

## ARTICLES

### PECUNIARY REPARATIONS FOLLOWING NATIONAL CRISIS: A CONVERGENCE OF TORT THEORY, MICROFINANCE, AND GENDER EQUALITY

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#### 1. INTRODUCTION

Numerous possible contexts can impel national governments to start reparations programs. From the array of possibilities, this Article focuses on reparations for the effects of a crisis that ravaged a whole nation—for example civil war, genocide, dictatorship, or apartheid—rather than on one discrete, odious deviation from the norms of a functioning democracy. Isolated incidents can generate urgent needs for repair, but the reparations under discussion in this Article presume a more fundamental ambition: a declaration of the nation's past as broken, and its future in need of mending.<sup>1</sup> The government of a nation, acknowledging grave strife in its

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<sup>1</sup> I remark on the problematic nature of “isolated incidents” in Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 499 & n.331 (1997). This reservation noted, I mean to exclude for this purpose reparations contexts such as the internment of Japanese citizens in the United States during World War II, focusing instead on comprehensive national schemes undertaken in a context of economic development.

recent past, has committed itself to disbursing sums of money to large numbers of its people as part of its transition to a stable civil society.

Precedents for this undertaking provide models for the subcategory of interest here, pecuniary reparations: that is, programs that seek to identify and compensate individual citizen-claimants in recognition of human rights violations during the recent past. Such recognition can take monetary form in transfer payments to individuals. Among the countries that have been able to distribute pecuniary reparations following national crises are Argentina, which through legislation in 1994 appropriated reparations for victims of forced disappearances and detentions that took place from 1974 to 1983, paid in the form of bonds;<sup>2</sup> Chile, which in 1992 appropriated pension funds for the victims of human rights violations that took place from 1973 to 1990;<sup>3</sup> and South Africa, which disbursed cash payments totaling U.S. \$5.5 million to approximately 14,000 apartheid-era victims.<sup>4</sup> In less wealthy nations, including Peru, Rwanda, Haiti, Sierra Leone, and Guatemala, governments have approved the provision of monetary compensation to citizen-victims in the wake of their own national crises, suggesting that pecuniary reparations hold appeal as policy even in nations that are hard-pressed to finance a new round of transfer payments.

When it opts for pecuniary reparations, a national government necessarily rejects various alternative stances. It disagrees with any onlookers who would say that the endeavor of reparation is futile. It does not believe that money in particular cannot affect meaningful reparation, and goes a step further by denying that payments to individuals waste more money compared to collective

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<sup>2</sup> See María José Guembe, *Economic Reparations for Grave Human Rights Violations: The Argentinean Experience*, in THE HANDBOOK OF REPARATIONS 21, 29–31 (Pablo de Greiff ed., 2006) [hereinafter HANDBOOK] (discussing the passage of laws providing compensation to victims of human rights violations that occurred between 1974 and 1983 and the valuation of the compensation provided).

<sup>3</sup> See Elizabeth Lira, *The Reparations Policy for Human Rights Violations in Chile*, in HANDBOOK, *supra* note 2, at 55, 83–85 (discussing the distribution of pensions funds to peasants excluded from agrarian reform or expelled from their land under the military regime).

<sup>4</sup> See Christopher J. Colvin, *Overview of the Reparations Program in South Africa*, in HANDBOOK, *supra* note 2, at 176, 188–89 (exploring the reparations debate in post-apartheid South Africa and outlining recommendations for reparations).

payments.<sup>5</sup> Consistent with Pablo de Greiff's panoramic chapter, "Justice and Reparations,"<sup>6</sup> this government has implicitly deemed insufficient two significant constituents of transitional justice: non-material reparations (such as an apology only)<sup>7</sup> and disbursements that pursue a collective goal (such as economic development) that make individuals better off only indirectly.<sup>8</sup>

Economic development hovers in the wings behind a reparations stage. Because reparations programs are frequently established in contexts characterized by disarray and vulnerability, they likely coexist with fragile national economies, shaky financial institutions, uncertain or erratic regulation of these financial institutions and related commercial practices, patchy telephony, and general technological underdevelopment. Significant physical danger might remain around the nation's buildings, modes of transport, and public spaces. Systemic human rights violations for which states have acknowledged responsibility are usually part of a larger devastation that did not leave the rule of law unaffected and had harmful effects on both the safety and protection of investment capital and the physical safety of civilian citizens.<sup>9</sup>

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<sup>5</sup> See *infra* notes 24–25, 31, and accompanying text (discussing these debates over reparations fundamentals).

<sup>6</sup> See Pablo de Greiff, *Justice and Reparations*, in HANDBOOK, *supra* note 2, at 451 (developing an understanding of reparations that can be applied to the resolution of "massive and systematic cases of abuse").

<sup>7</sup> Pope John Paul II, for example, once proclaimed an apology for the injuries done to Africa by Christian Europe. See E.J. Dionne, Jr., *Pope Apologizes to Africans for Slavery*, N.Y. TIMES, Aug. 14, 1985, at A3 (reporting on speech to Cameroonian intellectuals in which Pope John Paul II asked for "pardon from our African brothers who suffered so much because of the trade in blacks").

<sup>8</sup> After World War II, for example, Japan invested in the economies of Burma, the Philippines, Indonesia, and Vietnam pursuant to treaties whose names included the word "reparations."

<sup>9</sup> See HANS DIETER SEIBEL, FROM RECIPIENTS OF REPARATION PAYMENTS TO SHAREHOLDERS OF MICROFINANCE INSTITUTIONS: A STUDY OF THE POSSIBLE RELATIONS BETWEEN REPARATIONS FOR VICTIMS OF HUMAN RIGHTS ABUSES AND MICROFINANCE 2 (2003) (paper presented at The Rockefeller Foundation Bellagio Study and Conference Center "Villa Serbelloni") [hereinafter SEIBEL, REPARATIONS SHAREHOLDERS], available at <http://www.uni-koeln.de/ew-fak/aef/08-2005/2003-6%20ICTJ%20Microfinance.pdf>.

In a total crisis, the state virtually ceases to exist, national economies disintegrate, and social and political structures melt away. A significant number of people are exposed to a day-to-day struggle for survival, often separated from their homes and deprived of their usual sources of livelihood. In particular, total crisis means that national governmental and civil society organizations have been destroyed; the production and

A government certain of its plan to make transfer payments to victims could decide to wait for some marker of stability to arrive before forming its plan. But the wait might be too long, especially for a government that wants to capitalize on some of the advantages of economic reparations. If (contrary to rhetoric heard from some transitional governments), far from having to choose between reparations programs and development programs, a nation could design a reparations program in a way that simultaneously serves developmental goals, the advantages of moving swiftly forward become plain. The prospect of achieving both reparation and development is realistic if one mode of pecuniary repair, "microcredit" or "microfinance,"<sup>10</sup> is indeed as salutary as its many admirers believe.

That individuals benefit from receiving money is axiomatic. A financial institution that profits from such transactions with individuals will in turn regard itself as better off. When enough people join this new expansion of the banking business, gains spread beyond parties to the deals.

Many observers believe that gains rooted in small banking transactions change the world. The 2006 Nobel Peace Prize went not to treaty-signers or war-renouncers but jointly to an economist and the high-yield bank he founded, which had about \$564,000,000 on deposit at the time of the award.<sup>11</sup> "Lasting peace cannot be achieved unless large groups find ways to break out of poverty," the Norwegian Nobel Committee said in its announcement of the prize. "Micro-credit is one such means. Development from below also serves to advance democracy and human rights." The Committee added that microcredit was "an important liberating

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market distribution of goods and services has been disrupted; institutional capacity for policy decision and planning at [the] national level has been eliminated or curtailed... [and] large numbers of individuals have been physically and socially displaced and were subject to traumatizing experiences of violence.

*Id.*

<sup>10</sup> See *infra* Section 3.1.1 (providing working definitions of "microcredit" and "microfinance").

<sup>11</sup> See *Grameen Bank at a Glance*, [http://www.grameen-info.org/index.php?option=com\\_content&task=view&id=26&Itemid=175](http://www.grameen-info.org/index.php?option=com_content&task=view&id=26&Itemid=175) (last visited Oct. 26, 2009) (providing an introduction to the operations and ownership of the Grameen bank, which now has 2559 branches covering 84,691 villages).

force in societies where women in particular have to struggle against repressive social and economic conditions."<sup>12</sup>

As scholars have established, the effort to achieve reparation following national crisis is at least hobbled, if not defeated, by conceptions of agency, identity, and recognition that take inadequate note of women's experiences and consciousness.<sup>13</sup> Human rights, procedural rights, the law of war, acts of state, public discourse, dignity, distributive justice, and everything else that occupies the polity are all women's issues as well. They give rise to entitlements for both men and women, as individual citizens and stakeholders in the national collective.

If reparations foster healing, then postponing reparations retards healing; thus, the healthier course would be to install a reparations scheme as soon as enough stability in the nation exists to make it possible. The wait for wealth is too long. When the familiar reparations conditions are present—a strife-torn past, an optimistic present, and a national economy battered or frail enough to need intervention—a program committed to the transfer of funds to individuals becomes better positioned to attain repair if it can transfer money in a way that would strengthen the emergent civil society. Expenditures that merely put money in the hands of victims would be resisted, as dissenters within the government could invoke lack of resources, the existence of competing and legitimate reconstruction needs, and the divisiveness inherent in compensating only a few people.

The political value of reparations money increases when reparations can augment national wealth as well as compensate victims for human rights abuses. One might have thought that a reparations plan that transfers money must choose between (a) payments to repair past traumas or (b) investments in economic development, but not (a) and (b) both. As this Article will try to demonstrate, however, a reparations plan need not necessarily

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<sup>12</sup> See Press Release, Norwegian Nobel Committee, The Nobel Peace Prize for 2006 (Oct. 13, 2006), available at [http://nobelprize.org/nobel\\_prizes/peace/laureates/2006/press.html](http://nobelprize.org/nobel_prizes/peace/laureates/2006/press.html) (claiming that microcredit would have to play a major part in any effort to alleviate poverty).

<sup>13</sup> The leading writer on this subject is the Spanish constitutional scholar Ruth Rubio-Marín. See Ruth Rubio-Marín, *The Gender of Reparations: Setting the Agenda*, in WHAT HAPPENED TO THE WOMEN? GENDER AND REPARATIONS FOR HUMAN RIGHTS VIOLATIONS 20 (Ruth Rubio-Marín ed., 2006); Ruth Rubio-Marín, *The Gender of Reparations in Transitional Societies*, in THE GENDER OF REPARATIONS: UNSETTLING SEXUAL HIERARCHIES WHILE REDRESSING HUMAN RIGHTS VIOLATIONS 63 (Ruth Rubio-Marín ed., 2009) [hereinafter *Transitional Societies*].

relinquish either goal. Through reparations, governments can simultaneously pursue pecuniary recompense to individuals and economic gain to the nation.

The presence of entitlements amenable to monetary expression suggests that planners who make reparations policy ought to find guidance in principles of the law related to compensation for physical injury. Injured persons have been presenting claims for pecuniary redress over millennia, in a range of contexts and legal systems. The responses to their demands now form a transnational common discourse, such that it becomes plausible to regard pecuniary reparations as comparable to tort claims, no matter where the wrongs occurred or which legal system will adjudicate them. Accordingly, this Article offers an approach to pecuniary reparations for human rights violations that draws support not only from feminism in general and the idea of microfinance as empowerment for women in particular, but also from tort theory.

Anyone who proposes any form of pecuniary reparations, not just the microfinance variety advocated here, must first establish the rightness of paying money to individuals. Section 2 defends economic compensation as a remedy for injured persons as reparative of a past national crisis. Section 3 advocates microfinance in particular, in contrast to other (lesser) means of transferring payments to individual recipients.

Readers who accept the argument for pecuniary redress made in Section 2, and the argument for microfinance as laid out in Section 3, move to the last step of the Article, which is to ask the woman question: how would reparations in the form of microfinance advance gender equality? Section 4 provides an introduction to microfinance as constitutive of security and freedom. We have already noted the Nobel Committee citation that took as axiomatic the power of "micro-credit" to improve the lives of poor women.<sup>14</sup> Additional detail gathered in Section 5 supports that view and establishes that the association between microfinance and gender equality becomes even stronger in the reparations context.

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<sup>14</sup> See *supra* note 12 and accompanying text.

## 2. ECONOMIC COMPENSATION FOR INDIVIDUALS POST-CRISIS THROUGH THE RULE OF LAW

Reparations programs following national crises engage with and bear on the law in several distinct ways. International law creates at least a basis if not a mandate for reparations that can take a pecuniary form. Numerous legal instruments—the Universal Declaration of Human Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; the International Covenant on Civil and Political Rights; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment; the Convention on the Rights of the Child; the European Convention for the Protection of Human Rights and Fundamental Freedoms; the American Convention on Human Rights; and the African Charter on Human and Peoples' Rights—declare a right to redress for human rights violations.<sup>15</sup> Broadly understood, reparations constitute one form of such a legal remedy.

The law is intertwined with every stage of the reparations process, from the early design of each program to its conclusion. Legislation creates reparations schemes.<sup>16</sup> National laws decree what the government may do and which individuals will participate in processes. Judges, advocates, and administrative lawyers play leadership roles in the implementation of reparations measures. Even when laws and lawyers are absent from a particular locus of reparations, a discourse associated with law—words like rights and justice—will likely be present, and reparations themselves serve as instruments to rebuild or install a rule of law.

Although these iterations of law in reparations emphasize “public” law—especially international law, human rights law, and criminal law—the identification of individual victims also invokes a field of “private” law, the law of personal injuries. Tort law provides for compensation to persons injured by wrongful conduct. Within law, it contains its own jurisprudence—a

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<sup>15</sup> See HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION [Australia], SOCIAL JUSTICE REPORT 2000, ch. 5, available at <http://www.humanrights.gov.au/social-justice/sj-report/sjreport100/chap5.html> (criticizing the Australian government for rejecting a formal national apology, refusing to consider monetary forms of compensation, and stating that citizen litigation is sufficient to achieve reparations).

<sup>16</sup> For Example, HANDBOOK, *supra* note 2, contains nearly three hundred pages of primary documents and legislation.

perspective on law-based responsibility that—while compatible with the public law governing states, crimes, and assertions of human rights violations—brings its own concerns to the assignment of entitlements and responsibilities. This jurisprudence provides for torts-focused views on particular choices that face reparations planners.

