days of remembrance to commemorate the suffering of those who had been interned.”²⁷¹ The movement was not without resistance. As Minow recounts, a United States Senator tried to tie reparations for Japanese-

²⁶⁹ KRISHNA KUMAR, U.S. AGENCY FOR INT’L DEV., PROMOTING SOCIAL RECONCILIATION IN POSTCONFLICT SOCIETIES 1 (1999).

²⁷⁰ *Id.*

²⁷¹ MINOW, *supra* note 26, at 100–01.

Americans to reparations from Japan for the families of Americans killed at Pearl Harbor, apparently still unwilling or unable to recognize that Japanese-Americans belong to the American national community, not the Japanese.²⁷² But with sustained effort, that view was discredited, and ultimately the United States recognized that Japanese-Americans were within the community of those due property rights-respect. Public concern that Japanese-Americans' rights had been violated could only arise if, consciously or unconsciously, the public had decided that Japanese-Americans were worthy of such rights.

A critical step in the process of promoting rights-respect for Japanese-Americans was simply making available to the public objectively accurate accounts of their treatment.²⁷³ In many post-conflict societies, commissions have been established and tasked with determining the historical truth.²⁷⁴ "Harms that are intrinsically historical—which cannot be separated from the way people view from their history—call for a reparative response that addresses history."²⁷⁵ The result of dispossession is what Bernadette Atuahene calls "property-induced invisibility."²⁷⁶ The dispossessed are removed "from the social contract. The consequence is more than just the taking of real property, but also the destruction of their relationship to society. . . . [I]nvisibility is a type of social death."²⁷⁷ Stories that express the essential humanity of victims help to restore their social visibility. In a sense, as the social construction of the wrongfully dispossessed changes, such that their humanity is recognized, they re-emerge from the world of things into the living world of beings.

Once the dispossessed "become" worthy of property rights-respect, the conversation must become about what forms of restitution are possible. As Barkan says, most restitution programs occupy "a space between a moral aspiration and resignation to political limitations."²⁷⁸ With that in mind, there are two general discourses about restitution: "as restoration" and "as

²⁷² *Id.* at 100.

²⁷³ *Id.*

²⁷⁴ See PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS (2d. ed. 2010) (recounting the experiences of truth commissions in Uganda, Bolivia, Argentina, Uruguay, Philippines, Chile, Nepal, Chad, Germany, El Salvador, Haiti, South Africa, Ecuador, Guatemala, Nigeria, South Korea, Panama, Peru, Ghana, Paraguay, Morocco, Canada, and Greensboro, North Carolina, among others).

²⁷⁵ THOMPSON, *supra* note 40, at 66.

²⁷⁶ Bernadette Atuahene, *From Reparation to Restoration: Moving Beyond Restoring Property Rights to Restoring Political and Economic Visibility*, 60 SMU L. REV. 1419, 1431 (2007). She defines property-induced invisibility as "the confiscation or destruction of real property with no payment of just compensation, executed such that dehumanization occurs." *Id.*

²⁷⁷ *Id.* at 1424–25.

²⁷⁸ Barkan, *supra* note 268, at S-49.

reconciliation.”²⁷⁹ For those who see restoration as the only acceptable remedy, the wrongfully dispossessed must be placed in the same position they would have been in had they not been wronged, because only material restoration can undo the actual injustice of wrongful dispossession. For those who see reconciliation as the goal, there must be acts of contrition sufficient so that the parties are able to live in harmony and mutual respect; material restoration is a means of making reconciliation possible, and is only as necessary as required to achieve that goal. Restoration is sometimes said to be backward-looking, in that it attempts to undo past harms; reconciliation is said to be forward-looking, in that it attempts to create conditions which will allow the disputants to live peacefully in the future,²⁸⁰ part of “the larger project of restoring a dispossessed group or individual’s relationship to society.”²⁸¹

