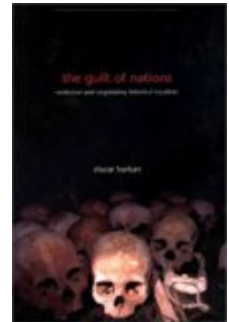


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Reviewed by Ernesto Verdeja

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Restituting Past Harms: On the Complexity of Satisfactorily Engaging the Past

The twentieth century's exceptionally violent pedigree—for some its most distinctive characteristic—should certainly give pause to those who detect a humanitarian teleology in history. Two major wars, numerous civil conflicts and struggles for independence, and systematic state-sponsored atrocities have left behind a battered political landscape and forced us to question whether advances in technology, culture and other intellectual domains really allow us to speak of progress in any meaningful sense. Certainly the *realpolitik* framework best articulated in Machiavelli's writings, and later adopted in its modern character in the peace treaty of Westphalia, gives lie to the notion that politics should include any moral reckoning or subjection to moral imperatives. The relation between ought and is, in other words, remains severed.

But equally interesting to the rise in genocidal violence—what Roger Smith has perceptively called "ideological genocide"[1]—is the concomitant development of a call for restitution and

moral acceptance of responsibility for past crimes. Certainly, victims' demands that perpetrators be held accountable are not new, and we can safely assume that throughout history victims and their descendants have sought revenge and restitution. What is intriguing, and certainly demands closer attention, is the perpetrators' acceptance of the moral status of these claims. Think of the debates in recent years surrounding "Nazi gold," restitution efforts in Eastern Europe, reparations to Japanese-Americans, and the like. Or, consider calls by indigenous groups around the world asserting claims of cultural patrimony over territories and property seized by European settlers (North America, Hawaii, Australia, New Zealand, etc.)

Of course, it would be wrong to claim that this engagement with the past has occurred across the board, as a kind of sea change marking the beginning of a new era of honesty, which engages old crimes. The transformation has been nothing of the sort. Instead, it has progressed in a kind of uneven and fragmented manner, in which perpetrators and victims (in certain contexts)

have become aware of other, foreign instances of moral engagement, but themselves remain guided and bound by the particularities of their respective cases. Nevertheless, recognizing the fragmented nature of this development does not undermine its significance. It marks a telling break from the past, where victors were considered morally justified by the simple fact of their success, and demands for contrition, restitution, or acknowledgement of guilt in any form were brusquely rejected. Elazar Barkan's book *The Guilt of Nations* carefully traces how these moral issues have come "to dominate public attention and political issues and displayed the willingness of nations to embrace their own guilt. This national self-reflexivity is the new guilt of nations" (p. xvii).

The book is interesting and clear, investigating the impact this new moral economy has had on victim-perpetrator relations. Barkan tackles a number of disparate historical injustices--most from the twentieth century, but some earlier--and identifies how they intersect with a new developing international morality. Part 1, "Residues of World War II," discusses German reparations to Jews, the United States' treatment of Japanese-Americans, Korean sex slaves under Japanese occupation, the Soviet's theft of German art, the Swiss gold controversy, and sundry calls for restitution in Eastern Europe in the aftermath of the war. Part 2, "Colonialism and Its Aftermath," covers injustices originating mostly in an earlier period, though demands for restitution have achieved wide resonance only recently. Barkan deftly traces out the cases of First Nations, particularly indigenous cultures in Hawaii, New Zealand and Australia, and later moves to a consideration of reparations for African Americans. The volume concludes with an informative discussion outlining what a theory of restitution must address.

Barkan argues that the very process of negotiating restitutions between past perpetrators and victims reshapes the way both sides understand

themselves. It is not simply "autistic self-indulgent victimization" on the part of victims, but points to something deeper, insofar as it represents an actual discussion between both parties predicated on negotiation as a search for a common solution. This reinscription of identity both promotes and results in a new rubric of global morality, or what he calls "Neo-Enlightenment morality" (pp. xx, 308-09). Traditional morality, according to the author, is premised on the standard liberal bundle of core rights, which are understood to accrue to individuals *qua* individuals. These rights are universal, not context specific; everyone has a right to bodily security and integrity, personal property, free and public expression, conscience without coercion, and similar protections. Neo-Enlightenment morality expands this considerably. As Barkan sees it, this morality recognizes that "victims have rights as members of groups," and "while preserving individual rights remains crucial, this in itself is no longer sufficient because people cannot enjoy full human rights if their identity as a group is violated" (p. xx). (I must admit that I am bit baffled by the term "Neo," since collective rights predate the liberal core values he takes as a springboard. Perhaps calling it something like "substantive" or ethical morality--where by ethics we mean Hegel's notion of a collectivity's self understanding--would be more appropriate, but this a minor quibble). This emerging morality, coupled with a growing acceptance by (the descendants of) perpetrators that their actions require moral attention, forces us to reexamine the meaning of justice. How do we address injustices of cultural patrimony? How do we define the contours of the victim group, particularly after generations have passed? And what constitutes a fair and equitable restitution?