### 2.1. *Compensation as a Constituent of Doing Justice*

International law recognizes a variety of means, going beyond money, to effect repair following violations of human rights. In 2006, the General Assembly of the United Nations adopted a report of the High Commissioner for Human Rights declaring that reparations to or in respect of victims encompass “restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.”<sup>17</sup> The last two are particularly broad categories that include a range of measures: verification of facts and disclosure of truth, searches for corpses, public apologies, tributes to victims, civilian control of the military, an independent judiciary, and the installation of codes of conduct and ethical norms.<sup>18</sup>

A torts perspective on reparations casts no slight on these ambitious ends by focusing on a discrete portion of them. The torts vantage point shares Pablo de Greiff’s view that the word reparations “refer[s] to measures that provide benefits to victims directly.”<sup>19</sup> It emphasizes compensation more than restitution, while acknowledging overlap between these two categories.<sup>20</sup> Most fundamentally, it emphasizes the need for money (or its equivalent) to change hands. An entity accepting responsibility for past wrongs—usually a government—disburses money; victims or their heirs receive it.

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<sup>17</sup> G.A. RES. 60/147, U.N. Doc. A/RES/60/147 (Mar. 21, 2006).

<sup>18</sup> See *id.*, ¶¶ 22–23 (detailing the measures that “satisfaction” and “guarantees of non-repetition” should include).

<sup>19</sup> de Greiff, *supra* note 6, at 453.

<sup>20</sup> RESTATEMENT (SECOND) OF TORTS § 901(a) (1979) (asserting that the first principle of tort actions is “to give compensation, indemnity or restitution for harms”). On the ranking of compensation ahead of restitution, see *id.*, cmt. a (noting that tort law, unlike the law of unjust enrichment, does not focus on the benefit that the defendant received: “This first purpose of tort law leads to compensatory damages.”). See also John C.P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435 (2006) (parsing distinctions between compensation and indemnification, which parallel distinctions between full and fair compensation).



The monetary nexus is integral to torts. In its use of the term “damages” for “the monetary award for legally recognized harm,”<sup>21</sup> tort law aspires to integrate wrongs and rights through the disbursement and receipt of money. This implicit unity appears more explicitly in the American compendium *Restatement (Second) of Torts*, which defines damages as “a sum of money awarded to a person injured by the tort of another.”<sup>22</sup> The *Restatement* declares that money is awarded to vindicate the ideals of tort law generally:

The rules for determining the measure of damages in tort are based upon the purposes for which actions of tort are maintainable. These purposes are:

- (a) to give compensation, indemnity or restitution for harms;
- (b) to determine rights;
- (c) to punish wrongdoers and deter wrongful conduct; and
- (d) to vindicate parties and deter retaliation or violent and unlawful self-help.<sup>23</sup>

In contrast to this claim of reparative ambition and possibility, several writers have singled out monetary compensation as uniquely problematic among possible means of reparation following a national crisis. Taking the perspective of a victim, they question the reparative effect of receiving cash from a distant government.<sup>24</sup> Taking the perspective of a payer-planner or

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<sup>21</sup> See DAN B. DOBBS, *THE LAW OF TORTS* 1047 (2000) (explaining that restitution and injunction are distinct from damages).

<sup>22</sup> RESTATEMENT (SECOND) OF TORTS § 902 (1979).

<sup>23</sup> *Id.* § 901.

<sup>24</sup> Women are prominent among the money-skeptics. See, e.g., Roman David & Susanne Choi Yuk-Ping, *Victims on Transitional Justice: Lessons from the Reparation of Human Rights Abuses in the Czech Republic*, 27 *HUM. RTS. Q.* 392, 403 (2005) (noting that some mothers of disappeared sons in Argentina refused financial compensation on the ground that it would “diminish their claims for truth and justice”); see also MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 103 (1998) (arguing with respect to reparations paid to survivors of Japanese-American internment that “reparations fall short of repairing victims or social relationships after violence” and questioning whether compensation is the most obvious need of victims); *id.* at 110 (“Social and religious meanings rather than economic values lie at the heart of reparations”); Tom R. Tyler & Hulda Thorisdottir, *A Psychological Perspective on Compensation for Harm: Examining the September 11th*

observer, they doubt that disbursements to individuals constitute a priority for a nation as it emerges from chaos and crisis.<sup>25</sup>

A torts-centered response to these criticisms would insist that while money is indeed never sufficient to repair serious violations of human rights, it is still necessary. Truth commissions, apologies, forward-looking rhetoric, newly-elected democratic governments committed to change, and other non-pecuniary measures are crucial to the rebuilding of societies in transition. Nevertheless, the currency of torts redress is literally found in currency. Moreover, because human rights violations trammel on persons as individuals, the currency of reparations must go to them directly and personally. Collective payments and programs, though undoubtedly salubrious, do not discharge this obligation.

Torts perspectives focus on a crucial half of a balance that might otherwise be overlooked. According to de Greiff, reparations payments without truth-telling can look like “blood money” to victims, whereas without payments, truth-telling can look like “cheap talk.”<sup>26</sup> Truth-telling ceases to be cheap talk when it includes the receipt and the disbursement of reparations monies. The value of receipt is at one level obvious—for most people, to have more money is better than to have less. The rare recipient who disagrees, and deems money odious, is free to repudiate or give away her payment.<sup>27</sup>

Disbursement yields its own benefits to the society and its government. Instrumentalists may note that by declaring a financial obligation that a successor regime owes to victims, these payments open the possibility of deterrence. Even though primary wrongdoers are likely unavailable to share in the obligation, a

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*Victim Compensation Fund*, 53 DEPAUL L. REV. 355, 361 (2003) (emphasizing that from a victim’s point of view, monetary compensation can never be adequate and “moral accountability” is key for satisfactory compensation).

<sup>25</sup> See, e.g., MINOW, *supra* note 24, at 73 (explaining that even though South Africa’s TRC employs a “public process of acknowledgment” of atrocities, psychological assistance and therapy may also be useful); see also Maryam Kamali, *Accountability for Human Rights Violations: A Comparison of Transitional Justice in East Germany and South Africa*, 40 COLUM. J. TRANSNAT’L L. 89, 129 n.173 (2001) (describing how countries that cannot afford to pay large sums of monetary reparations may supplement compensation with counseling and therapy in order to foster individual healing).

<sup>26</sup> See de Greiff, *supra* note 6, at 461 (explaining the complex means by which reparations complement other processes that occur in transitional justice).

<sup>27</sup> Exploring another level, I will presently take up the question of how to refine the payment of money to enhance its gains. See *infra* Section 4.

pecuniary program of reparations establishes ledgers that can be used in the future if wrongdoer-controlled assets become accessible. Since technological innovation has made recordkeeping cheaper and hidden wealth easier to uncover, the establishment of these ledgers declares that a government not only has the machinery but also the will to find, catalogue, and reallocate the wealth that human rights violators wrongly hold. For non-instrumentalists and instrumentalists alike, ledgers affirm an ideal of governmental responsibility not only to apologize and tell the truth, but also to pay for misdeeds as measured in wrongs and rights. The endeavor of determining a monetary amount to be paid, both in the aggregate and to each recipient, makes the reality of past wrongs concrete and visible even before any funds are transferred.<sup>28</sup>

### 2.2. *Not Just Money: Torts as Recognition*

We have noted the dichotomy that casts the phrase “blood money” as descriptive of monetary compensation that excludes truth-telling, and “cheap talk” as the complementary dismissive phrase for the inverse phenomenon. Monetary compensation and truth-telling in this view are incomplete halves, each needing the other to forestall a well-earned pejorative and effect real reparation. How can the two come together? The annals of reparations present several possibilities, to which the tort-focused approach of this Article adds its own perspective. For this purpose, tort law emphatically does not reduce to the payment of damages. It concerns itself at least as much with the agency of the victim and the generation of recognition for an affront.

Mere compensation has never accounted for all of what tort law and policy seek to accomplish. Any law-based scheme that purports to compensate without recognition of the individual behind a claim—a person who holds rights and freedoms—is abjuring torts for something else.<sup>29</sup> Tort law endeavors to speak for

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<sup>28</sup> Cf. Christian Sundquist, *Critical Praxis, Spirit Healing, and Community Activism: Preserving a Subversive Dialogue on Reparations*, 58 N.Y.U. ANN. SURV. AM. L. 659, 697 (2003) (arguing that reparations for African-Americans ought to take pecuniary form in order to highlight the economic privileges of white Americans, to “foster community activism,” and to emphasize the need among recipients for economic self-sufficiency).

<sup>29</sup> See generally STEPHEN D. SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW: NEW COMPENSATION MECHANISMS FOR VICTIMS, CONSUMERS, AND BUSINESS*

victims by supporting them as they speak for themselves. Complaint-initiated engagement of the legal system is a hallmark of tort, and has the capacity to alter the status quo before the government takes any initiative.<sup>30</sup>

This pride of torts notwithstanding, reparations planners start their work familiar with the protest that the central tort equation—approximately, wrongs equals damages equals money—does not align with injury as victims have experienced it. In her comparison of pecuniary versus non-pecuniary reparations schemes, Naomi Roht-Arriaza relates a useful survey of recipients in Latin America and South America. Though she is sympathetic to both types of reparations, Roht-Arriaza reports that victims value non-pecuniary measures much more than cash:

Over and over again, in interviews and in interactions with therapists, victims ask for official and societal acknowledgment that they were wronged, restoration of their good name, knowledge of who and how it was done, and justice and moral reparations. Victims are much more ambivalent about monetary reparations. On the one hand, a number of victims and organizations of family members refused all money as “blood money” intended to silence them and to deflect attention from the larger issues of impunity and societal recognition. On the other, some victims saw material reparations as just recognition by the state of the harm caused, money that would otherwise go to the state. All agreed that compensation was never enough, or even the most important thing.<sup>31</sup>

When asked why a reparations plan should spend scarce resources on a measure that recipients have declared would not by itself satisfy them, a defender of torts perspectives on reparations may need to say more than *pecunia non olet*.<sup>32</sup> This defender can

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(1989) (discussing alternative routes to the ends associated with torts, especially compensation and deterrence).

<sup>30</sup> See generally Anita Bernstein, *Complaints*, 32 MCGEORGE L. REV. 37 (2000) (arguing that complaints initiate the process of individual healing as well as encourage societal improvements).

<sup>31</sup> See Naomi Roht-Arriaza, *Reparations Decisions and Dilemmas*, 27 HASTINGS INT'L & COMP. L. REV. 157, 180–81 (2004).

<sup>32</sup> Latin: Cash will be welcomed by those who receive it; “money has no odor.”

point out that a tort approach does not reduce reparations to cash transfers.

An article from a bygone era is instructive on this point. Maurice Rosenberg, a civil procedure scholar, once contended that government had a role to play as a facilitator and supporter of personal injury claims.<sup>33</sup> The notion sounds jarring today, at least in the United States.<sup>34</sup> Nevertheless, in 1971 Rosenberg envisioned government intervention to assert the interests of injured citizens. He proposed a new ministry named the Department of Economic Justice that would pay out cash in response to reports of injury.<sup>35</sup> This utopian department would have the power to go after the wrongdoers it identified as responsible, taking “legal action appropriate to the situation—including wholesale (and hence, economically worthwhile) suits to recover amounts it had already paid out administratively, along with costs, interest, and other economic sanctions.”<sup>36</sup>

Anyone inclined to deem this suggestion a naïve, idle dream about benevolence in support of injury claims of other people should remember that the principle of vicarious liability is heeded in daily practice around the developed world.<sup>37</sup> All agree that an entity that did not participate directly or personally in wrongdoing may nevertheless be required, without any finding of its own fault, to compensate victims who suffered at the hands of individual wrongdoers. The best-known example of vicarious liability is *respondeat superior*, a form of strict liability that is prevalent worldwide. In the United States, business entities can also take on

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<sup>33</sup> See generally Maurice Rosenberg, *Devising Procedures that are Civil to Promote Justice that is Civilized*, 69 MICH. L. REV. 797 (1971) (discussing the role of courts and judicial administration and the need for improvement in the system’s ability to root out evil and effect “good” procedures).

<sup>34</sup> In contemporary American debates, liberals defend tort law as it is currently practiced and associate proposals to reform it with business interests. See Stephen D. Sugarman, *Ideological Flip-Flop: American Liberals are Now the Primary Supporters of Tort Law* 13 (U.C. Berkeley Pub. Law Research Paper, Paper No. 925244, Jan. 17, 2005), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=925244](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=925244) (explaining that the main supporters of the fault-based torts system in the United States are on the left side of the political spectrum).

<sup>35</sup> See Rosenberg, *supra* note 33, at 813–14 (suggesting an example of a departure from the more adversarial methods of seeking reparations).

<sup>36</sup> *Id.* at 814.

<sup>37</sup> Thanks to Mark Geistfeld, for clarifying this point, and to John Owen Haley for his insights into the relation between subrogation and torts-thinking about reparations, which inform these paragraphs.

vicarious liability by succession. They might, through the purchase of corporate assets, gain ownership of a business's liabilities, as well.<sup>38</sup> After being compelled to pay damages pursuant to vicarious liability, an entity has the prerogative to seek indemnification from the person responsible for having committed the more fundamental, primary wrong.<sup>39</sup> In this light, it becomes plausible to envision a unit within a national government (probably not named the Department of Economic Justice) taking on the role of a successor government, empowered to recoup national assets that have been plundered by notorious wrongdoers.

Disgraced and culpable individuals may have lost their power to inflict harm on their fellow citizens, but they may own property sufficient to pay for some of their past harms. For example, the rumor that Augusto Pinochet had stashed nine tons of gold in a Hong Kong bank vault proved to be untrue, but the estimate of \$28 million deposited in foreign accounts was well founded.<sup>40</sup> This sum could have made an impact on Chile's reparations program.<sup>41</sup> One human rights group has tried to force a reckoning of the gains amassed by the multinational corporations that supported the apartheid regime while doing business in South Africa the subject of another reparations program.<sup>42</sup> Haile Mengistu Meriam, under

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<sup>38</sup> See generally Symposium, *Multinational Corporations and Cross Border Conflicts: Nationality, Veil Piercing, and Successor Liability*, 10 FLA. J. INT'L L. 221 (1995) (discussing divergence between U.S. and U.K. law on the issue of successor liability and how the notion of successor liability is more developed in the United States).

