1999

Revaluing Restitution: From the Talmud to Postsocialism

Michael A. Heller
Columbia Law School, mheller@law.columbia.edu

Christopher Serkin

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship

Part of the Civil Rights and Discrimination Commons, Law and Economics Commons, Law and Race Commons, and the Religion Law Commons

Recommended Citation
Available at: https://scholarship.law.columbia.edu/faculty_scholarship/2331

This Book Review is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact cls2184@columbia.edu.
REVALUING RESTITUTION: 
FROM THE TALMUD TO POSTSOCIALISM

Michael Heller* and Christopher Serkin**


TABLE OF CONTENTS

I. INTRODUCTION ............................................ 1385
II. ROADMAP TO RESTITUTION ............................. 1388
   A. The Argument in Brief ............................. 1388
   B. The Translation Scheme ........................... 1389
      1. Definitions .................................... 1389
      2. American Law Application ....................... 1390
   C. Restitution and National Ethos .................... 1393
III. PUTTING RESTITUTION TO THE TEST .............. 1397
   A. The Relationship Between Privatization and Restitution ............................... 1397
   B. The Variety of Restitution ....................... 1399
      1. Restitution in the Czech Republic ............. 1399
      2. Restitution in Hungary .......................... 1402
   C. Gaps in the Existing Literature ..................... 1403
      1. Why Restitute Property At All? ............... 1403
      2. Why Natural Restitution? ........................ 1405
   D. Postsocialist Restitution Through the Dagan Prism ..................................... 1407
      1. Of Control and Well-Being ....................... 1407
      2. Eastern Europe and the "Personhood" of Property ...................................... 1409
      3. The Ethos of Expropriation ..................... 1410
IV. CONCLUSION ............................................ 1412

I. INTRODUCTION

Whatever happened to the study of restitution? Once a core private law subject along with property, torts, and contracts, restitu-
tion has receded from American legal scholarship.¹ Few law professors teach the material, fewer still write in the area, and no one even agrees what the field comprises anymore.² Hanoch Dagan’s Unjust Enrichment: A Study of Private Law and Public Values³ threatens to reverse the tide and make restitution interesting again. The book takes commonplace words such as “value” and “gain” and shows how they embody a society’s underlying normative principles. Variations across cultures in the law of unjust enrichment reflect differences in national understandings of sharing, property, and even personhood. As Dagan puts it, he seeks “the reflection of core social values in the technicalities of the law” (p. 1).

The law at issue can be briefly summarized (and its more tenuous complexities elided). Imagine, for example, someone chops trees from your land. Tort and contract law focus on remedying your loss. The law of unjust enrichment, however, is primarily concerned with restoring to you the trespasser’s gain from using the lumber. Dagan’s book reveals a complex inquiry hiding behind this simple distinction. Measuring restitution by the defendant’s gain is a prologue to the further analysis of how a society understands value. Within the American legal system, the tree-chopper’s gain may be defined as the lumber’s fair market value, or can be calculated in terms of the chopper’s net profits, the full proceeds from sale, or by a range of increasingly abstract methods. Within a single legal system, these various measures may all be available, each linked to restitution of a particular type of resource, each animated by different normative concerns. Dagan argues that restitutionary choices within a culture track attitudes towards property and personhood; overarching patterns across cultures reflect divergent national ethoses. Restitution is a window into a larger project of social understanding.

¹ See, e.g., Andrew Kull, Rationalizing Restitution, 83 CAL. L. REV. 1191, 1191 (1995) (“Few American lawyers, judges, or law professors are familiar with even the standard propositions of the doctrine. . . .” (emphasis omitted)).

