

Restitution post bellum: property, inheritance, and corrective justice

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The aftermath of war is always messy and complicated. When should objects or resources that were unjustly taken in wartime be returned to the victims of misappropriation, or their heirs? *Cosmopolitan Peace*, Cécile Fabre's excellent new book on *post bellum* justice, distinguishes two different rationales for reparation following wrongful acts of war. Chapter 5 deals with the restitution of property specifically, Chapter 6 with reparations more generally. My concern is with the former. In this article, I advance two arguments that are intended to buttress claims for the restitution of property in general, and particularly claims advanced by the heirs of the original victims of misappropriation. My position is not an argument for restitution *simpliciter*, requiring the return of misappropriated property regardless of the consequences. *Post bellum* contexts are inevitably the site of many competing moral claims: sometimes, these will trump claims for the restitution of property. Fabre argues that the mere fact that property has been wrongfully taken does not necessarily mean that it must be returned: I do not dispute this, but argue that she understates the force of arguments favouring restitution. Fabre's arguments are supportive of restitution in many cases, and she explicitly accepts that restitution is only one part of reparative justice. Nonetheless, I maintain that her arguments in favour of restitution should be stronger still. This point is significant beyond *post bellum* cases owing to Fabre's general methodological orientation, which holds that the same moral norms apply both in war and in non-war contexts (p.7). If we do not need distinct moral principles to deal with the aftermath of unjust war specifically, as opposed to other forms of injustice, then the limitations she endorses will equally apply to other instances which involve egregious injustice but which are not be classed as war in Fabre's terms (see p.10), such as much colonial wrongdoing. This would have significant implications for many contemporary arguments relating to the rectification of historic injustice where the initial victims of the injustice in question are no longer alive. In what follows, I first challenge Fabre's limited defence of restitution in such cases, arguing that claims for the return of misappropriated property need not, contra Fabre, rest on the identification of persisting harm stemming from the lack of possession of the property, but can more straightforwardly rest upon the property rights of the heirs of victims of injustice. I then go on to maintain that we may have distinct reasons of corrective justice to support restitution in a wide range of cases, even if it is not clear that the initial property holdings which were wrongfully disrupted were or are defensible at the bar of distributive justice.

As noted, Fabre's account of restitution is broadly supportive of the rights of those subject to misappropriation, but it is also importantly limited. Dispossessing an agent of their property does not confer ownership on the possessor even when dispossession is justified, and certainly not when unjustified. When A wrongfully takes g from B at t1, the *prima facie* case for restitution at t2 seems clear:

In so far as A was under a duty not to take g, it seems that he is under a duty to give it back at t2. For A wrongfully took from B something that rightfully belonged to her and indeed still rightfully belongs to her, period. To the extent that B was, and still is, g's rightful owner, and that there is no reason why she should not be allowed to use g, g should be returned to her—not just by A, in fact, but by whomever happens to have g. In sum, even if dispossessing B of g is morally justified, A does not thereby acquire ownership of g and is therefore under a *prima facie* duty to return it, either to B when B can still be described as g's rightful owner, or to some

other party when B cannot be so described. More clearly still, if dispossessing B of *g* is not morally justified, A is also under a *prima facie* duty to reconstitute it to her, for B is still its rightful owner. (p.124)