<sup>39</sup> The common law entitles an entity defendant to recover against an individual wrongdoer for monies that the entity paid to a third party as compensation for physical injuries. See *Lister v. Romford Ice & Cold Storage Co.*, [1957] A.C. 555 (H.L.) (U.K.) (appeal taken from Q.B.) (discussing how an employer who is required to pay damages after being found liable may seek indemnification from his employee); *Saranillo v. Silva*, 889 P.2d 685, 697 (Haw. 1995) (explaining that employers who are found liable under *respondeat superior* may receive indemnification from their employees); *Jackson v. Associated Dry Goods Corp.*, 192 N.E.2d 167, 169 (N.Y. 1963) ("It is well established that the culpability of the party seeking indemnity determines whether recovery over will be permitted.") (citation omitted).

<sup>40</sup> Eva Vergara & Patrick J. McDonnell, *No Pinochet Gold Hoard, Bank Says*, L.A. TIMES, Oct. 27, 2006, at A7.

<sup>41</sup> See Lira, *supra* note 3, at 56, 59.

<sup>42</sup> See Colvin, *supra* note 4, at 199.

Jubilee South Africa has also pointed out that the multinational corporations that helped to finance the apartheid government in its final, most repressive years removed roughly R3 billion (US \$375,000,000) a year between 1985 and 1993 from the country. Jubilee argues that if 1.5

whose rule an estimated half a million civilians were killed in Ethiopia, including political dissidents killed by his military junta in the 1970s, took up residence in Zimbabwe and enjoyed access to “a free apartment and a fleet of luxury cars” that could have been liquidated to pay reparations to victims’ families.<sup>43</sup> Too poor to effect its limited reparations scheme that had budgeted about \$3,500,000,<sup>44</sup> Haiti could certainly use some of the money that the Duvalier family embezzled before fleeing, even if the astounding estimate of “up to US \$900 million”<sup>45</sup> overstates what they stole.

In this torts-influenced reckoning, victims of human rights violations would assert their claims and receive reparations payments from governments to compensate for discrete wrongdoings, with human malefactors in mind, but not in a bloodless shuffle of papers. The government would accept responsibility on its own behalf—either for having done wrong itself or for not having fulfilled its duty to protect citizens from active wrongdoers<sup>46</sup>—and also as a quasi-insurer making payments for the wrongs of others, pursuant to its obligation. It would pay reparations to citizen-victims without condescension, valuing its right of indemnification against the persons and entities that bear primary responsibility for the harm.

Conveying payments for wrongful violations of human agency would thus signal not only an acknowledgment of responsibility

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percent of these profits was returned each year for six years, financial reparations at the level of the original TRC recommendations could be paid.

*Id.* Jubilee also supported a lawsuit in the United States against several of these corporations, arguing that they violated international law by exploiting cheap labor and collaborating with armed enforcers of the apartheid government. *In re South African Apartheid Litigation*, 346 F. Supp. 2d 538, 548 (S.D.N.Y. 2004) (dismissing the action on the ground that plaintiffs did not demonstrate a violation of international law).

<sup>43</sup> Victor T. LeVine, *Taylor Case Only a Start: Leaders Seldom Answer for Abuses, but that May Be Changing*, ST. LOUIS POST-DISPATCH, Apr. 9, 2006, at B4.

<sup>44</sup> One commentator does not attribute Haiti’s failure to implement a program simply to its scarcity of resources, but concludes that the nation’s poverty played an undisputed role. Alexander Segovia, *The Reparations Proposals of the Truth Commissions in El Salvador and Haiti: A History of Noncompliance*, in HANDBOOK, *supra* note 2, at 154, 164 (finding that other factors include the lack of importance given to reparations by the different players in the domestic, national, and international community).

<sup>45</sup> Paul Hamel, *Preventing Democracy in Haiti: Turning the Light Off at the End of the Tunnel*, PEACE MAGAZINE, Jan. 1, 2005, at 14.

<sup>46</sup> Rubio-Marín, *Transitional Societies*, *supra* note 13, at 77.

but a tacit pledge to pursue—or at least care about—the reclamation of this money from the primary offenders. The tacit pledge, implying that the giver values its payment, expresses recognition of a particular historical event and the claim of right that derives from a wrong. When the primary offenders gained the holdings in question through theft, extortion, or wrongful seizure, the retrieval effort also links the pathology of rights violation with the pathology of plundering a nation's wealth—a connection that stands up for fiscal law and order along with human rights, and thus could enhance the reparations program in the eyes of foreign investors.

Such recognition, with or without a public relations boost, has more force than a bland “mistakes-were-made handout” and acceptance of responsibility with no specific referents. Lacking any consciousness of opportunity cost, payment devoid of any implicit reference to indemnification sounds like “cheap talk”—only slightly less cheap than talk accompanied by no money at all. In the reparations setting of rights and wrongs, payment ought to come across as both compensation and fulfillment of a debt. The money is not laundered, one might say. Victims could accept it with honor.<sup>47</sup>

### 2.3. *Honoring Both (and Mediating Between) Security and Freedom Through Pecuniary Reparations*

Reparations planners who have decided to pay monetary compensation to victims might consider the purposes of transfer payments that are made as compensation for injury in ordinary litigation. Following the lead of Ruth Rubio-Marín and Margaret Walker, who have urged attention to human rights violations,<sup>48</sup> I

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<sup>47</sup> One activist lawyer pursuing human rights claims was irked by his compatriots' interest in the rumors of Pinochet's gold in Hong Kong: “It speaks badly of us Chileans that we react more strongly when we read a story about Pinochet and money, Pinochet and dollars, than when it is about Pinochet and deaths.” Vergara & McDonnell, *supra* note 40, at A7. Citizens of this very country who received “dollars” for events of the Pinochet-era nevertheless told researchers that money did not fulfill their needs for reparation. Roht-Arriaza, *supra* note 31, at 180. This apparent inconsistency becomes consistent when one recognizes that tort law's preoccupation with money as damages is not merely pecuniary and nothing more. Money changes hands to achieve fairness. The Chilean reaction to news of money was indeed also a reaction to news of deaths.

<sup>48</sup> Rubio-Marín, *Transitional Societies*, *supra* note 13, at 95–96 (advocating attention to reasons and rationales behind human rights as a way to pursue gender equity); Margaret Urban Walker, *Gender and Violence in Focus: A*



argue here for a commensurate concern with what financial recompense seeks to accomplish. The ends of tort law are security and freedom, pursued in balance.

Tort-thinking desires security and freedom for both sides of the litigation caption. A tort claim by a plaintiff complains of an invasion that may be seen as a breach of security; but defendants, for their part, are entitled to shelter from the danger of an arbitrary official conclusion that they caused injuries for which they now must pay. For defendants, security takes form in procedural justice. Tortious conduct impinges on the freedom of persons hurt by it. At the same time, too much tort liability – condemnation out of proportion to the magnitude of real injuries and risks – unduly impinges on freedom of action.

Divergent perspectives on torts share these two priorities even while unaligned on other questions. For example, “security” speaks as pertinently to various problems of economic efficiency in torts as it does to corrective justice’s attention to the nature of the wrong that a victim suffered;<sup>49</sup> human freedom is as integral to the jurisprudential concept of “fairness” as it is to the prerogative to engage in profitable activity that occupies the center of “welfare;”<sup>50</sup> thus the paired ends of “compensation” and “deterrence” mediate between security and freedom while honoring them both.<sup>51</sup>

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*Background for Gender Justice in Reparations, in THE GENDER OF REPARATIONS: UNSETTLING SEXUAL HIERARCHIES WHILE REDRESSING HUMAN RIGHTS VIOLATIONS* 18, 52 (Ruth Rubio-Marín ed., 2009) (noting that what appears to be one trauma can expand into a multiplicity of injuries).

<sup>49</sup> Examples abound. Insecurity as a transaction cost impedes bargaining; the right to hold property is integral to participation in civil liability system as well as to one’s status as an economic actor; threats to physical security absent tort liability would be guarded against by wasteful precautions.

<sup>50</sup> Notwithstanding the contention in one widely cited work that fairness and welfare are opposites. LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2002).

<sup>51</sup> In principle, deterrence can be severed from compensation as long as a system forces actors to internalize the costs of their activities by some other means, like fines; but welfare analysts prefer to empower compensation-seeking victims as enforcers of this obligation, at least in settings like the United States where these alternative sources of cost internalization are weak. *See generally* Mary L. Lyndon, *Tort Law and Technology*, 12 *YALE J. ON REG.* 137 (1995) (noting the need for tort liability, not just administrative regulation, to force cost integration through deterrence in the context of managing new technologies). *See also infra* note 142 and accompanying text.

### 2.3.1. *Enhancing Security*

Although security applies to both sides of the litigation caption, it functions in a more fundamental way on the plaintiff's side. After a procedure that is faithful to the rule of law deems a defendant responsible for an injury, security in tort law addresses mainly the safety or settled equilibrium that these defendants have disturbed. Any national scale repair of this disruption must consider that a wrongfully inflicted injury is a breach of the peace whose consequences extend into a victim's future.

In this reparations context, consider violence that government agents initiated or condoned, resulting in post-traumatic stress disorder and related anxieties. Tort-thinking reminds policymakers that the repair of this injury cannot succeed without acknowledging its future effects. Every wrong amenable to legal redress, not just trauma, projects forward in time. Some of the protrusion into the future may be juridical rather than inherent in the wrong itself—that is, they may be kept alive by the preparation of testimony, the stoking of narration in public venues (such as truth commissions), or the tendency of adjudication to look backward—but victims feel its effects all the same. Inflictors of injury know, or should know, that the wrong they commit will undermine a victim's security even after they stop acting.

The reparations programs of several nations have recognized this unity between past and future by not requiring victims to recount acute episodes that undermined their security abruptly. A mother who inferred after some weeks of absence that her son disappeared, for instance, cannot identify an exact moment that her injury occurred, but has suffered a breach of her security. National reparations programs confront a cruel past havoc. This disarray once threatened even business-like conceptions of security, such as the "rational" worries about investment that permeated the economies of Argentina and Chile. Reparations presume, in short, that the breach of security is still alive, unsettled, voracious—a blight on the future and the present as well as the national past.

Applied to ordinary civil justice in developed legal systems, where prosperous and well-represented defendants litigate by making arguments and shuffling papers, and where those "persons" who seek redress need not be human beings, rhetoric this vivid may sound a bit overheated. But even in the driest precincts, a quest for monetary compensation in court for non-

contractual wrongs necessarily involves a violation of security; at the same time, the resistance that a defendant mounts is a plea to keep the tranquility of the status quo, casting the plaintiff as a disruptor. Private-law adjudication sets out to determine in binary fashion which of the two is the troublemaker, the putative wrongdoer or the complainant.<sup>52</sup> And then, if the plaintiff wins, the adjudicator fashions a remedy to restore equanimity and civil peace.<sup>53</sup> Part of the work of recompense is to give the victim more security in the future. Money damages paradigmatically do this job by allowing victims to collect their awards, put them in the bank, and sleep better.

### 2.3.2. *Enhancing Freedom*

Perpetrators of wrongdoing obligated under tort law to pay victims recompense—in contemporary practice, such perpetrators could be nation-states or business entities, not just individuals—have overindulged in their own freedom, hurting other people at least along the way, if not on purpose. Their freedom to swing their fist, or to not care about the foreseeable consequences of their inattention, or recklessly to neglect the basic safety of their citizenry, should have ended before the other person was hurt, but did not. They felt free to cross a boundary. They were wrong. “Our autonomy is limited,” writes torts scholar and philosopher Jules Coleman, “only insofar as we are not free to cross the borders that define the protective moral spheres of our neighbors. Boundary crossings are violations, and should harm ensue, compensation is owed.”<sup>54</sup> Whether taking a trivial form, like an automobile collision that bends fenders, or a deep one, like a

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<sup>52</sup> See Anita Bernstein, *Reciprocity, Utility, and the Law of Aggression*, 54 VAND. L. REV. 1, 52 (2001) (examining this proposition through “[i]nversions of aggression” in civil rights litigation).

<sup>53</sup> Even in an idealized version of this restoration, nominal winners often fail to get what they really want. See Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603, 617-23 (2006) (noting the difficulty of collecting judgments). American tort plaintiffs, for instance, often seek medical monitoring following the exposure to toxic substances, but almost never receive it. Anita Bernstein, *Fellow-Feeling and Gender in the Law of Personal Injury*, 17 J. L. & POL’Y (forthcoming 2009). The focus of law (as contrasted to “equity”) on monetary damages forecloses creative remedies.

<sup>54</sup> Jules L. Coleman, *Legal Theory and Practice*, 83 GEO. L.J. 2579, 2615 (1995); see also Christine Chambers Goodman, *Protecting the Party Girl: A New Approach for Evaluating Intoxicated Consent*, 2009 B.Y.U. L. REV. 57, 61-62 (2009) (evaluating “boundary crossing” within the context of intoxicated consent under rape laws).

massacre, every wrongfully inflicted injury calls out for repair of what it inflicted on its victim. Too much prerogative on the part of the wrongdoer – insufficiently checked and inhibited – has violated the rights of a human being.

Pecuniary recompense for wrongdoing reminds the recipient that freedom exists not only for the class of assailants who overindulged but for the individual victim too. Consequently, after legal proceedings have concluded, the recipient will ordinarily enjoy more choice than before. If a monetary transfer succeeds in enhancing security for victims, then that increase in security will foster the victims' sense of power over their environment. Receiving money adds a layer of freedom to this minimum where the best revenge, so to speak, is not actual vengeance against perpetrators<sup>55</sup> nor withdrawal from civil society, but a superior exercise of one's human prerogatives. Victims can now do what they want in a way that, unlike the actions of the wrongdoer, does not violate the rights of anyone else.

Again, money makes for a uniquely effective instrument. Tortfeasors found liable in the legal systems of developed nations do not turn over a new appliance or a fancier wheelchair to you after you have established yourself as their victim. They cut you a check, which allows you to spend your "reparations" as you like. Measures of compensation that reparations programs might use should also foster choice, and thus freedom.