² See Richard A. Epstein, The Ubiquity of the Benefit Principle, 67 S. CAL. L. REV. 1369, 1371 (1994) (“At one point restitution was a standard course in the upper-year curriculum, but over time and with the ever greater expansion of public law subjects, it has slowly disappeared from view, being subsumed in a more general course on remedies, or taught in the interstices of the basic law of property, tort, and contract.”); Kull, supra note 1, at 1195 n.14 (noting that restitution was a standard part of the law curriculum a generation ago, but only a “bare handful of American law schools” offer the course today); Saul Levmore, Explaining Restitution, 71 U. VA. L. REV. 65, 65 (1985) (“There is probably no greater set of surprising results and inconsistent maxims in private law than that formed by cases dealing with claims for payment made by providers of ‘non-bargained benefits’ to silent or disclaiming recipients.”).

³ Hanoch Dagan is a Senior Lecturer, Tel Aviv University Faculty of Law and a Visiting Professor of Law, University of Michigan Law School.
In this review we put Dagan's jurisprudential approach to a practical test. 4 Restitution is going global; today, the postcommunist rebuilding of market economies, social developments in South Africa and Cuba, and even Native American and African-American claims are at the cutting edge of restitution. 5 We focus on Eastern Europe, where the Czechs are putting elderly people back into their childhood apartments, while the Hungarians offer compensation coupons for use in privatization auctions. 6 Governments are valuing the unjust gains of — and more often the losses inflicted by — the communists in radically different ways as they attempt to reconnect with a precommunist past. Yet little theoretical work explains the rise of and variations among these massive programs of property reallocation. 7

If Dagan's theory makes sense, and we think it does, then his book can provide some order for the hodgepodge of national mythmaking, political accident, and cultural posturing that surrounds the restitution frenzy in newly emerging market economies. 8 His framework helps explain postcommunist restitutionary programs and points to some surprising results: more aggressive restitution may prove less protective of private property rights. In turn, the Eastern European experience challenges Dagan's portrayal of

4. A wholly different review of Dagan's book could be written, parsing his jurisprudential argument on selfhood and altruism in relation to Thomas Nagel, Duncan Kennedy, Joseph Raz, Ernest Weinrib, and a full host of legal philosophers. We are more practically minded folk and therefore commend our jurisprudentially oriented colleagues to Dagan's text itself, particularly Chapters 2 and 3.


7. Postsocialist restitution scholarship is predominantly descriptive. See, e.g., infra note 22. Perhaps the best theoretical discussion is provided by Claus Offe, Disqualification, Reparation, Restitution: Dilemmas of Justice in Post-Communist Transitions, 1 J. POL. PHILOS. 17 (1993).

8. One might argue that postsocialist restitution does not fit within a technical unjust enrichment paradigm. See Kull, supra note 1, at 1212-22 (arguing that restoration of resources is not part of unjust enrichment). Restoration of property to former owners seems more concerned with remedying the plaintiffs' losses than undoing the defendant communists' gains. This approach, however, may sound in unjust enrichment law when harm exceeds gain, as was typical in socialist societies. For Dagan's position, see p. 17 (arguing that plaintiff's harm can be a restitutionary remedy). Many leading commentators have placed restoration squarely within the law of unjust enrichment. See John P. Dawson, Restitution Without Enrichment, 61 B.U. L. REV. 563, 610 (1981); Douglas Laycock, The Scope and Significance of Restitution, 67 TEXAS L. REV. 1277, 1284 (1989). We do not see much point in this hyper-formal taxonomic debate. Dagan's method proves useful whether postsocialist restitution is restitution rightly considered or something else.
the feel-good ethos of sharing by suggesting a richer and more troubling take on the meaning of community. By distilling doctrinal complexity through a sensitive jurisprudential filter, Dagan offers a new way to study private law.

II. ROADMAP TO RESTITUTION

A. The Argument in Brief

Dagan's book is an easy read. Without too many bows to past masters, the book is cleanly written and tightly argued. The Prologue encapsulates the story, while the following chapters are a disciplined march through his theory concluding with concrete applications to and comparisons among American, Talmudic, and international law.