Note three features of this account. First, the duty to reconstitute *g* rests upon the initial force of the claim that B was, at *t*₁, the rightful owner of *g*. This in turn depends upon us believing that agents can indeed have property rights over resources, and Fabre defends this in relation to both public and private contexts (pp. 119-121). Her account of how agents come to have ownership rights has two elements. Such rights are justified by the role that property plays in enabling individuals to lead flourishing lives. This tells us why individuals can have property rights, but not who should own which particular pieces of property: “the flourishing-life justification for ownership rights must be supplemented with an account of the conditions under which agents acquire (and forfeit) these rights.” (p. 124) Particular resources come to be associated with particular individuals for historical reasons: “I shall assume along Lockean lines that B rightfully owns *g* if and only if she has appropriated it *ab initio*, or produced it out of resources which she rightfully owned or obtained it from someone who rightfully owned it, *and* provided that her having exclusive rights over *g* does not wrongfully cause some other party to have a less than flourishing life.” (p.124) Second, the claim for restitution holds insofar as there is a party that “can still be described as *g*’s rightful owner”: it rests on B’s ownership persisting in the absence of possession, and potentially being successfully transferred to another agent, through a mechanism such as inheritance. Finally, the duty to reconstitute even to a rightful owner is “*prima facie*” – it may be overridden by some other moral concern.

Fabre’s account clearly advocates restitution where ownership is straightforward. If something is wrongfully taken from its rightful owner, the defeasible assumption is that it should be returned to them. However, the passage of time complicates things. What of the claim that B’s descendants are entitled to the restitution of *g*? Fabre acknowledges such claims have some force:

There is... independent support for the claim that *if* B’s descendants would have rightfully owned *g* at *t*₃, in virtue of having rightfully inherited it, then A is under a *prima facie* obligation to give it back to them. However, victims’ descendants, here and now, have an inheritance-right over those objects only if (a) individuals in general have inheritance rights over their ancestors’ estate *and* (b) it is plausible to hold that those descendants would have inherited those artefacts had it not been for the initial wartime taking. (125)

Some challenge descendants’ restitution claims by questioning the legitimacy of inheritance itself (Thompson, 2002) but Fabre notes that “sufficientist justice does make space for both the right to bequeath and the right to inherit as one important way in which agents can exercise the personal prerogative to attach greater weight to their own projects and attachments than those of others.” (125) There is therefore no general challenge to (a). Claim (b), however, introduces a significant restriction into the account, since Fabre claims that “the more time lapses the less certain one can be that such claims can be made, since the more time has passed, the more likely it is that the chain of ownership linking current claimants to their ancestors would have broken anyway through sales and gifts to outsiders.” (125) Entitlements to artefacts are only inherited if “it is plausible to hold that those descendants would have inherited those artefacts had it not been for the initial wartime taking”. Had this taking not occurred, other forms of transfer, such as sales or gifts to outsiders, may well have broken the chain of ownership upon which modern day descendants rely for their entitlement. The more time passes, the more likely that such a break will occur, and so less plausible the claim for restitution.

The key idea here is that the harm caused by past misappropriation of property tends to lessen with time. The point is made explicitly when Fabre considers the challenge

posed to restitution by the non-identity problem: how can present day parties maintain that they have been harmed by historic misappropriation if we believe that they would not exist but for the unjust actions in question? As an axiological individualist, Fabre rejects the common move of focusing not on individuals but on groups, whose identities persist across generations. Instead, she invokes recent work on the ongoing agency involved in the non-rectification of injustice: "...even if an unjust act brings about the existence of a particular individual and thus does not make that individual worse off overall than she would have been otherwise... failure to provide reparations to her parents for that unjust act after she has been conceived might well have severely harmful effects on her—so harmful in fact as to constitute an injustice for which she in turn is owed reparation." (p. 126)

Harm, then is a key element of Fabre's account of restitution when it comes to the descendants of the original victims of misappropriation. Demonstrating that rightfully held property was wrongly taken from one's ancestors is a necessary but not a sufficient condition for a plausible contemporary claim for restitution: one must also be able to demonstrate some kind of associated harm in the present. The important *post bellum* question is whether contemporary individuals have been harmed by historic misappropriation or by ongoing failure to fulfil duties of restitution. This sets the stage for Fabre's limited acceptance of restitution when she applies her theory to moveable property. The moral case for restitution is restricted in two ways. The first turns on the extent to which we should in fact see those in possession of property at the point of misappropriation as being "rightful owners" (initially taken for granted for the sake of argument). Fabre casts doubt upon this for two reasons. One is straightforward, when the property was itself misappropriated from others (128). The other is more complicated, as she argues with reference to post-WWII restitution claims:

