

Reparations, the Right of Conquest, and Ex Post Facto Punishment

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"Wagon Box Fight" by H. Charles McBarron Jr.

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J. Angelo Corlett begins the eighth chapter of his 2005 book *Race, Racism, and Reparations* by bringing up the many atrocities and injustices that took place during the history of North America. Of this lengthy catalog of cruelties, Corlett homes in on those atrocities inflicted by colonizing Western nations against North America's indigenous inhabitants: seizure of land, genocidal acts, and enslavement to name a few. These atrocities, by Corlett's account, have yet to be adequately addressed in the form of reparations. Corlett argues that the U.S. government (and presumably all other colonizing nations, though the U.S. is the focus of his analysis) has a moral obligation to provide reparations to the indigenous peoples that it wronged in the past. Reparations, in Corlett's judgement, "seek to rectify severe wrongs of the distant past by providing the wronged parties or their descendants a sum of money (often collected by general tax revenues), property, and other tangible goods that might be (roughly) proportional to the harms experienced by them" (150). In other words, U.S. reparations to Native Americans would take the form of substantial monetary payments, or- far more radically- the dissolution of the United States and the partition of its territory among the remaining Native American nations.

Needless to say, any argument that leads to the dissolution of the United States or the draining of its coffers is controversial. To Corlett's credit, he is very straightforward in his advocacy and avoids concealing his reasoning behind excessive verbiage or other obfuscating methods. Corlett formulates his argument for reparations in this way: "(1) As much as humanely possible, instances of clear and substantial historic rights violations ought to be rectified by way of reparations; (2) The U.S. government has clearly committed substantial historic rights violations against millions of Native Americans; (3) Therefore, the historic rights violations of

the U.S. government against Native Americans ought to be rectified by way of reparations, as much as humanely possible” (152). After formulating his argument, Corlett fills the rest of the chapter by anticipating potential counterarguments - some clearly stronger than others- and explaining why they fall short.

Having given Corlett’s argument its due consideration, I remain unconvinced as to the necessity of reparations for Native Americans. My reasons for this are mostly my own and are separate from the counterarguments Corlett addresses. The main thrust of my counterargument is twofold: firstly, by suggesting that the rights of Native Americans were violated during the conquest of their land by the U.S. government, Corlett is applying modern sensibilities and legal frameworks to a time period where such things were unheard of. The gradual takeover of indigenous lands by the U.S. government was an exercise of what today we might call the right of conquest. The doctrine of Manifest Destiny that motivated U.S. expansion westward appears to me to be a manifestation of this right in the American context. This so-called right of conquest is abhorrent to modern sensibilities and understandings of how international relations should be conducted- and for good reason- but during the time period encompassing the U.S. subjugation of the indigenous nations it was an acceptable and time-honored doctrine that had existed since the very beginning of recorded history. In short, what is now illegal and immoral was then a valid exercise of power of the strong over the weak. With this in mind, if the U.S. government were required to provide reparations to Native Americans it would be subjected to what legal scholars call an *ex post facto* punishment. This involves the meting out of punishment for an act that was not illegal when it was performed. It is not difficult to see why this kind of punishment is problematic; I will further expound on this point later.

As for the second prong of my counterargument, I would argue that when taken to its logical conclusion- beyond the limited context of North American history- Corlett's argument for reparations results in absurd and unacceptable outcomes. To see why this is the case, we must consider the important role conquest has played in state formation throughout history. Sadly, the unfortunate fate of Native Americans- the violent dispossession of their territory at the hands of foreign invaders- is in no way unique. The role conquest and usurpation has played in the formation of states and nations cannot be understated. Prior to the takeover of North America by colonial powers, countless peoples had met the same fate that would later befall Native Americans. This is relevant because Corlett's argument for reparations applies to so many other cases of historical injustice. Recall the first premise of Corlett's argument: "As much as humanely possible, instances of clear and substantial historic rights violations ought to be rectified by way of reparations" (152). A register of all these "clear and substantial historic rights violations" would fill volumes; this is problematic for Corlett because his reparations argument could be made for any of these instances. One would be hard-pressed to find a contemporary state whose history is free from conquest and bloodshed (as both the conqueror and the conquered) and the rights violations that this entails. Corlett's myopic focus on the history of North America and the conquest of its indigenous peoples glosses over this fundamental fact about world history and state formation. One might even argue, as Franz Oppenheimer does in *The State*, that conflict and conquest was an integral part of early state formation: "The State, completely in its genesis, essentially and almost completely during the first stages of its existence, is a social institution, forced by a victorious group of men on a defeated group, with the sole purpose of regulating the dominion of the victorious group over the vanquished, and securing itself against revolt from within and attacks from abroad. Teleologically, this dominion