From a large range of available restitution paradigms, Dagan focuses solely on the example of a defendant who is unjustly enriched by using a plaintiff's resource. Dagan avoids difficulties defining the scope of unjust enrichment in either the American or comparative setting because his goal is to "abstract[] from the contextual contingencies of any specific set of restitutory rules, and to extricate the essence — the common denominator — of the ways various societies implement the general principle against unjust enrichment" (p. 3). Across cultures and spanning a breadth of resources, social values are reflected in methods of valuation. This is more than a clever semantic point; by linking available measures of recovery with specific social values, Dagan provides a "translation scheme" for interpreting the meaning of valuation, summarized usefully in a simple table (p. 22).

Dagan has two distinct projects in uneasy relation to each other. The first project is to explain variations in restitutory remedies within a single culture. He relates those variations to the divergent rationales a society may seek to vindicate across a range of socially important resources. For example, Chapter Four sets out a detailed intracultural analysis of Americans' relationship with various resources. The more the specific property implicates its owner's "personhood" — like her body, her land, or maybe her car — the more likely the legal system will be to protect her control over the property rather than merely to restore her ex ante well-being.

The second project is more ambitious yet: to look across national legal systems and show how distinct national ethoses animate broader restitutory patterns. Chapters Five and Six make this

9. This form of restitution is often referred to as "restitution for wrongs" and is conceptually, if not analytically, distinct from cases in which a plaintiff confers a benefit on a defendant. See, e.g., ANDREW BURROWS & EWAN McKENDRICK, CASES AND MATERIALS ON THE LAW OF RESTITUTION 569 (1997).
comparison as they explore Talmudic civil law and international law respectively. While Dagan's first project strikes us as more compelling than the second, both parts of his effort contribute to revaluing restitution as a field for theoretical work.

B. The Translation Scheme

1. Definitions

Measures of restitutionary recovery range from the harm suffered by a plaintiff to several types of gain secured by a defendant. Gain, in turn, can mean quite different things, depending on the doctrinal niche in which the term is invoked. Gain can mean the fair market value of the appropriated resource or the defendant's net profits. It can refer to a defendant's gross proceeds from using an appropriated resource, in which case the defendant will be made worse-off than before she was unjustly enriched (assuming nonzero expenses in using the resource). Or gain can be measured as the greater or lesser of any combination of these values. Dagan points out that the ex post method of valuation will affect how vigorously people's resources are protected ex ante from appropriation and will signal a society's tolerance for appropriating another's property (p. 15). With the lowest measure of gain, defendants may readily appropriate resources they believe they can put to better use than the plaintiff; with the highest measure of gain, defendants may hesitate to take resources despite being confident their uses are more highly valued.

The question raised by the wide variety of restitutionary remedies is why, for any given resource, a legal system would choose one remedy over another. Dagan suggests that the specific measures of recovery noted above express various rationales that a society may be trying to vindicate, specifically well-being, control, sharing, and condemnation (pp. 15-16, 22). The argument concentrates primarily on well-being and control, which are defined by reference to the familiar distinction between "liability" and "property" rules. 10

Well-being mirrors a liability rule in which "ex post pecuniary recovery is intended as a surrogate for ex ante consent" (p. 15). This rationale maintains an individual's initial level of wealth. Control, by contrast, mirrors a property rule by requiring the resource holder's ex ante consent before the resource may be taken. While restitution operates in a sphere in which a forced transfer has already occurred, certain rules for recovery can actually vindicate ex ante control over resources by deterring invasions.