[W]hether private owners of confiscated artefacts were in morally rightful possession... is doubtful. For under no plausible description of the world as it stood in 1939 can it be held that it was a just world—a world, that is, where all individuals, wherever they resided, enjoyed prospects for a flourishing life. To bring about a just world *then* would have required heavier taxation and considerably more stringent restrictions on inheritance than were in fact imposed. In so far as there are overwhelmingly good reasons to believe that those who were in legal rightful possession of those objects were not in fact their morally rightful owners, it is not clear that they have a restitutive claim. (128)

So although Fabre's account of justice allows for the acquisition of bequeathable rights to private property, and so for the possibility of the restitution of inherited property, it does not follow from this that real world holdings came about by a process which gave rise to entitlements of this kind. This calls into question whether there should be any restitution at all once significant time has passed. If corrective justice is only to be employed in order to correct distortions from substantively just distributions, and if we believe that the world both was and is deeply unjust in distributive terms, then the place for restitution in post-war settlements will be limited indeed.

I return to the relation between distributive and corrective justice later. For now, I focus on the second restriction Fabre introduces into her account of the return of misappropriated property. This follows naturally from the harm-based rationale she gives for restitution for heirs and descendants. Fabre first disputes whether contemporary agents have in fact been harmed by past misappropriation, and then queries whether restitution, as opposed to compensation, is in fact the appropriate remedy:

[H]eirs cannot always claim that they would have had those objects in their *de facto* possession had enemy combatants not stolen them—most obviously in those cases where they would not exist but for the act of theft... [I]t is only if the [thief's] failure to return the good to their parents has harmed them to the point of constituting a wrongdoing that they have a restitutive

claim. But in this case it is not clear why the claim should be a claim to have that object itself returned to them, and not a claim to be compensated for the wrong which they suffered. (128)

Framing the case for restitution in this way, in terms of the redress of harm, loses the distinctive moral force of claims grounded in the need to return stolen property. It is helpful here to distinguish between two commonly articulated rationales for rectifying past wrongdoing.¹ The first is compensatory, and rooted in ideas of harm and benefit. On this account, x is owed reparation insofar as x has been made worse off by the effects of a past instance of wrongdoing. The second is restitutive, and rooted in notions of property and entitlement. Here, x is owed reparation insofar as x has inherited an entitlement to property currently in possession of another. As is frequently noticed, restitution claims are better placed than compensation claims to resist various problems that bedevil the compensatory account (though not necessarily fatally). Some believe that some kind of claim about *overall harm and benefit* must be made if the compensatory account is to succeed. Compensation is the provision of counter-balancing benefit to make up for loss – there has to be negative impact of some kind if there is to be compensation. This leads to scepticism as to whether present day parties have actually gained or lost in an all-things-considered sense. So one reason to focus on restitution specifically rather than compensation more broadly is to move away from such concerns and instead concentrate on a particular sense in which present day individuals might be affected by past wrongdoing. The move is commonly made in relation to reparations for slavery in the US.

Fabre is sensitive to this distinction, and successive chapters of *Cosmopolitan Peace* treat restitution and compensation separately. However, a focus on the return of property still leaves open two ways of understanding restitution. The first concentrates on how misappropriation of property has harmful effects. This is how Fabre frames the issue. Here, the critical question is whether contemporary individuals experience persisting disadvantage on account of, first, the original misappropriation, and second, the subsequent failure to return the property in question (and, perhaps, to fulfil other associated reparative obligations). This is done on the basis of counterfactual comparison. The question is whether the claimant is worse off than they would have been had the property not been taken. This approach makes the case for restitution dependent on whether there is a lasting harm in relation to property specifically. Insofar as what is at stake is the harm caused by the lack of a holding, it seems as if the appropriate response should be to make up for the harm by means of compensation. The literal return of property may sometimes be a straightforward way of doing this, but in fact it now emerges as neither necessary nor sufficient.