### 3. MICROFINANCE AS A DEVICE FOR REPARATIONS

Reparations planners willing to consider the medium of pecuniary compensation face the question of which means of payment to use. This Section outlines a proposal to convey payment in the form of shares in a microfinance institution. To assess and defend the suggestion, this section begins by discussing "microfinance" in contradistinction to the more familiar term "microcredit." It next explores alternative structures for microfinance programs, and considers what microfinance has to offer that simple cash transfer payments do not. Later parts of the Article build on this discussion by linking microfinance with the normative ambitions of tort theory and the enhancement of gender equality.

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<sup>55</sup> Recall the American declaration that damages are awarded "to vindicate parties and deter retaliation or violent and unlawful self-help." *See supra* note 23 and accompanying text.

### 3.1. Nomenclature: "Microfinance"

Coinage of the neologisms "microcredit" and "microfinance" added a contemporary gloss to ancient practices because small-time financial transactions are as old as commerce itself. Lack of clarity about what "microcredit" means in particular has sown confusion.<sup>56</sup> Today, decades after its entrée into development discourse in the mid-1970s, "microcredit" might refer to many kinds of small-time lending and borrowing, including "agricultural credit, or rural credit, or cooperative credit, or consumer credit, credit from the savings and loan associations, or from credit unions, or from money lenders."<sup>57</sup> The younger word "microfinance" was coined by the German development scholar Hans Dieter Seibel in 1990.<sup>58</sup>

#### 3.1.1. *What is the difference between microfinance and microcredit?*

Microcredit is a small amount of money loaned to a client by a bank or other institution. Microfinance refers to loans, savings, insurance, transfer services, microcredit loans and other financial products targeted at low-income clients.<sup>59</sup>

Respecting the distinction between these two terms, this Section examines the virtues and limitations of distributing

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<sup>56</sup> "[T]he word has been imputed to mean everything to everybody," wrote Muhammad Yunus, the banking pioneer who went on to Nobel acclaim, "[w]e really don't know who is talking about what." Grameen Bank, *What is Microcredit?*, Sept. 2009, [http://www.grameen-info.org/index.php?option=com\\_content&task=view&id=28&Itemid=108](http://www.grameen-info.org/index.php?option=com_content&task=view&id=28&Itemid=108).

<sup>57</sup> *Id.*

<sup>58</sup> Hans Dieter Seibel, *Does History Matter? The Old and the New World of Microfinance in Europe and Asia*, Oct. 5, 2005, at 1 (presented at the Asia Research Institute, National University of Singapore), available at <http://www.uni-koeln.de/ew-fak/aef/10-2005/2005-10%20The%20Old%20and%20the%20New%20World%20in%20Europe%20and%20Asia.pdf>.

<sup>59</sup> See *International Year of Microcredit 2005, Why a Year? – About Microfinance and Microcredit*, [http://www.yearofmicrocredit.org/pages/whyayear/whyayear\\_aboutmicrofinance.asp](http://www.yearofmicrocredit.org/pages/whyayear/whyayear_aboutmicrofinance.asp) (last visited Oct. 26, 2009). The definition reserves "low-income clients" for microfinance only, leaving open the possibility that high-income clients might partake of microcredit. In common parlance, however, they do not because high-income borrowers do not need small loans. See also MicroCapital Institute, *The Social Impact of Commercial Microfinance*, at 4, <http://microcapital.org/downloads/whitepapers/Social.pdf> (last visited Nov. 1, 2009) (noting that loan size "can be used as a proxy for the social aspects of microfinance").

reparations benefits as microfinance, giving beneficiaries new opportunities for savings and credit rather than loans.<sup>60</sup>

The appeal to microfinance instruments rather than microcredit keeps faith with a crucial characteristic of reparations: as complete or perfect transfers, they come with no obligation to be returned. Loans, credits, and exhortations to the poor to cultivate their inner entrepreneur are different from the transfer of wealth. Identified victims of serious human rights violations hold no responsibility for earning and paying for their own reparations.<sup>61</sup>

### 3.2. *Choosing Among Means to Convey Pecuniary Reparations Through Microfinance*

Continuing the theme of going beyond credit to include an array of financial activities derived from work by development economist Hans Dieter Seibel and others, would establish recipients of reparations payments as shareholders in microfinance institutions. The transfer payments from government to citizen-victims would take the form of shares. For this purpose, a microfinance institution is an entity that provides financial services—at least credit and savings, possibly others—to customers who would normally be considered too poor for a bank to profit from serving them.<sup>62</sup>

Microfinance institutions can be, in Seibel's tripartite scheme, either "formal," "semiformal," or "informal." The first category of "formal" institutions includes, or resembles, banking in the developed world: an institution (typically a bank or finance company) functions under regulation and supervision by a governmental authority. "Semiformal" institutions are registered but not regulated as financial entities. These institutions include savings and loan cooperatives and nongovernmental organizations

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<sup>60</sup> This Section sweeps past an extensive, bitter political battle over the two words. The United Nations "year," for instance, is of microcredit rather than microfinance, despite lobbying for "microfinance" by nongovernmental organizations. Connie Bruck, *Millions for Millions*, THE NEW YORKER, Oct. 30, 2006, at 62, 67. For a victory of "microfinance" over "microcredit," see Stephanie Strom, *What's Wrong with Profit?*, N.Y. TIMES, Nov. 13, 2006, at F1 (noting that the \$ 100 million donation of Pierre Omidyar to Tufts University was earmarked for "developing microfinance").

<sup>61</sup> References to "microcredit" arise occasionally in this Article, however, because the development literature relied on often uses this term when it intends the wider menu of "microfinance."

<sup>62</sup> SEIBEL, REPARATIONS SHAREHOLDERS, *supra* note 9, at 1-2.

("NGOs") that provide credit.<sup>63</sup> "Informal" institutions, including low-level moneylenders and self-help groups, are neither regulated nor registered, although their activities may fall within customary law.<sup>64</sup> Governments going the "informal" route would make reparations payments in the form of shares in existing unregulated, unregistered local institutions.<sup>65</sup>

Accountability, transparency, and protection of the rights and interests of shareholders and those who deal with them command a preference for formal or semiformal entities as reparations vehicles, unless only informal institutions are available during the nation's transition. Absent a minimal degree of economic development and stability, informal institutions could join the plan with the understanding that their connection to a government program demands a degree of extra oversight. Engagement with national reparations would necessarily push the institution upward toward the semiformal category.

Although this Article cannot provide detailed descriptions of the financial institutions with which national governments might build partnerships to effect reparations schemes, planners who devise reparations have the benefit of decades of development assessment as a base of relevant experience. To be sure, reparations differ greatly from economic development initiatives, but the two categories of intervention have enough in common to support some preliminary thoughts about how formal, semiformal, and informal institutions fit within a reparations scheme. Generalization in this mode will be refined (or belied, if need be) at the planning stage by the varied encounters already experienced by most governments with microfinance.

One common starting place for a reparations program, feasible in most countries that have started to emerge from crisis and falling under the "semiformal" category of microfinance institution, is the credit NGO. A credit NGO typically offers small loans, often along with other interventions (education, counseling, health care), to its low-income clientele.<sup>66</sup> Capitalized by external

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<sup>63</sup> The Grameen Bank started out as a credit NGO, funded first by "soft loans and grants" before becoming more self-sustaining. See Bruck, *supra* note 60, at 62 (recounting early development of Grameen Bank).

<sup>64</sup> SEIBEL, REPARATIONS SHAREHOLDERS, *supra* note 9, at 1 n.2.

<sup>65</sup> See generally Douglas Snow, *Microcredit: An Institutional Development Opportunity*, 1 INT'L J. ECON. DEVELOPMENT 1 (1999) ("Sustainable microcredit programs must be embedded in the network of existing local institutions.").

<sup>66</sup> SEIBEL, REPARATIONS SHAREHOLDERS, *supra* note 9, at 8-9.

donor agencies, this entity would have been at work inside the strife-torn country before the government started to disburse reparations payments. A reparations program could partner with a credit NGO in a transitional relationship aimed ultimately at forming a freestanding financial institution that citizen-recipients would own collectively.<sup>67</sup> The NGO would deliver financial services to this clientele, along with practical help (like office space for its operations) on terms of cooperative ownership, until the membership of shareholders achieves the capacity to govern itself.<sup>68</sup> Working with an existing credit NGO offers this reparations plan an established connection between funders and poor people, as well as the flexibility to take on new projects quickly;<sup>69</sup> these advantages might outweigh the difficulties presented by shared governance.

Reparations planners could alternatively pursue a type of partnership with a different mix of advantages and disadvantages for the program. Governments might bypass (or be unable to engage) credit NGOs and instead link up with informal—unregulated and unregistered—local institutions that function only as microfinancers.<sup>70</sup> Recipients of reparations would acquire shares in existing entities that might have been formed as associations, cooperatives, or foundations. Their government-disbursed payments would join capital already held by the informal institution. Such an arrangement would lack the access to capital and established routes to reach the poor that a credit NGO would likely have, but could pay undivided attention to microfinance and enjoy freedom to veer from the mandate of a foreign entity.

A third possibility for reparations-through-microfinance is the formation of a new microfinance institution from the ground up.

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<sup>67</sup> In Rwanda, for example, a nation that has tried to use microcredit as a constituent of reparations, an NGO called AVEGA extends microcredit to genocide widows. See GLOBAL YOUTH CONNECT, RWANDA PROGRAM REPORT (2006), available at [http://www.globalyouthconnect.org/pdf/rwanda\\_summer2005.pdf](http://www.globalyouthconnect.org/pdf/rwanda_summer2005.pdf) (describing the AVEGA program). An existing relation like this could form the base of microfinance in contrast to microcredit.

<sup>68</sup> See SEIBEL, REPARATIONS SHAREHOLDERS, *supra* note 9, at 12 (noting institutional weaknesses in NGO governance). See also Bruck, *supra* note 60, at 65 (quoting one founder of a credit NGO: "If you give them a loan and don't see that their other needs are met, perhaps they are worse off. They have a debt to repay, but still they have no sanitation, no health care, no education.").

<sup>69</sup> SEIBEL, REPARATIONS SHAREHOLDERS, *supra* note 9, at 9.

<sup>70</sup> *Id.* at 12.



When choosing this approach, the government would make reparations payments in the form of shares in new institutions. Experience suggests that planners of this new entity should strongly consider building a revenue base consisting of more than government-directed transfer payments: adding the "savings of other people, no matter how small" would make the institution more likely to succeed in its community.<sup>71</sup> The Arab *sanadiq* (a plural noun; singular *sanduiq*) present a model for this approach. *Sanadiq*, financed by "a mixture of member-equity and external equity contributions,"<sup>72</sup> have succeeded in Syria<sup>73</sup> and offer a model for future reparations in Iraq.<sup>74</sup>

In every form that a national reparations program might pick to convey reparations payments, the microfinance institution would establish recipients who had suffered violations of their human rights as owner-decisionmakers, thereby enhancing their agency in the process of rehabilitation. Victims of abuses would receive reparations payments in the form of shares in an enterprise that offers them savings and the prospect of credit. Pooled capital would become their shared portfolio, amenable to diversification and oriented toward pecuniary returns for its owners.<sup>75</sup> Restrictions on how to trade or otherwise alienate shares in the microfinance institution would necessarily vary from country to country in response to existing corporate law and the reparations

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<sup>71</sup> *Id.* at 16.

<sup>72</sup> *Id.* at 18.

<sup>73</sup> Markus Buerli & Aden Aw-Hassan, *Assessing the Impact of Village Credit and Savings Associations on the Rural Poor in Low Rainfall Areas in Syria*, Deutscher Tropentag: Rural Poverty Reduction Through Research for Development, 1 (Oct. 5, 2004), [http://www.tropentag.de/2004/abstracts/links/Buerli\\_fHJgUS4i.pdf](http://www.tropentag.de/2004/abstracts/links/Buerli_fHJgUS4i.pdf).

<sup>74</sup> SEIBEL, REPARATIONS SHAREHOLDERS, *supra* note 9, at 18.

<sup>75</sup> The government would need to resolve, preferably by transparent means, the contentious question of how much freedom these shareholders should have to govern their institution. At present, a consensus in the development literature advocates the frank pursuit of profit by microfinance institutions: shelter from the market results in squandered opportunity, in this view. A national government supportive of this stance would encourage recipients of reparations payments to become small capitalists. As shareholders of their institutions, they could extend credit at uncapped interest rates and foreclose on loans no matter how poignant the defaulting debtors; in general they would live by a free-to-fail market ideology. This development literature consensus could shift in the future to favor more regulation and less owner-manager prerogative.

goal of maximizing the autonomy, agency, and welfare of shareholder-recipients.<sup>76</sup>

### 3.3. Simple Transfer Payments Contrasted

Although microcredit is an extraordinarily popular tool in the development kit, even its admirers like to call it “no panacea,”<sup>77</sup> and counsel caution in its application. The lexical move from “microcredit” to the vaguer (and, of course, debt-free, at least before the institution starts making loans) “microfinance” may ease some worries, but does not eliminate all controversy in the recommendation. Scarcity is a precept that unites those who might otherwise disagree on reparations policy. Microeconomic understandings of what choosers gain and lose, the macroeconomic theories that underlie development intervention, and national governments making policy decisions would all call on an advocate of microfinance in reparations to say why this particular expenditure makes sense as a means to effect a reparative goal when this choice would necessarily conflict with other means.

The most straightforward alternative to microfinance is a simple cash transfer payment.<sup>78</sup> Planners would arrange to

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<sup>76</sup> See *infra* Section 4.1.2 (linking free trading of shares to community’s ability to pursue projects based on differing levels of risk tolerance).

<sup>77</sup> See, e.g., Tony Allen-Mills, *No Panacea for World Poverty – Benefits of Micro-Lending Called Into Question*, THE AUSTRALIAN, Oct. 5, 2009, at 10 (noting modest gains); Nan Dawkins Scully, *Micro-Credit No Panacea for Poor Women*, GLOBAL DEVELOPMENT RESEARCH CENTER, <http://www.gdrc.org/icm/wind/micro.html> (last visited Oct. 29, 2009) (conceding that “[m]icroenterprise development has, in some circumstances, contributed positively to women’s empowerment”); Lisa Avery, *Microcredit Extension in the Wake of Conflict: Rebuilding the Lives and Livelihoods of Women and Children Affected by War*, 12 GEO. J. ON POVERTY L. & POL’Y 205, 228 (2005) (“Microcredit is Not a Panacea”); Yunus, *supra* note 56 (recommending more clarity in the definition of terms); Celia W. Taylor, *Microcredit as Model: A Critique of State/NGO Relations*, 29 SYRACUSE J. INT’L L. & COM. 303, 320–35 (2002) (contending that the effects of microcredit on international law warrant more attention).