These issues can only be tackled after we settle on a definition of restitution. For Barkan, restitution strictly refers to "the return of the specific actual belongings confiscated, seized, or stolen, such as land, art, ancestral remains and the like. Reparations refers to some form of material rec-

ompense for that which cannot be returned, such as human life, a flourishing culture and economy, and identity. Apology refers not to the transfer of material items or resources at all but to an admission of wrongdoing, a recognition of its effects, and, in some cases, an acceptance of responsibility for those effects and an obligation to its victims" (p. xix).

Barkan uses the term restitution in a broader sense to include all of these elements, arguing that it acquires political and social significance to the extent that it raises complex issues of identity, guilt and responsibility that traverse strictly legal boundaries and help shape how groups understand themselves. In this respect, it is different from traditional war reparations, where victors impose payments on losers. There, reparations are seen as a form of punishment, and the losers accept no moral responsibility for their actions. For Barkan, restitution includes a moral acknowledgement of past sins, and in the process establishes stronger relations with the victim group as well as representing a sharp break from the past. This admission of guilt is done through a dialogue with the victims. It also constitutes the difference between the reparations imposed on Germany in the aftermath of the First World War and the reparations and restitution programs Adenauer promoted after the Second World War. Rather than pay reparations to the winners, Germany in 1952 began paying those victims most violated, the Jews (the status of Roma and Slavs is a different story altogether). Restitution was not only a way for the new Germany to repent for past sins but also represented a manner of achieving political and moral legitimacy by distancing the country from its bloody past. Whereas the war reparations of the Versailles Treaty fed German resentment and consequently encouraged the rise of Fascism, post-WWII restitution to Israel allowed Germany to show itself differently, as a new nation accepting of its moral responsibility to victims. "Sponsored by Germany's struggle to cleanse itself of the past, restitution became a precedent

for moral claims in international justice and was introduced into international public moral discourse as an implied new normative morality" (p. 22).

Nevertheless, Barkan is quick to note that practical considerations may play a role in restitution initiatives. In the case of Germany's payments to Jews, he argues that "Philo-Semitism was supported within the German leadership as both an ethical and utilitarian policy, primarily a pro-American stance" (p. 22). For Western Germany, it was crucial to maintain the economic, military and political support provided by the United States, and a foreign policy that appealed to American concerns naturally made sense. "Notwithstanding private anti-Semitic pronouncements, the official reconciliation of the government with the victims played very well in public opinion. Conducting a moral policy had its rewards" (p. 22). In Barkan's view, utilitarian considerations do not necessarily tarnish the morality of the entire restitutive enterprise, provided that the perpetrators' strategic aims work in tandem with worthy goals of victim recognition and reparations, rather than undermining them.

Barkan also identifies a logic of morality animating Washington's restitution efforts with Japanese Americans. For the United States, the internment of American citizens of Japanese ancestry is today considered a grievous violation of their rights, and the government worked to "correct" these transgressions through a series of negotiations that culminated in a reparations program that both sides (surprisingly) found adequate. Interestingly, Japan has failed to come to terms with its treatment of sex slaves during the war and, thus, a ripe case for restitution has gone nowhere because of the intransigence of the Japanese government. Barkan argues that this is largely because "Japan has always presented itself as the victim of the war" and therefore "has consistently ignored and repressed any attempts to focus on its aggression and war crimes" (p. 50).

For Eastern Europe, the fall of communism was inflected with a tinge of human rights and historical justice discourse, a discourse that affected everything from the drafting of constitutions to the imperatives of economic reconstruction. In the latter case, economic development was tied together with recognizing certain groups as historical victims while excluding other groups, although in the case of Czechoslovakia, for example, targeting Sudeten Germans began right after the war. Jews, Roma and Germans generally fared poorly, while ethnicities seen as constituting the core of the nation were favored with economic programs promoted in part as restitution for past suffering.

Postcolonial and indigenous calls for restitution qualify as a different category. Particularly in English speaking nations, and later in Latin America, indigenous claims for restitution and recognition gained wider acceptance starting in the 1960s and 1970s, spreading significantly in the following decades. Barkan discusses how negotiations over property rights, cultural claims, and economic and natural resources for indigenous minorities have set the tone for indigenous-majority politics, and in many cases legislation on these issues has included an implicit or even explicit nod to the moral claims of victims. These indigenous-settler debates, with the former's claims of group rights and privileges, have tested the liberal democratic frameworks in Australia, New Zealand, Canada and, to a lesser extent, the United States. Questions about what constitutes fair reparations riddle indigenous cases. Who, exactly, is an Indian? Is blood or direct lineage a crucial element, and if so what "percentage?" Should there be a statute of limitations for these types of claims, where the atrocities were committed a long time ago?