There is much to be said for thinking carefully about how misappropriation can cause enduring harm in the present. But it is not the only way to ground arguments in favour of restitution, and although valid claims can emerge in this fashion, an exclusive focus on this model misses another significant source of morally compelling arguments. The second approach to restitution focuses not on harm, but on the entitlement to property itself. The argument is simple: insofar as another possesses an object to which I have an entitlement, I suffer an injustice. I retain a right to the property in question. This entitlement remains regardless of whether the non-possession of the object in question is harmful to me. It may well be – if so, this will predictably give rise to a further compensatory claim. But it is not a necessary condition of my retaining my entitlement that non-possession of my property is harmful in either a wide or a narrow sense. There is no need for counterfactual calculations of harm and benefit to ground the case for restitution. If we assume for the sake of argument that I am the rightful owner of an item of property, then the reason it should be returned if it is taken from me is not only that its absence is harmful to me. It is that I am entitled to the object, and retain a right to it even in its absence.

This formulation is significant when it comes to the inheritance of entitlements. Recall Fabre's limitation: descendants can only advance a claim for restitution if "it is plausible to hold that those descendants would have inherited those artefacts had it not been for the initial wartime taking." The key question, however, is not whether it is likely that these resources would have been passed to descendants had they not been misappropriated, and so whether the descendants are worse off than they would be in the most probable scenario which would have unfolded were it not for the wartime taking.² The question is more specific: have the descendants inherited an entitlement to the resources in question? One can inherit an entitlement even if it is unlikely – or effectively impossible – that one would have inherited the actual property in question. Consider the following examples.

- 1) A steals a picture from B's house two days before B dies. C burns down B's house the day before B dies. B leaves all her possessions to D.
- 2) A steals a picture from B's house two days before B dies. B burns down her own house the day before she dies. B leaves all her possessions to D.

In both cases, it appears that A is in possession of property to which D has inherited an entitlement. Yet note that Fabre's condition, that it is plausible that D would have inherited the painting had A not stolen it, has not been met. The question is not whether D would have – counterfactually – inherited the painting had it not been stolen. It is whether D has in fact inherited the painting, and this need not make reference to the language of harm, or to any counterfactual reasoning at all.

I have argued that the restitution account, given an initially robust account of property entitlements, is stronger than Fabre suggests. But what of Fabre's first concern, which queries whether, in a distributively unjust world, we should see original holders of misappropriated property as being in morally rightful possession of the property at the time of its taking? My claim is that, in wrongdoing's aftermath, there is value in seeing corrective justice as having moral significance aside from its distributive effects. Here are four reasons to pursue corrective justice:

- 1) To restore a substantively just distribution.
- 2) To advance the cause of distributive justice more broadly, for example by making an unjust distribution more just.
- 3) To restore a distribution which, while not perfectly just in strict terms of distributive justice, is sufficiently just as to count as legitimate.
- 4) To overturn or otherwise address the effects of wrongdoing.

Rationales (1) and (2) are straightforwardly dependent on distributive justice. Rationale (3) is at least limited by (and potentially dependent on) distributive justice. Rationale (4) is independent of distributive justice, and so may stand in opposition to it.