<sup>78</sup> Another, and to many observers a more attractive, alternative to microfinance and simple cash transfer payments would be “collective payments,” or social welfare spending, for the good of the entire public rather than to benefit individuals identified as victims of wrongdoing. A government might establish new health clinics, for example, or implement programs that reduce or eliminate school fees. Such spending would in many cases do more good for the country than pecuniary reparations for individuals. One would hope that governments recognize the public good of expenditures on the needs of citizens. This Article omits study of this alternative, however, in the belief that social welfare spending

distribute money to recipients. Though attractive in its simplicity, the cash transfer alternative is inferior to microfinance in several ways.<sup>79</sup>

The first advantage of microfinance over cash transfers is a practical one, as well as a reminder of the central role of security in reparations. Functioning as shareholders in a microfinance institution gives recipients a safe place to store their monetary property, which includes not only reparations payments but also their savings. Given the near certainty that poverty will accompany a reparations program, planners who seek to make pecuniary distributions need to address the question of whether a recipient can safely hold on to the money she receives. Around the world, poor people—who never own absolutely nothing—suffer from this lack of basic security. They struggle to find substitutes for the insured and well-guarded bank accounts that wealthy people take for granted.<sup>80</sup> Savings first, then.

Second, microfinance opens the possibility of expanding credit to the poor who would otherwise be regarded as ineligible to borrow money. The government-funded microfinance institution would go on to lend out portions of its capital, probably offering small loans to borrowers in its community who would otherwise have little or no access to credit. By this move, a significant share of reparations-money transitions through microfinance into microcredit, and partakes of microcredit's considerable success. For reparations purposes, the curative effect of expanded credit reaches fundamentally into a victim's well-being. The word "victim," the source of her entitlement to become a shareholder, loses its hold as this citizen moves to bankability. Shakespeare notwithstanding, any person who may both "a borrower . . . [and] a lender be"<sup>81</sup> is more autonomous, more likely to enjoy both self-

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is not reparations. Compare de Grieff, *supra* note 6, at 468–69 (detailing advantage and disadvantages of treating social welfare spending as reparations) with Rubio-Marín, *supra* note 13, *Transitional Societies*, at 29 (advocating inclusion of social welfare spending in the reparations category).

<sup>79</sup> SEIBEL, REPARATIONS SHAREHOLDERS, *supra* note 9, at 8; Hans Dieter Seibel & Andrea Armstrong, *Reparations and Microfinance Schemes*, in HANDBOOK, *supra* note 2, at 676, 678.

<sup>80</sup> "With no safe place to store whatever money they have, the poor bury it, or buy livestock that may die, or invest in jewellery [sic] that may be stolen and can be hard to sell." Tom Easton, *The Hidden Wealth of the Poor*, *ECONOMIST*, Nov. 3, 2005, at 3 (*Survey of microfinance* section).

<sup>81</sup> WILLIAM SHAKESPEARE, *THE TRAGEDY OF HAMLET, PRINCE OF DENMARK*, act 1, sc. 3.

respect and the respect of others, than a person shut out of both roles. As they become investors, reconstructors, and rebuilders of the social tissue, these shareholders gain in relative social status, and by their work and risk-taking they earn this gain.<sup>82</sup>

Third, through their investment decisions and eventual extraction of income from the microfinance institution, recipients gain routes to the social services that some deem at least as central to compensation for the human rights violations they experienced (planners think first of medical clinics, but counseling, adult education, and vocational and agricultural training are also among the possibilities).<sup>83</sup> A recipient who gains a cash transfer payment can obtain social services by spending the transfer on them; a recipient who obtains shares in a microfinance institution can obtain social services by turning her shares into cash and by directing investment into for-profit vehicles that make social services likely to emerge and flourish faster than they would from the injection of more money into the local economy – by elevating per capita income, engaging women as adult civic participants, and strengthening networks. Microfinance thus comes closer than cash payments to the social investment alternative expenditure that some observers would prefer. Indeed, over time microfinance delivers these other two types of recompense, cash and (for those recipients who want them) social services.

The fourth point in the roster moves from individuals to societies: in action, microfinance moves beyond savings and credit as pursued and deployed by citizens to social effects. Any national repair following a total crisis requires both sustainable income-generating activities and sustainable local entities that can extend capital to finance them.<sup>84</sup> Neither of these two conditions will endure without the other; both call on citizens to participate in collective undertakings. The establishment of microfinance

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<sup>82</sup> Thanks to Ruth Rubio-Marín for underscoring this point.

<sup>83</sup> Reparations in Guatemala, for example, emphasize the need for social supports and direct relatively little funding to what the program calls “economic indemnification.” Claudia Paz y Paz Bailey, *Guatemala: Gender and Reparations for Human Rights Violations*, in *WHAT HAPPENED TO THE WOMEN? GENDER AND REPARATIONS FOR HUMAN RIGHTS VIOLATIONS* 92, 110 (Ruth Rubio-Marín ed., 2006). One alderman in Chicago issued a call for slavery reparations in the United States that would eschew transfer payments in favor of social supports. Fran Spielman, *Slavery Reparations Leaders Rip Bank’s Scholarship Offer*, *CHI. SUN-TIMES*, Jan. 23, 2005, at 10.

<sup>84</sup> SEIBEL, *REPARATIONS SHAREHOLDERS*, *supra* note 9, at 1.

institutions for reparations supports both conditions. New capital makes sustainable income-generating activities more likely to occur, and extending shareholder ownership to victims of human rights abuses engages these individuals in civic repair. Hans Dieter Seibel has gone further, noting that new loci of economic power pull wealth away from a government that has been at best unreliable in the past. Microfinance “creates alternative nongovernmental sources of power,” Seibel and Andrea Armstrong write, and thus “is a potential impediment to future abuses by the central government.”<sup>85</sup> As a means of reparation, this measure enlists recipients into a common pursuit of institution-building and the relationships that follow the rise of stable institutions.

To this four-item list of virtues—safe savings for the poor, enhancement of agency, expansion of services, and civic repair through the building of financial institutions—one might add a fifth pecuniary virtue that builds on the second and third points. Reparations programs that feature microfinance would capitalize on extraordinary worldwide enthusiasm for this measure,<sup>86</sup> and thus might simply become more likely to happen.<sup>87</sup> An international donor disinclined to finance a cash-transfer or social-supports reparations program, on the ground that mending a nation following crisis is a task for government alone, may hold a different view of a program patterned in part on longstanding development initiatives.

Many who laud this form of development have added hard capital of their own, not just words of praise, to the microfinance endeavor. In the early 1980s, the then-governor of Arkansas, Bill Clinton, asked Muhammad Yunus for advice on applying Grameen Bank’s small-loan methods to alleviate poverty in his state. Two decades later, this same man structured a Clinton Global Initiative that placed \$30 million in microcredit funds in NGOs around the world.<sup>88</sup> The story of the \$27 loan that Dr.

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<sup>85</sup> Seibel & Armstrong, *Reparations Schemes*, *supra* note 79, at 679.

<sup>86</sup> See Avery, *supra* note 77, at 224–225 (summarizing the achievements of microcredit programs); Press Release, Norwegian Nobel Committee, *supra* note 12 (recognizing the positive impact of microcredit programs conducted by the 2006 Nobel Peace Prize Laureates).

<sup>87</sup> It would be irresponsible not to acknowledge, in a work on reparations, that some reparations plans fail.

<sup>88</sup> Clinton Global Initiative, Grameen Foundation USA’s Growth Guarantees Program, 2005, <http://rews.clintonglobalinitiative.org/CGIsite/commitmentnote>

Yunus made out of his own pocket to Bangladeshi basket weavers in 1976 has spurred a multibillion-dollar business which includes some of the world's largest financial institutions, such as Citibank, Deutsche Bank, and the Dutch giant ABN AMRO.<sup>89</sup> Microcredit also appeals to big businesses beyond big banks: As one industrialist remarked at a microcredit summit, success in microlending would mean new prospective customers for his own company.<sup>90</sup>

As this Article goes to press, "microcredit" as a buzzword still enjoys continuing popularity with numerous and varied sources of development funding.<sup>91</sup> No jargon will stay eternally in fashion. By any name, however, microcredit presents a macro-prescription: the fostering of gainful economic activity through small loans for which lenders expect and enforce repayment. As such, it will continue to appeal to sources of capital located outside the boundaries of the nation that builds a reparations scheme.<sup>92</sup> This

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.asp?ID=218024 (last visited Sept. 24, 2009). Other American politicians admire microcredit, too. Introduced in the United States Senate, the Women and Children in Conflict Protection Act of 2003 sought to extend microcredit to society's most vulnerable classes, including refugees and internally displaced persons. See Women and Children in Conflict Protection Act of 2003, S. 1001, 108th Cong. § 306(e) (2003) (detailing microfinance grants to specific persons and institutions). Aiming to implement sustainable programs equipped to address acute humanitarian needs, this bill includes provisions for microcredit as a source of enhanced economic security for women as household providers. *Id.* § 306(a)-(d).

<sup>89</sup> Alison Benjamin, *Dollar a Week Bank is Still a Success*, GUARDIAN WEEKLY, Jun. 19, 2009, at 44 (reporting expansion of Grameen programs into New York, via Citibank); Mark Sappenfield & Mark Trumbull, *Big Banks Find Little Loans a Nobel Winner, Too*, CHRISTIAN SCIENCE MONITOR, Oct. 16, 2006, World, at 1, available at <http://www.csmonitor.com/2006/1016/p01s03-wogi.html> (describing the business appeal of microfinance programs).

<sup>90</sup> Hugh Grant, Chief Operating Officer, Monsanto Co., Remarks at the Microcredit Summit +5 (Mar. 2003) (transcript available in Microcredit Summit E-News, [http://www.microcreditsummit.org/enews/2003-03\\_sp\\_grant.html](http://www.microcreditsummit.org/enews/2003-03_sp_grant.html)).

<sup>91</sup> See, e.g., Sara Corbett, *Can the Cellphone Help End Global Poverty?*, N.Y. TIMES, Apr. 13, 2008, (Magazine), at 34 (explaining the role of microfinance in developing village phone-sharing initiatives); Cheryl Hall, *Big D Givers Embrace Micro-Loans Programs*, DALLAS MORNING NEWS, Oct. 26, 2008, Business, at 1D (addressing Grameen affiliate initiatives that support local Texan businesses like beauty parlors and auto repair shops); Jim Simon, *In Kenya, Ambitions for Microfinance Grow*, CHI. TRIB., Sept. 22, 2009, at 27.

<sup>92</sup> For a more cynical expression of this point, see Walden Bello, *Microcredit, Macro Issues*, NATION, Oct. 14, 2006, <http://www.thenation.com/doc/20061030/bello> (arguing "establishment circles" support microcredit programs largely because they present a market-based economic strategy without the

sector of foreign supporters reliably prefers entrepreneurship to mere “handout[s],”<sup>93</sup> or what Seibel has called “one-off payments.”<sup>94</sup> Another virtue that might remain central—long after the Year of Microcredit has ended—is that while this technique flatters neoliberalism and the politicians who promote markets in the West, microcredit can also be practiced in harmony with Islam.<sup>95</sup> Partnerships between national reparations-through-microfinance plans and foreign sources of capital could thus arise in Muslim contexts with relatively little worry about potential backlash—an unusual advantage for a device that gets praised both as feminist<sup>96</sup> and for offering a secular alternative in the Muslim nation of Bangladesh.<sup>97</sup>

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serious side effects that have arisen from alternative market-based plans, such as the World Bank’s infamous structural adjustment policies).

<sup>93</sup> On the contrast between the two, see *Can Technology Eliminate Poverty?*, BUS. WEEK ONLINE, Dec. 26, 2005, [http://www.businessweek.com/magazine/content/05\\_52/b3965025.htm](http://www.businessweek.com/magazine/content/05_52/b3965025.htm) (“I get very upset when people say [the poorest] people don’t have the entrepreneurial ability, initiative, and skills to use loans, so they need some other kind of intervention like subsidy, handout, or charity.” (quoting Muhammad Yunus) (alteration in original)); Evelyn Iritani, *Tiny Loans Seen as Big Way to Invest in Developing Nations’ Poor*, L.A. TIMES, July 28, 2006, at C1 (reporting strong entrepreneurial interest in microcredit particularly because of its “hand-up, not a handout” approach to poverty); Corbett, *supra* note 91, at 34 (describing a Grameen initiative that uses microcredit to facilitate rural access to cell phones through local entrepreneurs).

<sup>94</sup> SEIBEL, REPARATIONS SHAREHOLDERS, *supra* note 9, at 1 (noting that, in contrast to microfinance, the benefits of such payments “tend to be short-lived and unsustainable”).

<sup>95</sup> Zofeen Ebrahim, *Pakistan: Islamic Banking is Microcredit Too*, INTER PRESS SERVICE, Feb. 5, 2006, <http://ipsnews.net/news.asp?idnews=32041> (reporting that one microcredit lender in Pakistan espouses the religious tenet of Qarze-e-Hasna, or “helping someone in need with interest-free loans, which are preferred over charity”). The question of interest on the loans would play a part in Muslim opinions of microcredit schemes, but poses no insurmountable hurdle. After all, enterprises currently transact financial business in the Muslim world while respecting its disapproval of interest. Jerry Useem, *Banking on Allah*, FORTUNE, June 10, 2002, at 154, 156 (describing Islamic approaches to financial transactions, including *murabaha*, a method that resembles interest, and *darura*, the excuse of “overriding necessity”).

<sup>96</sup> See Press Release, Norwegian Nobel Committee, *supra* note 12 (acknowledging the empowering role of microcredit for women).

<sup>97</sup> See Celia W. Dugger, *Peace Prize to Pioneer of Loans for Those Too Poor to Borrow*, N.Y. TIMES, Oct. 14, 2006, at A6 (“In the overwhelmingly Muslim nation of Bangladesh, Mr. Yunus’s approach also offered hope and ideas to compete with the allure of fundamentalist Islamic causes. ‘It’s a very secular movement,’ Professor [Amartya] Sen said, ‘very egalitarian, market friendly and socially radical.’”).