In all of these instances, the aim is to reach a restitution agreement that victims find morally and financially acceptable and perpetrators economically viable. Achieving this, Barkan argues, is difficult for a host of reasons. How do we assign a

value to destroyed or stolen property, mass suffering and widespread death? How do we quantify the loss of cultural identity, particularly when it is unclear what a group's identity would have looked like had it not suffered extreme violence? Counter-factual evidence is unhelpful here, for the obvious reason that it is impossible to predict the trajectory of a culture by changing one "variable" (e.g. colonization) while allowing the others to play out. This is not science, after all, but history, with all the contingency and unpredictability that it entails.

There are additional stumbling blocks. For example, consider the issue of financial reparations to individuals rather than groups, an issue Barkan does not address in his book but which is crucial in these debates just the same. Do they actually provide some form of redress, and if so, what are the moral elements of this? It is difficult to give an answer to this in the abstract and, instead, we must turn to the recipients themselves. Here, the responses are often contradictory, with some recipients arguing that reparations qualify as a form of moral redress and others rejecting payments as a crude form of self-exculpation on the part of the state. Additionally, restitution must promote a sense of responsibility by the state for atrocities and abuses, and where the victims are members of the same polity as the perpetrators encourage a further sense of trust in state institutions among the citizenry.

These issues deal with the effectiveness of restitution, questions that cannot be fully answered outside the specific context of the case at hand. Furthermore, a second set of normative issues, not discussed by Barkan, concerns how to measure harm when dealing with individuals. When putting together a restitution package that includes reparations for individuals who are still living (rather than only the return of stolen property, for example), harm measurements come into play. The first difficulty consists of how to quantify these harms. How do we assess the value of los-

ing different limbs or more difficultly, how do we assess compensation for different forms of psychological and emotional harms? Second, there are numerous complexities surrounding the individualizing of harms. Should efforts be made to tailor reparations for individuals or should general packages be put forth? While individualizing benefits certainly gives the program a sense of being more just, administrative obstacles may be significant and draw resources away from the recipients. Third, the issue of comparison between victims poses difficulties of its own. The same harm inflicted on different people may very well have a different psychological effect, such as the use of certain forms of torture, the loss of the same limb, etc., a difference which a standardized reparations package cannot take into account. Nevertheless, it may be a mistake to show too much sensitivity here, as otherwise a program runs the risk of creating a hierarchy of victims within the same harm category. Indeed, assuming actual criteria could be established, a further risk is faced. Those persons who have managed to overcome their suffering would effectively receive less compensation and thus would essentially be punished for having overcome their trauma.

All of the concerns listed above deal with restitution and reparations programs for "individuals." But as indicated earlier, and as Barkan convincingly states, there is a complex social or collective element to restitution as well. The difficult problems here surround collective rights, made particularly salient in indigenous calls for restitution. When indigenous minorities make a claim to restitution, they are basing it on a claim of group identity, which by definition is not recognized in the traditional liberal framework that privileges individuals and denigrates or ignores communal affiliations. The conflict finds parallels in academic debates between liberals such as John Rawls and communitarians such as Alisdair McIntyre, who struggle over how to expand ethical self-

recognition at the communal level, while maintaining a liberal political order.[2]

Barkan is careful to note that communal claims can often be internally coercive against "deviant" members of the community, but he sees this as an inescapable danger that nevertheless does not, ipso facto, undermine communal claims against the majority. Instead, he calls for a careful negotiation between the two poles—liberalism and communitarianism, or universalism and particularism—when addressing historical injustices and collective restitution. He offers a sober, pragmatic alternative, one rooted in the practical possibilities of a particular case, while eschewing normative absolutism on either side. As he sees it, Neo-enlightenment morality must address both individual and collective rights; articulate a connection between universal cosmopolitan values and traditional customs; and permit a space for contextualist claims so long as these do not trump a "narrow set of universals." It is worth quoting him at some length here:

"A strong claim for restitution begins from a Neo-enlightenment morality—that is, the recognition of an ensemble of rights, primarily the rights of peoples and nations to decide for themselves and to reject external impositions. Restitution privileges partial solutions over no resolution. The focus of a negotiated solution (justice) is consent rather than a specific predetermined result and reflects an international trend that places ethical principles alongside traditional realpolitik considerations. The discourse of restitution encourages governments to admit that their policies were unjust and discriminatory and to negotiate with their victims over morally right and politically feasible solutions" (p. 318).