The relationship between corrective and distributive justice is most straightforward when we start from a just distribution as in (1). The role of corrective justice may not be simply to restore that distribution: factors which made the initial distribution just may have changed in the interim. But there will be a ready complementarity between distributive and corrective justice on this account. Rationale (2) is similar: if the pursuit of corrective justice contingently happens to bring us closer to distributive justice then there are at least no distributive reasons to oppose it, and potentially gains to be made, if, for example, we believe that corrective considerations can prompt action in ways that distributive considerations do not. Rationales (3) and (4), however, potentially provide support for restitution beyond Fabre's framework. Arguments for restitution grounded in the legitimacy, rather than the substantive justice, of an initial distribution affirm that the prior distribution meet a threshold condition of not being *too* unjust. For example, Jules Coleman writes:

In order for a scheme of rights to warrant protection under corrective justice... they must be sufficiently defensible in justice to warrant being sustained against individual infringements. Entitlements that fail to have this minimal property are not real rights in the sense that their infringements cannot give rise to a moral reason for acting. (1992: 352)

The most straightforward way to understand the significance of legitimate property holdings here is by linking them to individuals' interests in flourishing. The misappropriation of property predictably disrupts life projects and impacts on a whole range of individuals' interests: the restitution of property seeks to correct this shortfall and may be thought to be morally important at least insofar as it does not entail that others fall below the threshold of sufficiency. Whether we should see this as the right thing to do, in an all-things-considered sense, but as a trade-off against distributive justice, or whether this is what distributive justice actually requires in non-ideal contexts can for now be left as an open question. Endorsing this approach widens the set of cases where restitution is called for beyond those where initial distributions were positively affirmed by distributive justice, and so loosens Fabre's first restriction, but does so by linking the case for restitution to the harm paradigm, with its aforementioned problems. So while it provides a rationale for reparation in some cases, particularly of relatively recent wrongs, it will be less persuasive given the passage of significant periods of time.

What of rationale (4)? This holds that there is moral value in correcting wrongs aside from considerations of distributive justice. Such a claim needs careful unpacking. It should be distinguished from the argument that many accounts of distributive justice take account of too narrow a range of benefits and burdens, and so underplay the significance and persistence of structural forms of disadvantage, as has been noted by writers such as Iris Marion Young (2013) and Catherine Lu (2017). Such writers do take careful note of the past, but do so in order to make provision for the future: their claim is that existing oppression, exclusion, and inequality can be only be properly approached if their historical origins are understood and addressed. Though such writers consciously seek to go beyond the customary language of distribution, there need be no conflict here between the requirements of distributive justice and corrective justice properly understood: the point is rather that properly ensuring a fair distribution of benefits and burdens will necessitate taking reparative action if all are to receive their due. But other accounts of corrective justice do not have such a character: instead, they give rise to the possibility of genuine conflicts between the requirements of corrective and distributive justice. They have in common the idea that some wrongs should not be allowed to stand: that morality sometimes requires us to seek to undo wrongdoing, not because doing so happens to coincide with our distributive duties, but because wrongdoing, and wrongdoers, should not be allowed to prevail. This point has been made repeatedly in recent philosophical work on the duties of beneficiaries of injustice. Daniel Butt has argued that the duty of beneficiaries of wrongdoing to compensate victims "can be seen as emanating from one's condemnation of the wrongdoing in question" maintaining that "our moral agency requires us to demonstrate an aversion to wrongdoing, and a commitment to the reversal of its effects" (Butt, 2014). A related sentiment is in play in Robert Goodin's and Tom Parr's recent work on disgorging tainted benefits (Goodin, 2013; Parr, 2016), and in Bashshar Haydar and Gerhard Øverland's claim that beneficiaries possess particular responsibilities to repair when they are the intended beneficiaries of injustice (Haydar and Øverland, 2016). Support for the independent moral force of corrective justice can be derived from a number of different types of argument, ranging from rule utilitarian claims based on the forward-looking consequences of adopting particular attitudes to past wrongdoing,³ through arguments stressing duties to previous generations, to accounts that explicitly maintain that there is at least some impersonal value in seeking to overturn the effects of wrongdoing. Such considerations can play a significant role in reparative politics in general, and in

relation to the restitution of property in particular. They will not necessarily be decisive: sometimes they will be outweighed by other considerations, including ones stemming from distributive justice, particularly when these relate to basic interests in flourishing. But they have a place in the mix.