had no other purpose than the economic exploitation of the vanquished by the victors” (15). Something similar can be found in the *Republic*, where in the process of formulating an ideal state Socrates and Glaucon mention the need for a guardian class of warriors whose responsibilities include the defense of the state and the expansion of its borders: “A slice of our neighbors’ land will be wanted by us for pasture and tillage, and they will want a slice of ours, if, like ourselves, they exceed the limit of necessity, and give themselves up to the unlimited accumulation of wealth? That, Socrates, will be inevitable. And so we shall go to war, Glaucon” (373d-373e). By this account, if states are to move beyond the provisioning of bare necessities for their populations, warfare and expansion are required. If we are prepared to concede that historically conquest and state formation were two inseparable phenomena, then nations leveling demands for reparations at one another over the infringements that their ancestors suffered in the past would be a fruitless endeavor. This would invariably result in an intractable tangle of claims and counterclaims as the annals of history are combed over for evidence of rights violations that might be considered grounds for reparations. If there is no statute of limitations on justice as Corlett would lead us to believe, then there is no limit on how far a nation could go back when hunting for injustices demanding reparation. As a sort of case study, one could consider the historical interactions between the Greek and Turkish peoples, in particular the latter’s gradual usurpation of the former’s territory in Asia Minor following the battle of Manzikert in 1071 CE. The Turks that dominate Asia Minor today are descendants of the Oghuz Turks who were indigenous to Central Asia, specifically the area between the Aral and Caspian seas. How an Asiatic people eventually found themselves dwelling in a state at Europe’s doorstep is, to put it lightly, not a tale of peace, understanding, or respect for rights. It is a tale of conquest, usurpation, and subjugation. To condense a long historical saga into a few sentences, an Oghuz

Turkish clan known as the Seljuks pillaged and conquered their way from their heartland in Central Asia, through Persia and Mesopotamia before coming into conflict with the Byzantine Empire, the Greek remnant of the Roman Empire that at the time controlled much of the Balkan peninsula and nearby Asia Minor. The latter landmass had been in Greek hands since its conquest from the Persian Achaemenid Empire by Alexander the Great more than a thousand years prior. A decisive Seljuk Turk victory over the Byzantine Greeks at the battle of Manzikert in 1071 CE initiated a series of further Turco-Greek conflicts that would culminate in the conquest and Turkification of the entirety of Asia Minor and beyond (Istanbul and Eastern Thrace). Needless to say, there were no shortages of Turkish violations of Greek rights during this period.

With a few tweaks, Corlett's argument for U.S. government reparations to Native Americans can be adapted to advocate for Turkish reparations to Greeks: (1) As much as is humanely possible, instances of clear and substantial historic rights ought to be rectified by way of reparations; (2) The Turkish government has clearly committed substantial human rights violations against countless Greeks; (3) Therefore, the historic rights violations of the Turkish government against Greeks ought to be rectified by way of reparations, as much as humanly possible. Recall that Corlett makes no fine distinction between the descendants of wrongdoers and the wrongdoers themselves, likewise for the descendants of victims and the victims themselves. By Corlett's account, then, the vast generational divide between the Turkish wrongdoers and the Turks of today and between the Greek victims and the Greeks of today is irrelevant as far as reparations are concerned. Furthermore, as for the type and the extent of reparations the Turkish government owes to the Greeks, we can turn to what Corlett seems to believe is the ideal form of reparations the U.S. government could provide to Native Americans:

“Morality and justice require the complete return of the lands of North America that were gotten from Native peoples in violation of the principle of morally just acquisitions and transfers. Such a measure of reparations would not only return all such lands outright to Native peoples, but would require the U.S. government...to pay native peoples significant sums of money as compensation for damages for the crimes...committed against Native Americans in the ‘settling’ of the ‘New World’” (185). Corlett refrains from explicitly endorsing this reparations option as the most ideal; however, granted that he presents this option first and refrains from critiquing it as he does with the others, an implicit endorsement can be assumed. Applying this to the Turco-Greek reparations scenario, and considering that all Turkish territory was acquired by means of conquest in violation of Corlett’s principle of morally just acquisitions and transfers, we are presented with the following result: the emptying of the Turkish coffers to provide for monetary reparations, the deportation of all ethnically Turkish residents to their Central Asian homeland in what is now Turkestan on account of them residing on stolen land, and the ceding of all Turkish territory to Greece (and presumably to Armenia, in addition to the carving out of a Kurdish state in the east). As if this result was not patently ludicrous enough, the same argument and resulting reparations package can be applied to any other state who finds its origins in conquest and usurpation: deportation of all French descendants of Roman, Frankish, and Norman invaders and the garnishment or wholesale expropriation of their properties, deportation of all British descendants of Roman, Anglo, Saxon, Jutish, Viking, and Norman invaders and the garnishment or wholesale expropriation of their properties, so and on so forth, ad nauseam. If the U.S. were to provide reparations to Native Americans according to Corlett’s terms, a Pandora’s box would be opened involving the deportation and expropriation of those peoples deemed insufficiently indigenous to the states in which they dwell, a cataclysmic upheaval in geopolitics as borders are

redrawn and states are dissolved according to who is indigenous to what land, an international relations nightmare as states exchange dueling demands for reparations, and not to mention the inconceivable amplification of human suffering that the foregoing changes would bring about. Corlett's argument for Native American reparations results in monumental absurdity and clearly unacceptable changes to the order of things- not much more can be said in this regard.

Returning now to the first prong of my counterargument, it is necessary to further explain what an *ex post facto* punishment is, why it is a questionable practice, and why reparations would entail an *ex post facto* punishment of the U.S. government. As a preliminary note, any Native American reparations delivered by the U.S. government would likely come about as a result of a statute passed by Congress. According to Cornell Law School's Legal Information Institute, an *ex post facto* statute is one that "punishes actions retroactively, thereby criminalizing conduct that was legal when originally performed." As previously mentioned, it is easy to problematize such a statute. Indeed, many states do: *ex post facto* statutes are explicitly prohibited in many countries, including the United States. The framers of the Constitution made their position very clear: "No Bill of Attainder or ex post facto Law shall be passed" (Constitution of the United States, art. 1, sec. 9). The plurality of constitutional prohibitions on *ex post facto* statutes in countries around the world is a strong indication that law and punishment ought to be oriented towards the present and the future while leaving the past as the exclusive preserve of the historians and their art. A simple thought experiment can help illustrate the folly of *ex post facto* punishment: imagine an American man in 1917 being arrested and heftily fined for violating the Eighteenth Amendment's prohibition on alcohol sales all because he had once operated a bar years earlier. This is an absurd and morally inadmissible punishment.

Having established that *ex post facto* statutes and punishments are morally and constitutionally inadmissible, if it were shown that reparations to Native Americans on Corlett's terms would entail such a statute or punishment, then it follows that such reparations are morally and constitutionally inadmissible. As I have previously argued, Corlettian reparations impose *ex post facto* punishment because they punish the U.S. government for exercising the right of conquest during a time period wherein such a doctrine was at least implicitly accepted. Here, the second premise of Corlett's argument for reparations is called into question. It cannot be claimed that the rights of Native Americans were violated if the rights in question were not yet conceived of and codified. Once again, Corlett is applying modern sensibilities to an era where they were unheard of. If the U.S. government's conquest of the Native American nations had taken place after, say, the Hague Conventions or the Nuremberg Trials, which taken together repudiate the so-called right of conquest, then reparations would undoubtedly be warranted. This, however, is not the case- the U.S. takeover of North America was mostly finished by the time the Hague Conventions were organized and completely so when the Nuremberg Trials were held.

In the place of a standard conclusion, I would like to make a disclaimer: none of the foregoing argumentation should be misconstrued as either an endorsement, celebration, or trivialization of the horrors borne by North America's indigenous inhabitants. It is merely a repudiation of an argument I found to be lacking. Moreover, it does not refute the idea of reparations for Native Americans in general- just one narrow conception of what they might look like. The cause for reparations is not a lost one; all that can be concluded if my reasoning contra Corlett is sound is that its advocates ought to look elsewhere to find intellectual grounding.

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