Law provides a powerful arena in which reconciliation can occur. It can provide a forum through which historical facts are acknowledged and personal stories revealed. It can also be used to fashion a wide range of specific remedies in addition to, or in lieu of, full restoration: public acknowledgement of the truth, apology, memorials, and symbolic compensation for the wrongfully dispossessed or the secondarily dispossessed. These lesser remedies matter. “Quite apart from any attempt genuinely to compensate victims or offset their losses, reparations may symbolize a society’s undertaking not to forget or deny that a particular injustice took place, and to respect and help sustain a dignified sense of identity-in-memory for the people affected.”²⁸² For example, while the amounts paid to the Japanese-Americans were not nearly enough to offset their losses of property, opportunity, community, and psychological peace, that was not the point. As Waldron describes, the point of payments to Japanese-Americans interned in concentration camps during World War II “was to mark—with something that counts in the United States—a clear public recognition that this injustice did happen, that it was the

²⁷⁹ THOMPSON, *supra* note 40, at 47–48. The same word, reconciliation, is often used to describe both the process of restoring mutual respect, and the end goal of that process. THE GUIDING PRINCIPLES FOR STABILIZATION AND RECONSTRUCTION, U.S. INST. OF PEACE 186 (2009), available at http://www.usip.org/sites/default/files/guiding_principles_full.pdf (citing JUDY BARSALOU & VICTORIA BAXTER, THE URGE TO REMEMBER, U.S. INST. OF PEACE, <http://www.usip.org/sites/default/files/srs5.pdf> (last visited Oct. 3, 2013)). As Thompson uses the term here, it refers to the end goal of the process described above. I understand it as a state in which those who were in conflict regard each with mutual rights-respect.

²⁸⁰ See BROPHY, *supra* note 32, at 8 (“Backward-looking relief seeks to assess the exact harm of the past and compensate for it. Proponents of forward-looking relief, in contrast, recognize that past harm is having some continuing effect on the present, but they make little effort to assess the exact value of those past harms. In place of an exact calculation of past harm, they seek some compensation that attempts to improve lives into the future Forward-looking relief seems to be the dominant form among reparations proponents, for it provides flexibility in choosing the type and size of remedy.”).

²⁸¹ Atuahene, *supra* note 276, at 1424.

²⁸² Waldron, *supra* note 3, at 6.

American people and their government that inflicted it, and that these people were among its victims.”²⁸³ Moreover, Waldron argues that “[i]t is no objection to this that the payments are purely symbolic” because “identity is bound up with symbolism” and “a symbolic gesture may be as important to people as any material compensation.”²⁸⁴

In addition to material compensation, apology may become possible. Many victims of violence report that apology is the most important remedy to them, perhaps because it embodies within it an acknowledgement of the rights-worthiness of the victim. Sometimes, contrition can help lay the ground work for forgiveness.

Forgiveness is said to benefit victims, perpetrators, and divided societies. It can end cycles of violence, help victims reestablish their own dignity, redeem wrongdoers as persons worthy of forgiveness, renew civic relationships between victims and perpetrators, and allow bystanders to realize their own roles in the past. Forgiveness helps societies to overcome, though not forget the past and thus make possible progress to the future.²⁸⁵

For example, in David and Choi’s remarkable study of the willingness of former political prisoners to forgive those responsible for the fact and conditions of their imprisonment, the second strongest variable positively associated with forgiveness was an apology from their captors. Apology was more important to forgiveness than the length and conditions of imprisonment; the subsequent individual, social, or political empowerment of the wronged party; or the punishment of the wrongdoer.²⁸⁶ Some material compensation, combined with acknowledgement, apology, and forgiveness, may complete the process of reconciliation.²⁸⁷

“Reparatory justice is not merely about the restitution of property or the payment of compensation to former owners. Such schemes . . . have a wider, normative significance; they help to shape collective memory and national identity”²⁸⁸ It is in that sense that “laws of restitution are another

²⁸³ *Id.* at 7.