Microcredit has offered much to many: one magazine characterized the gains as “Millions for Millions.”<sup>98</sup> It need not deliver on everyone’s ambitious dream to help a reparations plan. Popularity itself is a useful virtue, and reparations programmers who avail themselves of microfinance would be connected to sources of powerful external support.

#### 4. THE ALIGNMENT OF MICROFINANCE WITH REPARATIONS AS INFORMED BY TORT THEORY

A program that disburses pecuniary reparations in the form of shares in microfinance institutions would augment the security and freedom of citizen recipients and thus, as elaborated in the previous Part, align with aspirations central to tort law. Equally important, microfinance as a mode of pecuniary reparations strengthens the promise of tort law as a means to effect justice for individuals. Simple cash transfer payments to individuals comport with the ambitions of tort law, but microfinance does so with more force.

##### 4.1. *Augmenting Security and Freedom*

###### 4.1.1. *Microfinance and security*

In prosperous nations, tort remedies presume that judgments yield money and that successful plaintiffs will receive these funds in a form they can save or spend as they choose. Spenders get the benefit of what they buy; savers get the comfort of knowing they can spend later. This belief is not especially accurate, even when one puts aside the fact that even in the United States, a country perceived as litigious, most victims of tortious conduct do not sue and most lawsuits are resolved by means other than a judgment.<sup>99</sup> In nations suited to considering reparations schemes, the presumption grows more inaccurate still. The poor—and a large

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<sup>98</sup> Bruck, *supra* note 60.

<sup>99</sup> See Richard L. Abel, *The Real Tort Crisis – Too Few Claims*, 48 OHIO ST. L.J. 443, 448–52 (1987) (noting studies that indicate a low incidence of tort claims arising out of injuries in the United States); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 515–16 (2004) (documenting high settlement rate as one of many mechanisms for dispute resolution obviating the need for trial resolution); Gilles, *supra* note 53, at 617–23 (reporting high proportion of potential defendants who are judgment-proof).



number of reparations recipients will be poor—often cannot save, and not because they need to consume all their income for survival. As was mentioned, bank accounts remain out of reach for many poor people around the world, who must resort to dangerous methods of holding their savings: burial (as in under a mattress, or in the ground); jewelry that is vulnerable to theft and usually cannot be sold quickly for its full value; and animals that die, get sick, get stolen, and wander away.<sup>100</sup>

When governments disburse money, other threats to security arise even for recipients who have a safe place to store it. The trauma to the nation that preceded the reparations program compels planners to anticipate threats to safety in the disbursement of payments. Conflict-torn regions are littered with armaments like guns and grenades; demobilized soldiers who know how to use these weapons are often present as well.<sup>101</sup> Microfinance institutions struggle with this danger on the ground.

As a response to this problem, one report offers microfinance institutions practical advice toward advancing security. It seeks mainly to prevent armed robberies, which threaten institutions and their human constituencies.<sup>102</sup> Tipsheet pointers (e.g., “[n]either staff nor clients should wear uniforms or organizational T-shirts or outfits which may identify who might be carrying money”)<sup>103</sup> do not of themselves build a “failsafe” institution.<sup>104</sup> But a local microfinance entity might nevertheless be the safest place for a recipient to store the money she receives, and microfinance has great potential to increase security even for those who do not participate as shareholders. When a microfinance institution is the only bank-like entity within reach and can offer a modicum of security to its customers, the money the recipients deposit there will generally be safer from loss than money they keep at home.

When a local microfinance institution exists near a commercial bank, this institution can offer recipients security-enhancing benefits that the nearby commercial bank may not be able to give

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<sup>100</sup> Easton, *supra* note 80.

<sup>101</sup> See KENNETH GRABER, MICROENTERPRISES BEST PRACTICES, SECURITY ISSUES FOR MICROFINANCE FOLLOWING CONFLICT 1-2 (2001), [http://www.gdrc.org/icm/disasters/Following\\_Conflict\\_Brief\\_6f.pdf](http://www.gdrc.org/icm/disasters/Following_Conflict_Brief_6f.pdf) (describing the unique dangers posed by the lingering effects of combat in post-conflict societies).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 3.

<sup>104</sup> *Id.* at 5.

them. For example, a recipient might be too small an account-holder to have access to a commercial account, but holding reparations-based shares in a microfinance institution could convey to her this additional security whenever microfinance institutions band together, offering low-tech shelter to members in their dealings with the nearby commercial bank. A group of otherwise vulnerable recipients could travel together when carrying money, receive checks rather than cash from the commercial bank, and have space to welcome representatives of the commercial bank who come to meetings bearing cash.<sup>105</sup>

By bringing together enterprise-minded individuals with cash on their hands, microfinance settings also offer a venue for creative thinking on how to store money safely and enhance the safety of familiar settings.<sup>106</sup> They provide a locus from which to initiate or expand the furnishing of insurance, a commodity that poor people around the world desperately want. Researchers find strong demand for insurance in the developing world, particularly against drought, harm to livestock, and funeral or burial expenses.<sup>107</sup> Entities supported by government reparations payments would have the capital to meet some of this demand. Engaging microfinance institutions would thus add force to the security that tort principles seek to extend.

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<sup>105</sup> *Id.* at 4–5.

<sup>106</sup> For example, in 1984 the Association of Rickshaw Pullers of Zaire worked out a scheme to deposit part of a day's receipts with a respected elder. When the elder is a woman, the record of deposit is called a *mamma-card*; a deposit with a male elder is a *papa-card*. Before the onset of this system, the rickshaw pullers had no safe place to store their income. Ass'n of Rickshaw Pullers of Zaire, *Papa-Card or Mamma-Card: Innovative Way for Credit*, <http://www.gdrc.org/icm/inspire/papa-mamma.html> (last visited Nov. 1, 2009). In West Africa, mobile bankers called *susu* in Ghana and *esusu* in Nigeria have evolved to allow poor people to maintain savings accounts. These savers have to pay a small fee every month to do so, rather than collect interest; they favor the arrangement because it keeps their money safe and establishes a relationship with a banker who might be available later to make a small loan. WORLD BANK, *ENGENDERING DEVELOPMENT: THROUGH GENDER EQUALITY IN RIGHTS, RESOURCES, AND VOICE* 173 (2001).

<sup>107</sup> Stefan Dercon, a professor of development economics at Oxford, has explored the issue in several contexts. See, e.g., Stefan Dercon, *Insurance Against Poverty Overview*, Jan. 2003, at 2, [http://www.economics.ox.ac.uk/members/stefan.dercon/overview%20document%20insurance%20against%20poverty\\_new.pdf](http://www.economics.ox.ac.uk/members/stefan.dercon/overview%20document%20insurance%20against%20poverty_new.pdf) (arguing poor people are "least able to cope with risk and shocks, and therefore would benefit most from protection"); Stefan Dercon et al., *Group-Based Funeral Insurance in Ethiopia and Tanzania* 5–6 (Ctr. for the Study of African Economies, Working Paper No. 227, 2004), available at <http://www.bepress.com/cgi/viewcontent.cgi?article=1227&context=cxae> (finding funeral associations may be useful model for "other developmental activities").

#### 4.1.2. *Microfinance and Freedom*

Giving recipients money in the form of shares in a microfinance institution enhances their freedom as owners, entrepreneurs, and policymakers. Under the reparations scheme advocated here, these individuals would receive not only money from their government but, later on, applications from persons in their community seeking to borrow some of this capital from the institution. Thus money quickly conveys to victims of human rights abuses a modicum of power over their future. They would have a legislative-like say in appropriations that affect human lives. They might ask, "Do we want a well, an electric plant, a feedlot, an expanded transport?" In the answer they express, they would establish themselves as builders of a sustainable order.

One American donor who had managed a mutual fund before devoting her time to microfinance projects reported raptly on her observation of microfinance in Vietnam as an expander of freedom:

Does everyone succeed? No. But it is the same in the investment business. You don't want to take a lot of risk? Buy some ducks. But the more risk-taking borrowers will pool their loans and buy a baby water buffalo and rent it to men for farming. And then there are those who blow right past livestock and build a brick factory.<sup>108</sup>

#### 4.1.3. *Justice for Individuals*

A microfinance scheme rather than a simple transfer payments scheme addresses the concern that many observers and recipients of pecuniary reparations have expressed about the limits of cash as redress for injury. Recall that victims of human rights abuses feel ambivalent about monetary payments known to some of them as "blood money."<sup>109</sup> If Tom Tyler and Hulda Thorisdottir are correct to say that for victim-recipients money is never enough, and leaves them hungry for a sense of "moral accountability,"<sup>110</sup> then microfinance is a uniquely strong form of pecuniary reparation.

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<sup>108</sup> Bruck, *supra* note 60, at 64.

<sup>109</sup> de Greiff, *supra* note 6, at 461; *see also supra* note 26 and accompanying text.

<sup>110</sup> Tyler & Thorisdottir, *supra* note 24.

In addition to the greater force of increasing agency during the process of reparations,<sup>111</sup> microfinance adds strength through its preoccupation with accountability and honest books. A cash transfer appropriates a large sum of money and divides it into handouts or “one-off payments.”<sup>112</sup> For recipients, this payment may bear an air of “Here you are, happy now? For God’s sake, no revolution, please.” Endowing recipients with shares in a microfinance institution, by contrast, emphasizes the government’s commitment, permanence, and seriousness of purpose. Under ordinary conditions of liquidity within the microfinance institution chosen for the plan, a recipient might be able to turn her distribution into one-off payment money and nothing more, but she would have to work to get that result.<sup>113</sup> The default setting would establish her as a shareholder in an ongoing enterprise. In her role as owner-manager, a person playing some role in the review of loan applications, she would necessarily think about repayment in terms of justice and rectification.

A microfinance scheme for distribution also strengthens the possibility that the government would use subrogation in the seizure of wrongdoers’ assets.<sup>114</sup> In order to choose microfinance over the simpler transfer payments scheme, the government would have to commit itself to a more detailed set of books. It would know not only who was receiving payments but where those payments were going, at least at their first point of transfer. Thereafter, the regulations affecting the functions of the microfinance institution would provide further monitoring of these funds.<sup>115</sup> This level of regulatory detail might convince overseas banks holding wrongdoers’ assets that the nation emerging from chaos can be trusted to control the monies they would turn over. This confidence in the future would encourage such a turnover,

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<sup>111</sup> See *supra* Section 3.3 (discussing advantages of microfinance over simple cash transfers).

<sup>112</sup> Seibel, *supra* note 9, at 1; see also *supra* note 94 and accompanying text.

<sup>113</sup> See *infra* text accompanying notes 136–38 (discussing the cultural and legal obstacles encountered by women in maintaining property in their own name).

<sup>114</sup> See *supra* text accompanying note 39 (discussing vicarious liability in the context of proposed unit within national government that would seek indemnification from wrongdoers).

<sup>115</sup> See *supra* notes 63–65 and accompanying text (noting the microfinance institution that would receive payments might be a formal institution, meaning a regulated entity, or a semiformal institution, meaning a registered entity whose existence is known to the government; even institutions in the “informal” category might be upgraded later).

and next this transformation of ill gained wealth into lawfully held funds would help to satisfy recipients that what they receive consists of shares in an endeavor to link money with justice rather than injustice.

##### 5. MICROFINANCE PAYMENTS AS SOURCES OF GENDER FAIRNESS AND WELFARE

According to the many admirers of microfinance, this innovation, particularly its variant of "microcredit," permits women to flourish. The citation for the Nobel Prize awarded to Muhammad Yunus and the Grameen Bank mentioned women's liberation as one of the effects of microcredit.<sup>116</sup> Conventional wisdom holds that women who receive microloans work hard, repay debts faithfully, encourage fellow borrowers to comply with loan terms, and, perhaps, manifest ideals of community and team-player solidarity from which a male-dominated model of commercial banking could learn.<sup>117</sup>

In response, critics have called microcredit a false cure for female poverty and powerlessness.<sup>118</sup> As United Nations Secretary

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<sup>116</sup> See Press Release, Norwegian Nobel Committee, *supra* note 12 and accompanying text ("Micro-credit has proved to be an important liberating force in societies where women in particular have to struggle against repressive social and economic conditions.").

<sup>117</sup> See Avery, *supra* note 77, at 221-22 (explaining group-based lending encourages compliance with loan terms through peer pressure of maintaining good credit for the group); Fundación Adelante, What We Do: Our Loan Program, [http://www.adelantefoundation.org/loan\\_program.htm](http://www.adelantefoundation.org/loan_program.htm) (last visited Nov. 1, 2009) (attributing a better than 95% repayment rate to "character-based lending" to poor female borrowers in Honduras, in contrast to traditional "collateral-based lending").

<sup>118</sup> Drake Bennett, *Small Change*, BOSTON GLOBE, Sept. 20, 2009, [http://www.boston.com/bostonglobe/ideas/articles/2009/09/20/small\\_change\\_does\\_micro\\_lending\\_actually\\_fight\\_poverty/](http://www.boston.com/bostonglobe/ideas/articles/2009/09/20/small_change_does_micro_lending_actually_fight_poverty/) ("And while microcredit champions point to microloans as a tool for empowering women, the studies see no impact on gender roles, and find evidence that if any one group benefits more, it's male entrepreneurs with existing businesses."); Barbara Crossette, *Experts Question Wisdom of Micro-Credit for Women*, WOMEN'S E-NEWS, Mar. 2, 2003, <http://www.womensenews.org/article.cfm/dyn/aid/1284>; Anne Marie Goetz & Rina Sen Gupta, *Who Takes the Credit? Gender, Power, and Control Over Loan Use in Rural Credit Programs in Bangladesh*, 24 WORLD DEV. 45, 47 (1996) (noting that male relatives control much of the loaned capital that women are obliged to repay); Gina Neff, *Microcredit, Microresults*, 74 LEFT BUS. OBSERVER 1, 4-5 (Oct. 1996), available at <http://www.leftbusinessobserver.com/Micro.html> (criticizing Yunus and the Grameen bank for failing to lift most borrowers out of poverty and arguing that entrepreneurship rhetoric diverts women from wage labor that

General Kofi Annan put this objection in a 1999 report to the General Assembly, it is “lack of access to land,” rather than a lack of loans, that presents the most critical single cause of rural poverty.”<sup>119</sup> On the Grameen fix, the Annan report expressed skepticism, stating “a certain sense of proportion regarding micro-credit would seem to be in order.”<sup>120</sup> This critique prompts a useful reminder of the difference between “microcredit” and “microfinance” for reparations purposes: the microfinance scheme advocated here does not create the burden of new debt because it regards reparations payments as conveyed outright, rather than loaned to recipients. Thus, even if critics are correct to worry about the imposition of loan repayment obligations on women who may not be able to control the money they borrow, that concern does not pertain to the reparations plan advocated here.