Dagan's "translation scheme" demonstrates how different measures of restitutionary recovery relate to control, well-being, or both. Assuming that the plaintiff was harmed less than the defendant was enriched — a presupposition Dagan makes in his paradigmatic case (p. 13) — measuring recovery as the plaintiff's harm encourages a savvy defendant to appropriate resources from plaintiffs who value them less than either the defendant or the market. In such a case, measuring restitution by the plaintiff's harm promotes sharing of resources by encouraging more efficient users to take without permission. Restoring the resource's fair market value protects the plaintiff's well-being by restoring her to her ex ante level of wealth, including her ability to sell the resource at market value. A recovery of net profits vindicates the plaintiff's control by removing a potential appropriator's economic incentive to take the plaintiff's resources, regardless of the defendant's higher valued use of those resources. Finally, a recovery of gross proceeds (not offset by the appropriator's expenses in using the resource) may be reserved for cases where a society wants not only to protect the plaintiff's control, but also to express its condemnation of the defendant's action.11

These four rationales motivate different levels of recovery and comprise the heart of Dagan's theory of valuation.12 "Choosing amongst these possibilities is not a purely theoretical enterprise; rather, it dictates and shapes the available remedies" (p. 15). The pattern of restitution that a national legal system offers — fair market value for certain resources, net profits for others, and so on — is, Dagan claims, purposive, nonarbitrary, and subtly revealing of the contours of a national psyche.

2. American Law Application

In the American legal system, the law of unjust enrichment offers a menu of restitutionary remedies across a spectrum of resources (pp. 71-108). Within this single national setting, restitutionary awards can be explained by the extent to which they implicate the owner's "personhood." As Dagan writes:

11. It would be possible to construct a slightly different translation scheme in which "gross proceeds" were merely another but more effective method of protecting control. If, as Dagan claims, ex post recovery vindicates control by acting as an ex ante disincentive to appropriate (p. 15), then a higher level of recovery is just a more effective deterrent.

12. Dagan also introduces the concept of proportional profits whereby courts "reconstruct[ ] the way the parties would have divided the contractual surplus under circumstances of full information" (pp. 19-20). Proportional profits are a useful addition to the traditional Calabresi & Melamed matrix, protecting something between the resource-holder's well-being and control. We omit this restitutionary remedy from our Figure 1 and from the remainder of our account because it does not substantially help us illuminate Dagan's theory or unravel our postsocialist application.
Revaluing Restitution

The sphere of control American law is expected to confer on its constituents will not be absolute, but rather will occur along a continuum of diminishing interests: from core interests (one's identity, physical integrity, reputation as dignity, and land) through less-protected interests (copyright, and to a lesser degree, commercial attributes of one's personality and patents) to least-protected interests (contractual relations and performances and information). [p. 71]

In America, restitutionary recovery for core resources — such as for a trespass involving land — is often valued at the higher of fair market value or profits, thus vindicating what Dagan refers to as "well-being and control" (p. 75). In contrast, patents are protected from infringement only by an *ex post* award of fair market value (pp. 87-89). Dagan suggests that this lower level of protection shows that patents in America are less personal to their holder than certain rights in land may be. Therefore, if the infringer can make more beneficial use of the patent than the market price reflects, he or she may capture the excess gain and actually be encouraged to infringe. Figure 1 suggests the relationship Dagan is noting:

![Figure 1: Explaining Variation in American Restitutionary Remedies](https://example.com/figure1.png)

What seems to be arbitrary variation in the definition of gain to the defendant derives from intracultural values regarding personhood — a range of restitutionary values available within the American legal system (summarized in a second useful table, p. 107). Dagan's exploration of Americans' relationship with various resources is astute, but raises some questions. Why does trespassing on land implicate personhood interests more than infringing on a patent? Perhaps the level of restitutionary recovery serves as an indicator of the "personhood quotient," so we learn from the restitutionary rules that Americans value patents less than land. Or the prediction could work the other way around: if we believe patents
have lesser personhood quality, we should expect a lower measure of recovery for their infringement. Because, in fact, we see a lower recovery, his theory is confirmed. We are not sure which way the causation runs in what Dagan calls his "retrodictive" approach, which he defines as "the ability . . . to predict prior events: here the details of the pertinent [restitutionary] doctrines" (p. 8). Dagan suggests a dynamic relationship between the social understanding of a resource and its legal protection. "Our attitudes towards one another and the prescriptions of our legal regime are embedded in one holistic web, each inculcating, and inculcated by, the other" (p. 39). The claim may be circular.13