²⁸⁴ *Id.*

²⁸⁵ BURYING THE PAST: MAKING PEACE AND DOING JUSTICE AFTER CIVIL CONFLICT (Nigel Biggar, ed., 2003); DESMOND TUTU, NO FUTURE WITHOUT FORGIVENESS 226 (1999); Roman David & Susanne Y. P. Choi, *Forgiveness and Transitional Justice in the Czech Republic*, 50 J. CONFLICT RES. 339, 340 (2006) (citing MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS (1998)).

²⁸⁶ David & Choi, *supra* note 285, at 359. The only variable more positively related with forgiveness than apology by the captors was frequency of church attendance by the captives. *Id.*

²⁸⁷ *Id.* at 354.

²⁸⁸ Pogány, *supra* note 80, at 399.

chapter in this reconstruction of, and search for, a national self.”²⁸⁹ A nation constructing a national self that is committed to justice may have to “make reparations for its past wrongs—including wrongs that were done in past generations.”²⁹⁰

Far from being unjust, acceptance of collective responsibility becomes an active affirmation of the centrality of justice in a society’s identity. As Hanoch Dagan has argued, “[A] regime of ‘moral retroactivity’ anticipates and encourages” a citizenry committed to justice: “rather than undermining law’s legitimacy, retroactive application of core human rights ends up presenting law at its best: as a perennial quest for justice.”²⁹¹

The stories of Karel Des Fours Walderode, Johanna Kammerlander, Robert Brok, and the Schwarzenbergs demonstrate the need for restitution remedies, the need for flexibility in fashioning them, and their importance not only to the dispossessed but also to the identities and aspirations of secondary dispossessors.

Walderode himself has died, and therefore the strength of his personal tie to his former property has largely dissolved; there is no longer a need to restore it to him because of its connection to his sense of his own identity. And yet, given the tenacity with which he fought for his property throughout his life, it clearly was part of his life’s work to preserve his connection to it. That should and can be honored. Moreover, the Czechs own identity as a people committed to justice and the rule of law should motivate them to provide restitution in some form to Walderode. The extra-legal machinations involved in annulling his initial restitution award were unseemly and disgraceful; *Lex Walderode* is a blemish on the Czech lawmaking system. The Czechs own moral aspirations are best served by affording him the dignity of at least partial restoration. They should also publicly acknowledge that he was wronged, and perhaps construct some type of memorial on his former property acknowledging his contributions and loyalty to the Czech Republic.

Robert Brok has died and his restitution claim is no longer being pursued. During his life, the intensity of his connection to his former property, and the centrality of to his own sense of identity, could hardly be overstated. After all, even when his restitution claim was unjustly denied, he continued to live in the building as a tenant and worked most of his life as a doorman at the hotel across from it. Particularly given the depth of his suffering at Terezín and Auschwitz, it is terrible to think that the property that was so central to his existence is now degraded into a strip club for Western tourists.²⁹² Given its

²⁸⁹ *Id.* (quoting Shlomo Avineri, *A Forum on Restitution*, 2:3 E. EUR. CONST. REV. 34, 37 (1993)).

²⁹⁰ THOMPSON, *supra* note 40, at 68.

²⁹¹ Hanoch Dagan, *Restitution and Slavery: On Incomplete Commodification, Intergenerational Justice, and Legal Transitions*, 84 B.U. L. REV. 1139, 1173 (2004).

²⁹² See *supra* Part II.C.2.

location in Josefská, Prague's former Jewish district, it would be an excellent site for a memorial to the vanished Jewish population of Prague.²⁹³ Brok's story could and should be told there. And again, the Czechs should be motivated to make at least those amends not solely because of what is owed to Brok, but also because of their own moral aspirations and commitment to an identity as a liberal and pluralistic democratic state. And, to the extent that Brok's descendants have been impoverished by his unjust treatment, they must be compensated and made whole.