This reservation noted, microfinance and what one World Bank report calls gender equality—a term defined there to include “equality under the law, equality of opportunity (including equality of rewards for work and equality in access to human capital and other productive resources that enable opportunity), and equality of voice (the ability to influence and contribute to the development process)”<sup>121</sup>—have common elements. Both have to do, at least in part, with the distribution of material goods.<sup>122</sup> Both are secular phenomena. Both are at least consistent with, if not committed to, the seizure of new opportunity by historically oppressed persons. As practiced around the world, microfinance puts money in the hands of women, an outcome that advocates of gender equality pursue.

To add tort theory to the mix of gender and microfinance, consider the quest for security and freedom that underlies tort actions as prosecuted in the courts. Tort principles emerge with reference to the purposes and functions of civil liability as policy. Its doctrine compels wrongdoers to pay damages to their victims

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would pay better, and also restricts women borrowers to low-yield work that men do not want to do).

<sup>119</sup> Crossette, *supra* note 118.

<sup>120</sup> *Id.*

<sup>121</sup> WORLD BANK, ENGENDERING DEVELOPMENT THROUGH GENDER EQUALITY IN RIGHTS, RESOURCES, AND VOICE 2-3, (2001), available at [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2001/03/01/000094946\\_01020805393496/Rendered/PDF/multi\\_page.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2001/03/01/000094946_01020805393496/Rendered/PDF/multi_page.pdf).

<sup>122</sup> Some strands of “feminism” do not share this inclination: “gender equality,” by contrast, cannot escape the material world.

not only to enhance the freedom and security of individuals in the correct balance but also, at a societal and conceptual plane, to achieve results. Welfare and fairness are its two chief desiderata. Fairness (associated with corrective justice) looks backward, to redress injury attributed to wrongdoing. From this perspective, leaving the injury without a remedy is wrong. Some observers of tort law regard fairness as central; others deem it peripheral and subordinate to its rival, welfare. Reparations through microfinance comports with both fairness and welfare.

5.1. *Reparations Through Microfinance as a Source of Fairness for Women*

5.1.1. *Ameliorating the Additional Injustice of Having Been Deprived of a Fair Measure of Control Over Money*

The endeavor of planning reparations for recent human rights violations coexists with a less vivid, but older and more deeply rooted, wrong: throughout human history, and continuing to this moment, women in the aggregate have not enjoyed equality with men with respect to the possession of and control over wealth. Laws and norms have taken money out of their hands as if women were moral children and money something too dangerous for them to hold. A generation ago, the United Nations made a famed announcement on point: "Women do two-thirds of the world's work [as measured in hours], earn one-tenth of the world's income, and own less than one-hundredth of the world's property."<sup>123</sup>

Although the United Nations has not updated this notorious statistic about the world, local studies have continued to find that disparities remain. For example, the United Nations Millennium Task Force reported in 2005 that women produce up to 80% of the household food in Africa and the Caribbean,<sup>124</sup> and that women in Zambia devote an extraordinary 800 hours a year to gathering food and firewood.<sup>125</sup> Ownership of land—a time-honored means for individuals to accrete economic strength—is less available to women than men, particularly in developing countries. The World

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<sup>123</sup> CATHARINE A. MACKINNON, ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES 21 (2006) (citing UNITED NATIONS, THE STATE OF THE WORLD'S WOMEN (1979)).

<sup>124</sup> U.N. Millennium Project, Task Force on Educ. and Gender Inequality, *Taking Action: Achieving Gender Equality and Empowering Women* 77 (2005).

<sup>125</sup> *Id.* at 7–8.

Bank reports that many national laws still place women under the guardianship of husbands and recognize “no independent right to manage property.”<sup>126</sup> Several African countries deny married women the right to own land<sup>127</sup> and take land ownership away from women who become widowed or divorced.<sup>128</sup> Studies of cultivated-land ownership in Asia and Latin America as well as Africa show that women possess smaller parcels, inferior land, and less farming equipment than what men possess.<sup>129</sup>

These conditions—more toil, less income, and much less property for women—persist and appear more benevolent than they are with the help of ideology. Patriarchy posits a male provider who heads his household and meets the needs of the women and children inside. It further asserts that the women inside are better off than they would be under conditions of gender parity.<sup>130</sup> The male-headed household protects women from their various infirmities regarding money and property. Women, it has been said around the world, are too naive to manage money, too swayed by emotion to retain it, too busy with child-making and child-minding to have time for it, too petty-minded to leverage it, or too pure to want it. A dire pattern in many parts of the world,

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<sup>126</sup> WORLD BANK, *supra* note 121, at 37.

<sup>127</sup> *Id.* (including Botswana, Lesotho, Namibia, and Swaziland).

<sup>128</sup> *Id.* at 51.

<sup>129</sup> *Id.* at 51–52; *see also, id.* at 120–21 (reporting that much land reform of the 1990s in Latin American and Africa has failed to alleviate these conditions).

<sup>130</sup> One expression of this ideology argues that it benefits women:

The women of every society save our own have understood that the male's nature is such that he must be given a special position in the family if he is to peacefully take his place in it . . . . Women have realized that men will not even attempt to suppress [their socially disruptive] tendencies if they are offered no distinctive and respected position in the family, a position that can act as counterpoise to both the limits marriage sets on male behavior and the centrality that the woman's unique physiological and psychological bond to the infant automatically gives her. . . .

In response to the refusal to grant them their traditional role men will tend to either a) disrupt the family as they attain through aggression that which they were once granted, or b) channel their energies into sexual conquest outside the family. Women will find that they are raising their children either on a battlefield or alone, wondering why loudmouthed Rambos have replaced strong, silent defenders of justice and protectors of women.

Steven Goldberg, *Can Women Beat Men at Their Own Game?*, NAT'L REV., Dec. 27, 1993, at 30.



unequal educational opportunities for girls and young women is both a symptom and cause of these beliefs.

Payments in the form of shares in a microfinance institution serve to repair this unfairness more effectively than other forms of pecuniary reparations. Regardless of the level of formality of the microfinance,<sup>131</sup> these shares can work to rectify historical gender-injustice. Formal institutions offer women recipients access to technology, and services that had been closed off to most of them in the past. The category of semi-formal institutions available for reparations through microfinance is dominated by nongovernmental organizations, which can offer female recipients a range of support as well as a place to hold their reparations shares. Informal institutions can advance women's interests by honoring compatible local traditions and promoting ideals of self-help.<sup>132</sup>

The simultaneous creation of both a savings account and a modicum of power over the economic lives of other people bestows property on women whose value exceeds the sum transferred. Shares in microfinance institutions give all women recipients at least de-facto savings accounts (which might previously have been out of their reach), and for some fraction of recipients creates real opportunities to govern the institution. Because virtually every microfinance institution makes loans, these women shareholders have a voice in capital investment decisions affecting their communities. A reparations payment with the name of a woman on it links these small savings accounts and shares in a business with the rectification of injustice. If microfinance can generate even a portion of the wealth that its admirers believe it can create, then a reparations scheme that transfers shares of a microfinance institution to women as recipients and owners will improve dramatically the statistic that half the world's population owns less than a hundredth of its property.

Shares in a microfinance institution thus help women take a stand against both the injustice of human rights violations and the unjust effects of patriarchy within a national economy. Patriarchy had instructed women to renounce any desire for overt power in hopes of gaining security in return. Microfinance teaches just the opposite: that the security one receives from holding money takes

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<sup>131</sup> See SEIBEL, REPARATIONS SHAREHOLDERS, *supra* note 9, at 4 (sketching three levels of formality).

<sup>132</sup> *Id.* at 14–16 (describing informal microfinance institutions).

form not in a wall or barrier from public life but in decisions, choices, and investment. Shareholders affect their own wishes and respond to the material consequences of what they express. Whether they participate in microfinance while unable to forget the human rights violations for which they received monetary compensation, or, at the other extreme, feel determined never to think about their past and only look forward as investors, they reclaim what was theirs all along, the sense of recognition and agency.

In standing up against both acute crises and quotidian patriarchy, this measure of reparation emphasizes what the two evils have in common. The stated transformation of wrongdoing and suffering into shares for holders who may have had no prior experience with financial instruments reminds participants and observers of the connection between, on one hand, the episode of oppression that gave rise to a reparations scheme, and on the other, the duller background condition of women disabled from full rights to own property. To name these two wrongs in the same sentence is not to equate them. The first is not only more vivid but worse. However, linking a historical antecedent with a facet of everyday life does not deny any portion of the horror inherent in a particular national crisis.

On the contrary, catastrophes become both more intense and more poignant when one becomes aware of an infrastructure that amplifies their harm. To put the point more optimistically, a reparative project that enables women to hold and spend their own money installs an architecture that can help achieve other repairs, should a subsequent crisis ensue. An architecture that puts money in all its facets—saving, spending, diverting, withholding, encouraging, investing—in the hands of women also makes civil society stronger.

#### 5.1.2. *Fairness Through Shareholding Rather than the Receipt of Quick Cash*

As we have seen, one reason policymakers choose shares in microfinance institutions as the means of effecting pecuniary reparations is to augment “security,” in the sense of allowing a recipient to keep her payment safely rather than have to hide it in her home or convert it into none-too-safe chattels that could be

destroyed or taken from her.<sup>133</sup> Reparations through microfinance offers security in other senses, including the prospect of leveraging one's payment into additional income that can buy more shelter from various dangers—cleaner food and water, safer housing, respite from exhausting or dangerous labor—and the fostering of sustainable income-generating activities.<sup>134</sup> There remains for brief treatment here one more crucial security theme, present in any plan for pecuniary reparations: the danger that (male) relatives or intimate partners could seize money nominally distributed to (female) recipients.

Layers of complication challenge the delivery of security—and freedom-enhancing increments to women through any pecuniary reparations program, not just the microfinance variant advocated here. Some recipients might, in particular, wish to share or relinquish what they receive, and believe they enjoy more freedom or more security as a consequence. A wife may know that her husband had his eye on a bicycle or a truck, from which purchase she would also gain some attenuated benefit. If he had been idle and depressed, she might believe he would feel heartened, and thus become easier to live with, by the boost of money in his pocket. A handout to a man from a woman might also ameliorate difficulties inside the home when a man impinges on his family's security by making threats to leave, to become violent, or to take up dangerous work for the sake of earning income.

Should these examples sound drearily anti-male, amiable men will serve the point almost as well. A good man may too have suffered in the old days and been treating his woman kindly during hard times; might our recipient not want to share her money with him? A recipient of reparations money might feel indebted to her man for shelter and other boons from intimate partners.

Or consider children. Some, if not most, women who receive reparations money would, without hesitation, try to share it with the next generation. Notwithstanding de Greiff's warning that "the responsibilities of a program of reparation are not the same as that of a development or social investment plan,"<sup>135</sup> mothers would

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<sup>133</sup> See Easton, *supra* note 80, at 3 and accompanying text.

<sup>134</sup> See SEIBEL, REPARATIONS SHAREHOLDERS, *supra* note 9, at 1, 6–9 and accompanying text.

<sup>135</sup> de Greiff, *supra* note 6, at 451, 471.

certainly spend part of their reparations funds on education, health care, and food for their young.

Overriding such choices by women, or making them difficult to effect, could undermine the ambitions of compensation. The large feminist literature on choice and agency cautions against accusing women of “false consciousness” for manifesting decisions that appear self-negating,<sup>136</sup> but offers little guidance on how to make reparations money stay with the women who receive it. Here, thinking about security and freedom becomes helpful after the fact as a way to understand what might otherwise look like squandering. The point of the endeavor had been to enhance the security and freedom of recipients. Recipients’ diverting their money to men and children might have been consistent with this goal.

That said, however, it would be a facile error to condone any and every distribution of reparations payments as always (with the help of tautology) enhancing the security and freedom of their female recipients. Reparations programs owe to recipients not only the rendering of a designated payment, but also the safeguards that protect it from both intentional and unintended disappearance. Like commercial creditors, investors, and mortgagees, women recipients of reparations are entitled to enjoy whatever the rule of law can provide to safeguard their property. Accordingly, a program’s design must anticipate foreseeable obstacles to delivery and receipt of the transfer of wealth.

When recipients are women, one key obstacle worthy of attention is the belief that women should not have the power to spend money on their own, or for themselves. One can envision women who simply do not feel entitled to make spending decisions that enrich themselves directly until they know that their families’ needs have been satisfied first. A reparations planner probably cannot thwart such an inclination, but each payment should have a chance to get to each individual woman first, rather than to her men or dependent children. Shares in an institution

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<sup>136</sup> See, e.g. Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 324–50 (1995); Nadine Strossen, *A Feminist Critique of “The” Feminist Critique of Pornography*, 79 VA. L. REV. 1099, 1139–40 (1993); see also Kerri Lynn Stone, *Consenting Adults?: Why Women Who Submit to Supervisory Sexual Harassment Are Faring Better in Court Than Those Who Say No . . . and Why They Shouldn’t*, 20 YALE J.L. & FEMINISM 25, 25 (2008) (describing ambiguous views of female agency in sexual harassment case law and commentary).

achieve this result better than any other rendering of money. These shares have women's names on them. They implicitly contain protection against theft and loss. They state plainly that recipients include individual women (or men), and are not paid only to households, families, or communities.

These specifics might provoke an objection, familiar from the gender controversies surrounding microcredit in the Grameen mode, that recognizing women as individuals with competence in worldly realms and who hold personal identities separate from household and tribe offends the cultural norms of a particular country, and thus that such a reparations scheme would be unsustainable in that venue.