There is sometimes something particularly appropriate about the restitution of property as a partial response to wrongdoing. Reparation is inevitably the politics of the second-best. Absent a time machine, we can't literally undo wrongdoing: the question is what we should do in response to the non-ideal aftermath. Compensatory justice is clearly of this character: ideally it seeks to provoke a counter-balancing benefit to make up for a harmful loss, often it inevitably falls short, and can only lessen the effects of injustice. Restitution is also non-ideal, but represents a different kind of response to wrongdoing, in that it seeks to reverse at least some of its lasting effects. In reaching an all-things-considered settlement in the aftermath of unjust wars, we should consider the extent to which the world we live in reflects the intended consequences of those responsible for the original wrongdoing and ask ourselves whether this gives us reason to act so as to thwart their devices and desires.

Dealing with cases of historic injustice raises obvious issues of moral hazard. If one believes that the passage of time lessens the rights of victims, it appears as if malefactors have clear incentives to engage in wrongdoing with the intention of benefiting their descendants, safe in the knowledge that, in time, their actions will bestow legitimate entitlements on their heirs. If a claim to territory is justified solely with reference to sustained possession, for example, then by holding onto misappropriated property for long enough, one is able to gain an entitlement. My claim is that this is something that can be taken into account in *post bellum* settlement processes. Concerns of corrective justice will not necessarily carry the day in such deliberations: we need not argue that restitution be done regardless of consequences. But there is something to be said in favour of returning that which has been stolen as the appropriate response of moral agents to wrongdoing, aside from, and even sometimes in opposition to, concerns of distributive justice.

References

- Daniel Butt, *Rectifying International Injustice: Principles of Compensation and Restitution Between Nations* (Oxford: Oxford University Press, 2009).
- Daniel Butt, "Inheriting rights to compensation: compensatory justice and the passage of time", *Ethical Perspectives* 20 (2013), 245-269.
- Daniel Butt, "A Doctrine Quite New and Altogether Untenable": Defending the Beneficiary Pays Principle', *Journal of Applied Philosophy* 31 (2014), 336-348.
- Jules Coleman, *Risks and Wrongs* (Cambridge: Cambridge University Press, 1992).
- Cécile Fabre, *Cosmopolitan Peace* (Oxford: Oxford University Press, 2016).
- Robert E. Goodin, "Disgorging the fruits of historical wrongdoing." *American Political Science Review* 107 (2013), 478-491.
- Bashshar Haydar and Gerhard Øverland, "The Normative Implications of Benefiting from Injustice", *Journal of Applied Philosophy* 31 (2014), 349-362.
- Robert Kirby, "The Beneficiary Pays Principle and Climate Change" (2016), available at <https://openresearch-repository.anu.edu.au/handle/1885/109334>.
- Catherine Lu, *Justice and Reconciliation in World Politics* (Cambridge: Cambridge University Press, 2017).
- T. Parr "The Moral Taintedness of Benefiting from Injustice", *Ethical Theory and Moral*

Practice, 19 (2016), 985 - 997.

Victor Tadros, 'What Might Have Been' in J. Oberdiek (ed.), *Philosophical Foundations of Tort Law*, (Oxford: Oxford University Press, 2014).

Janna Thompson, *Taking Responsibility for the Past: Reparations and Historical Injustice* (Cambridge: Polity, 2002).

Iris Marion Young, *Responsibility for Justice* (Oxford: Oxford University Press, 2013).

¹ For more on the approach developed here, see Butt (2009) and (2013).

² In fact, it might be disputed whether this is the correct question to ask even within the harm account. The harm account does require comparison to a possible counterfactual state, but this arguably need not be the most likely state that would have occurred had the wrongdoing not happened, but may instead be a less likely state whereby resources do in fact pass to descendants. For discussion, see Butt (2009), pp. 102-115; Tadros (2014).

³ On this, see Kirby (2016).