Nevertheless, the difficulty in finding an acceptable mean between liberal and communitarian positions often poses obstacles to negotiating restitutive efforts. Consider the Canadian court case of *Delgamuukw v. the Crown*, between the state (the liberal guarantor of individual rights)

and two Aboriginal groups making communitarian property claims. The two tribes, the Gitskan and the Wet'suwet'en, brought a property claim against the government on the grounds that it was ancestral land that should be returned to native control.[3] What is remarkable about this case is not simply the claim of cultural patrimony over land, but the evidentiary claims made by the indigenous groups. They argued that judicial norms of acceptable evidence required change in order to recognize proof of ancestral ownership. Specifically, they wanted the Supreme Court to recognize mythical narratives (oral histories, stories, totems) as valid evidence for proof of ownership of land. This case highlights how the very rules of debate required negotiation between two competing normative systems; one which was positivist and legalist, recognizing only formal individualist rights of ownership, predicated on titles, deeds and similarly recognized documents of possession, and the other communitarian, which recognized ancestral tribal narratives as equally valid.

After a great deal of argument and debate, the Court eventually agreed to accept some tribal stories as valid evidence on a par with formal law and social-scientific studies (ethnographies, sociological studies, and other scholarly works), but it did not discuss, at any length, the broader implications of its decision. The consequences of its ruling, however, are vast. As legal scholar Angelia Means has written, "The Court [...] presumed a relation between the expressive language of authoritative participants [indigenous leaders] and 'truth.' At issue, then, was not just the public recognition of the 'authentic' recollections of a people, but the complex relation between 'authoritative' recollection and social-scientific (as well as moral-juridical) truth." [4] How do we navigate the differences between these very distinct epistemological positions, without losing sensitivity to the arguments of indigenous communities while avoiding collapse into a situation of particularis-

tic, mutually exclusive truth claims? The Court's decision side-stepped this important position.

Delgamuukw underscores the difficulties that can arise between victims and perpetrators at all stages of negotiating restitution, even the early stages where the terms of acceptable debate are still hotly contested. Barkan's book does a fine job identifying the issues that arise in these situations, and how they develop and (ideally) are resolved, but he offers little in the way of a more general-theoretical analysis of restitution. In the final, important chapter of the book, "Toward a Theory of Restitution", the author revisits the communitarian-liberal debate and its relation to historical injustice at a more abstract level. While the chapter is informative, he never tells where exactly he stands in the debate, except to say that a balance between both positions should be sought. The reader is left wanting a normative, rather than merely descriptive, theory: something more than a descriptive account of the relevant issues and a more extended treatment of which values we ought to privilege in general.

Barkan's refusal to offer a systematic, prescriptive theory of restitution is probably rooted in his uneasiness at moving too far away from empirical accounts to the level of general abstraction. He argues that competing liberal and communal claims create a certain "pragmatic indecisiveness" and "cognitive dissonance" (p. 319) that can only be resolved in actual cases but not theoretically, and many practitioners in the field would agree with him. To the extent that he offers a theory, it is pragmatic and partial, and rests on the notion of reciprocity; that is, the recognition and consequent transformation of perpetrators and victims through the process of negotiating and struggling with historical injustice. Many readers may find themselves wanting a more extended normative treatment of restitution, particularly in this final chapter.

Nevertheless, Barkan's book is a welcome contribution to the literature on this subject. Most

works focus on one case study or possibly a handful of very similar ones, but rarely attempt comparison across a wide spectrum of historical injustices. The book's comparative framework allows us to see how seemingly different cases engage many similar issues, and how "reciprocity" and negotiation can take myriad forms. Its clear writing style and even-handed accounts make *The Guilt of Nations* an excellent book for graduate and undergraduate courses on large-scale violence. The cases discussed in the book-- with their sometimes remarkable but always-partial successes (for how could one satisfactorily repair the damage of genocide)--point to the tempered attitude and lowered expectations that one must always bring into these discussions, but they also point to the possibility of constructing a new moral future by honestly engaging the past.

Notes:

[1]. Roger W. Smith, "Human Destructiveness and Politics: The Twentieth Century as an Age of Genocide," in *Genocide and the Modern Age: Etiology and Case Studies of Mass Death*, ed. Isidor Wallimann and Michael Dobkowski (Syracuse: Syracuse University Press, 2000).

[2]. The literature on the liberal-communitarian debate is vast. Key texts include John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971); and Alisdair McIntyre, *After Virtue: A Study in Moral Theory* (South Bend: University of Notre Dame Press, 1984). Also see Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982); Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983); and Rainer Forst, *Contexts of Justice: Political Philosophy Beyond Liberalism and Communitarianism* (Berkeley: University of California Press, 2002).

[3]. See Angelia Means, "Narrative Argumentation: Arguing with the Natives," *Constellations* 9:2 (March 2002).

[4]. Ibid., p. 224.

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