This objection should be seen either as mere vapor that rises from what activist Sara Hlupekile Longwe has called "the patriarchal cooking pot"<sup>137</sup> and rejected, or else taken seriously and heeded. In other words, perhaps there really are places where cultural predilection and commercial backwardness intersect to destroy basic safeguards that would otherwise protect property transferred to women. Where the claim of absent safeguards is credible, program designers should, in the name of fairness, reconsider their plan of paying recompense to individuals. A society that cannot foster women holding property in their own name—one treats women only as the means, never the end, of a program that affects national repair—is one whose reparations scheme ought to be confined to non-pecuniary measures. Insisting on naming women as payees would promote strife in such a setting. Cash changing hands under the contrary approach, one that defers to patriarchy rather than resists it, would reach the wrong people and go to waste.

As the experience of microcredit around the world demonstrates, however, some women even in backward economic settings have held their property successfully.<sup>138</sup> The limited successes of microcredit would be enhanced by shareholding in contrast to the receipt of quick cash, which non-recipients could grab and squander. Shares in a financial institution, in sum, can offer the best prospects for fairness in the delivery of pecuniary reparations.

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<sup>137</sup> Sara Hlupekile Longwe, *The Evaporation of Gender Policies in the Patriarchal Cooking Pot*, 7 DEV. PRAC. 148, 148 (1997).

<sup>138</sup> On the disputes surrounding this point, see *supra* note 118 and accompanying text.

5.1.3. *Reparations Through Microfinance as a Source of Gender-Egalitarian Welfare*

In contrast to the fairness perspective, welfare analysis looks forward, striving to increase wealth for persons in the aggregate. It seeks incentives. In the context of personal injury law, the welfare perspective encourages legal systems to force inflictors of injury to pay for the injuries they cause when the internalization of these costs of harm-causing activities would enhance social wealth.<sup>139</sup> Recognizing that human activity produces prosperity along with losses, welfare analysis seeks to foster optimal rather than unbounded investments in safety. Thus, it requires those who inflict injury to pay only for not having taken cost-justified measures, rather than every possible measure, to avoid causing injury.<sup>140</sup>

Welfare analysis of injury law may appear to deviate slightly from the scope of this Article. First, it is normally used to study accidental harm, not the intentional or reckless injuries that reparations programs address. Second, in principle, welfare analysis does not pursue the compensation of victims, but rather the imposition of monetary sanctions. As long as the injurer pays, and as long as potential injurers as a group have to take into account their obligations to pay should they injure someone, it matters little to welfare analysis whether any injured person collects anything. However, these deviations do not limit the value of the exercise. Nothing in welfare analysis precludes its application to intentionally or recklessly inflicted harms,<sup>141</sup> and efficiency-minded scholars have recognized that because fines and other public sanctions are typically under-used and too cheap: empowering the victim as recipient can help to ensure that wrongdoers pay at the optimal level.<sup>142</sup>

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<sup>139</sup> See generally STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 5–46 (1987) (discussing deterrence and the maximization of welfare).

<sup>140</sup> In other words, if a precaution would have cost more money than it would have saved, the inflictor should not have to pay for the resultant loss. This possibility lies outside the scope of this Article.

<sup>141</sup> Indeed, one prominent practitioner, Richard Posner, applied this analysis to rape. See RICHARD A. POSNER, *SEX AND REASON* 384–85 (1992) (discussing the tension between moral intuition and the rational model's allowance of rape so long as the rapist receives more pleasure from the action than inflicts pain on the victim).

<sup>142</sup> Writings on this point from the law and economics camp include Jennifer H. Arlen, *Compensation Systems and Efficient Deterrence*, 52 MD. L. REV. 1093, 1114

Variables will complicate their assessment of a reparations program, but in general, the awarding of monetary reparations to individual victims in the form of microfinance will make sense to welfare analysts. Even though reparations planners may feel confident that the nation has turned a corner and thus that traumas to citizens will not recur, a project of reparation does not supersede the quest of deterrence through incentives. Even though many individual wrongdoers would then be out of power (or, better yet, dead), awarding money to victims from the government deemed responsible teaches prospective wrongdoers about this particular punch contained in a new rule of law. Among the different ways to distribute pecuniary reparations, microfinance in the post-crisis context is particularly attractive to welfare analysts because of the connection between microfinance and sustainable economic development.<sup>143</sup>

With the welfare effects of a reparations-through-microfinance scheme noted, government planners can pay heed to the distributive effects of this reparations policy. Enter gender. Welfare analysis aggregates people into groups, and so one applying it may generalize about “men” and “women,” individual exceptions notwithstanding. In this framework, placing value on the interests and experiences of women citizen-recipient is a good idea if it would make societies better off, but a bad one if it would make societies worse off. Because this extra attention to women would have the effect of transferring money into women’s hands,

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(1993) (emphasizing that civil actions may be more likely than criminal actions to be prosecuted); Ronen Perry & Yehuda Adar, *Wrongful Abortion: A Wrong in Search of a Remedy*, 5 YALE J. HEALTH POL'Y L. & ETHICS 507, 585 (2005) (arguing that “wrongful abortion” creates more deterrence than either tort or criminal liability can deliver, and proposing that courts make available “an extra-compensatory civil fine” to be divided between plaintiffs and the state). See generally Richard Craswell, *Instrumental Theories of Compensation: A Survey*, 40 SAN DIEGO L. REV. 1135, 1138 (2003) (arguing that whether requiring the payment of compensation accords with the goal of efficiency is a complex question whose answer depends on variables). Another prominent economic analyst argues that mandating compensation to victims is *more* necessary in the case of intentional torts as compared with “ordinary” or accidental torts, so as to eliminate inefficient expenditures in self-protection that victims make. See William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652, 673 (1983) (“In ordinary torts, efficiency can be achieved without compensating the victims. In contrast, efficiency usually requires compensating the victim of an intentional tort to prevent him from spending resources to avoid the tort.”).

<sup>143</sup> See generally SEIBEL, REPARATIONS SHAREHOLDERS, *supra* note 9, at 7 (providing an illustrative list of various microfinance intuitions contributing to sustainable economic development).

the question becomes whether societies are better or worse off when, other things being equal, women gain control over more money.<sup>144</sup>

Evidence indicates that societies will indeed be better off if they transfer money to women (and if they use microfinance rather than simple cash payments to effect this transfer) because male and female adults—the majority of whom in every country have children—provide for their children unequally. Money in the hands of a woman is more likely to buy “goods that benefit children and enhance their capacities.”<sup>145</sup> Around the world, men devote more money to pleasures for themselves—cigarettes, alcoholic beverages, leisure activities like sports, sexual conquests—than do women. By contrast, “[s]tudies conducted on five continents have found that children are distinctly better off” when their mothers have more money to spend.<sup>146</sup>

In Kenya, for example, the more income controlled by women in sugarcane farmer households, the greater the household caloric intake. In Jamaica, female-headed households spend more on food and less on alcohol. Data from the Ivory Coast suggest that doubling the proportion of income controlled by women would cause a 26% reduction in amounts spent on alcohol and a 14 percent reduction in money spent on cigarettes. “In Brazil, \$1 in the hands of a Brazilian woman has the same effect on child survival as \$18 in the hands of a man.”<sup>147</sup> In richer countries, where calorie counts are a less reliable proxy for well-being, one finds other indicators.

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<sup>144</sup> Other welfare effects relating to reparations for women, though beyond the scope of this Article, warrant brief note here. Researchers have estimated that violence against women cost the national economy of Nicaragua 1.6% of its GDP (\$29.5 million) in 1999, and 2% of the GDP of Chile (\$1.56 billion) in 1996. See Andrew R. Morrison & Maria Beatriz Orlando, *Social and Economic Costs of Domestic Violence: Chile and Nicaragua*, in *TOO CLOSE TO HOME: DOMESTIC VIOLENCE IN LATIN AMERICA* 51, 57, 61 (Andrew R. Morrison & Maria Loreto Biehl eds., 1999) (discussing the economic and social costs of domestic violence in Nicaragua and Chile). To the extent that reparations payments promote stability through civic engagement and thereby diminish violence against women, national economies can look forward to becoming more prosperous. Another example is the correlation between GNP and the enrollment of girls at school. See U.N. Millennium Project, *supra* note 124, at 47 (describing how research illustrates that failure to invest in education for young women results lowers gross national product).

<sup>145</sup> ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED* 120 (2001) (footnote omitted).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 121–22.



For example, affluent divorced fathers in the United States are less likely than their (somewhat less) affluent ex-wives to cooperate with paying for their children's college education.<sup>148</sup> Around the world, female legislators introduce and promote more child-friendly government expenditures,<sup>149</sup> suggesting a secondary welfare effect: the more women can avail themselves of education and other sources of access to civic life, the better off children will be.<sup>150</sup>

Experts on economic intervention, who have long recognized that development-related expenditures that benefit women yield payoffs to societies, share this assessment:

This claim has now achieved "motherhood" status, in virtue of the accumulating evidence confirming what has long been available at an intuitive level, which is that

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<sup>148</sup> *Id.* at 126.

<sup>149</sup> See, e.g., *Id.* (noting the same pattern in Scandinavia); see generally Matthew M. Davis & Amy P. Upston, *State Legislator Gender and Other Characteristics Associated With Sponsorship of Child Health Bills*, 4 *AMBULATORY PEDIATRICS* 295 (2004) (reporting study of American state legislatures). Voting rights activist Carrie Chapman Catt, working for suffrage in the United States, looked at several other countries where women had the vote in 1915 (including Australia, New Zealand, Norway, and Finland) to conclude that "wherever women, the traditional housekeepers of the world, have been given a voice in the government, public housekeeping has been materially improved by an increased attention to questions of pure food, pure water supply, sanitation, housing, public health and morals, child welfare and education." Carrie Chapman Catt, *Do You Know?*, reprinted in *WOMAN SUFFRAGE: HISTORY, ARGUMENTS, AND RESULTS* 138 (Frances M. Björkman & Annie G. Porritt eds. 1917).

<sup>150</sup> Some criticisms of the Crittenden thesis may be noted briefly. Crittenden writes that men in governments, especially American governments, dislike making transfer payments to mothers because they believe—correctly, it turns out—that money helps women abandon their unsatisfactory relationships with men. See CRITTENDEN, *supra* note 145, at 122 (describing how money granted to poor women during experiments in the 1970s "reduced wives' financial dependence on their husbands and increased the probability that an unhappy wife would pack her bags, scoop up the kids, and leave"). Thus, it may be prudent to anticipate on our welfare ledger an increase in divorce and the severance of informal unions (although it appears equally likely that the receipt of reparations payments would enhance peace and stability in a household). Children are probably still better off. Another possible criticism: nations could use excise taxes to pursue the same welfare gains that redistribution in favor of women would achieve. "Sin" taxation of liquor, cigarettes, motorcycles, brothels and so on, and could, in theory, generate enough revenue for governments to enhance child welfare through public programs. However, such an agenda would burden a transitional democracy trying to repair its recent failure to uphold the human rights of its citizens. It is probably better to pursue welfare by putting money into the hands of mothers.

“investing in women,” especially in the areas of health and education, is likely to generate payoffs or “positive externalities” for the well-being of children, the household, and the economy as a whole.<sup>151</sup>

One microcredit leader accordingly decided early in his banking career to take gender into account in his lending decisions, believing that the children of low-income parents would profit more from loans to their mothers.<sup>152</sup>

Differences between microcredit and microfinance are pertinent to this welfare perspective. Microcredit has won praise for making poor women wealthier but also blame for forcing them to toil in repayment efforts. A harried woman struggling to repay her loan might feel compelled to draft her children into her struggling business. Under this pressure, a daughter would probably look more valuable to her mother as a housekeeper and child-minder than a student continuing her education. The form of microfinance proposed here—shares in a financial institution that carry no repayment obligation—does not generate new pressure to turn children into laborers. True, it does not eliminate the deleterious effects on society of financial hardship, but neither does any other mode of reparation; and even though becoming a shareholder in a financial institution can disrupt a woman’s life, the disruptions of microfinance payments that beget no new debt are much gentler than the disruption of money-lending among the poor.

And so the scenario of an engaged, decision-making, money-spending, policy-directing female citizenry becomes attainable—even likely to develop—and conducive to the good of all persons in the nation implementing reparations. Wealth in the hands of women enhances welfare not only for children, as recipients of expenditures, but also for mothers, as determiners of these expenditures. Developmental economics regards microfinance as an especially effective means to maximize the value of an initial investment. Thus for purposes of enhancing welfare, the

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<sup>151</sup> Kerry Rittich, *Engendering Development/Marketing Equality*, 67 ALB. L. REV. 575, 580 (2003) (footnote omitted). See also WORLD BANK, *supra* note 121, and sources cited therein (showing women’s life expectancy increased and gender gaps in the labor force were reduced according to the level of education women attained).

<sup>152</sup> See Bruck, *supra* note 60, at 62 (referring to the policies of Mohammad Yunus and his Grameen Bank).

combination of female recipients and microfinance presents an exceptionally high potential yield for a reparations plan.

## 6. CONCLUSION

Standing alone, pecuniary reparations leave the effects of serious human rights violations unrepaired. They do not take recipients back to an idyllic past where they were safe from large-scale horrific wrongdoing. They cannot be rendered in proportion to the harm suffered. Of themselves, they provide no truth-telling, nor guarantees of non-recurrence, nor the kind of government and civil society that fend off wrongdoing before it arises.

These infirmities of pecuniary reparations, though meaningful, leave intact a quality necessary to effect recognition of wrongs and an ambition to change current conditions: governments and individuals who engage in reparation cannot deny the microeconomic tenet of scarcity. The phrase “cheap talk” adverts to the infinite supply of words available to the disingenuous or distracted, who can denounce past ills with endless verbiage, never having to surrender anything they value enough to hold.<sup>153</sup> A recipient of pecuniary reparations, by contrast, knows that the payer has parted with something scarce in order to affirm the truth of what happened to her. This monetary acknowledgement does not of itself correct the wrong, but it honors her experience, augments her agency, holds potential to increase her security and her freedom, and invites her concretely, as a holder of power, into the emergent civil society.

Once identified as integral to the larger reparative endeavor of recovering nation, pecuniary reparations ought to take the form that best advances the agency, recognition, security, and freedom of injured citizens. This ideal form will seldom be simple transfer payments. Cash is too easy for a recipient to forfeit, alienate, and lose. The alternative presented in this article—establishing each recipient as shareholder of a financial institution—conveys money to her in honor of the nation’s past, where she suffered a wrong, and its future, which her choices and prerogatives will shape.

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<sup>153</sup> See de Greiff, *supra* note 6, at 461 (explaining that without reparations, victims may view mere truth-telling as an empty gesture).