In many ways, the Schwarzenbergs' story could not be more different than Brok's. The property of which they were dispossessed is not a nondescript building now used as a strip club; it is the most prominent palace in Prague. The Schwarzenbergs were not impoverished by the unjust expropriation of their properties. But the ferocity with which Alžběta Pezoldová, now 66, pursues restitution even today speaks volumes about the painful effect of injustice.

The Schwarzenbergs were unjustly deprived of their property even though Adolph Schwarzenberg supported the Czechoslovak government in exile, and Jindřich Schwarzenberg was sent to Buchenwald for his opposition to the Nazi regime. It is the bitterness of that thought that lingers. It is of course simply unrealistic to think that a palace now treated as national treasure will be returned to private ownership. But all personal property tied to Ms. Pezoldová's father and grandfather should be restored to her. And, again, the Schwarzenbergs' stories should be told and honored. Not just their loyalty to the Republic during its occupation, but also the unjust way in which they were treated by the Republic during the Beneš years.

These, of course, are just three stories. In the Czech Republic, there are tens of thousands of individual stories untold and unknown. In the world beyond the Czech Republic, including in the United States, there are millions.

The Czech Republic is rightly regarded as a model of peaceful transformation, and its restitution program for the victims of communism was so extensive precisely because it was, for the Czechs, a moral matter. The Czech restitution program is remarkable on many levels. Attempting any restitution program at all in the face of such tumultuous history is a remarkable testament to the Czech people's determination to emerge from history. The program's unusual commitment to restoration as the remedy of first resort defied conventional wisdom that doubted such a program could work. Its huge economic cost was worth bearing because it was central to Czech moral identity and aspirations. But the Czech restitution program also reveals, by who it ignores, that the corrosive effects of time cannot alone explain refusals to provide restitution. Rather, restitution also depends upon overcoming the debilitating effects of the social construction of unworthiness.

Of course, the Czech Republic is not the only society with unaddressed restitution issues—in the United States, our own history of ethnic cleansing and

²⁹³ See *supra* Part II.C.2.

wrongful dispossession remains an unhealed wound. But perhaps, as it did in 1989, the Czech Republic can provide a moral light for others to follow.

IV. CONCLUSION

To overcome the paradoxes of restitution and embrace an identity as a people committed to justice, it is necessary that two things happen: we must acknowledge that the dispossessed were human beings worthy of property rights-respect, and we must assume, collectively, the responsibility to overcome the effects of that unaddressed injustice—restoring rights where it is possible and morally justified, making other amends where it is not. And all of this must happen before time renders justice impossible.

The process of restitution can be both incredibly powerful and dangerous. Powerful, because it is a tool that can be used to re-structure history itself. Dangerous, because in doing so, it might damage the present and the future. Finding the right balance is difficult. The law has a role to play: not as the determinant of outcomes through the application of rigid formulas, but as an institution nearly as adaptable and flexible as the needs of justice. Legal institutions provide a forum through which we can decide, to the best of our honest ability, what is historically true. And, in the light of historical truth, law empowers us to give effect to the most just course of action possible.

Political limitations cannot be ignored; in some cases, peace may depend upon observing them. But we also must recognize that where political limitations are caused by socially constructed and imposed unworthiness, they may (and very likely, will) change in time. If that is true, then we can do two things: encourage that change and prepare our institutions so that they are ready when it occurs.

Beyond its immediate horrors, mass dispossession is an amputation performed on the future. It diminishes the lives of the dispossessed and their heirs, and the dispossessors and their heirs. The heartbreak, and the smoldering corrosive effect of injustice, is palpable. It can only be overcome by assuming collective responsibility to make amends.

Precisely because the assumption of collective responsibility in such circumstances is neither required nor expected, it is an act outside the current of history that ends the continuous move and countermove of historical conflict. It is the end of historical conflict and the chance to begin anew. By assuming collective responsibility to overcome the legacy of socially constructed rights-unworthiness, we overcome the paradoxes of restitution and author a different ending.