The predictive (or, as Dagan would say, retrodictive) force of the argument also leaves out courts' frequent consideration of the defendant's good or bad faith behavior and numerous other moral and conventionally utilitarian concerns. For example, how courts value restitution often depends on whether the defendant was acting in good faith when he wrongly chopped the plaintiff's lumber. Dagan notes that courts will award gross proceeds if the defendant was acting in bad faith and the higher of fair market value and profits if the defendant's trespass was unintentional or innocent (p. 74). While this distinction reflects different rationales for recovery — condemnation versus well-being and control — it is unclear to us why the defendant's motives should matter in Dagan's model, which asserts that the relevant variables are the national socio-economic ethos and the character of the resource. An account could probably be developed to suggest why people in certain societies are more harmed by intentional rather than innocent appropriation.14 A given society may prefer to protect well-being if the trespass is unintentional but vindicate control for purposeful invasions. Dagan's account, however, does not explain why this distinction should be true and leaves us to ponder the ambiguous role of the defendant's bad faith in his model.15 Nevertheless, Dagan's

13. For example, we find Dagan's suggestion that patents are less personal than copyrights plausible but not obvious. As evidence for his claim, Dagan points to the different methods of valuing patent and copyright infringement (pp. 82-89). The argument, however, seems to assume what he is trying to prove: that methods of valuation correspond to the personhood quotient of various resources.

14. Cf. Michael A. Heller & James E. Krier, Deterrence and Distribution in the Law of Takings, 112 HARV. L. REV. 997, 1007-09 (1999) (arguing that a per se takings rule for physical invasions — such as that suggested by Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) — may lead to perverse results if government agencies respond by inflicting more costly, but nonphysical and hence noncompensable harms on property owners); Frank I. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law, 80 HARV. L. REV. 1165, 1227 (1967) (suggesting that “[a]ctual, physical use or occupation by the public of private property may make it seem rather specially likely that the owner is sustaining a distinctly disproportionate share of the cost of some social undertaking.”).

15. The defendant's motives have long been a source of debate in the restitution scholarship. See John P. Dawson, The Self-Serving Intermeddler, 87 HARV. L. REV. 1409, 1410
framework does analytic work explaining the otherwise odd variety of methods that courts use to value a defendant’s gain.

C. Restitution and National Ethos

Dagan’s second argument is that legal systems are each characterized by a “socio-economic ethos” that varies along a scale of communitarian fellow-feeling. The book’s final two chapters make this point by moving from an intra- to an intercultural analysis. In particular, Dagan switches to the quite distinct system of Talmudic civil law, parsing ancient religious texts to uncover the animating ethos of Jewish law. Given their different traditions, juxtaposing American and Talmudic law could be an odd choice if one system were intended to inform, or comment on the other. Dagan, however, uses the very heterogeneity of the systems he studies as a way to sharpen distinctions. For these purposes, Imperial Chinese law could have been equally apt as a comparison.

Dagan’s approach seems straightforward. Various measures of recovery encourage different levels of appropriation or involuntary resource transfers: namely, restitution affects the amount of forced sharing. Cross-cultural variations in the measure of restitutinary recovery reflect differences in societies’ communitarianism specifically, and social ethos generally. For example, with Americans, “one can expect that the rules of the American doctrine will be concentrated mainly between control and well-being. . . . The American commitment to the individualistic values of desert and negative liberty is moderated by some — albeit fairly weak — egalitarian and needs-based convictions” (pp. 60-61). And indeed, the American legal system often measures restitutinary gain by the defendant’s net profits; thus reducing incentives to appropriate by recapturing any possible gain from using a wrongfully taken resource.

By contrast, in a more collective legal culture, people may sometimes permit appropriations when society gains overall. If a restitutinary award only restores the amount the original owner is harmed, then potential appropriators may take resources they can

(1974). Dagan’s desire to address the issue is understandable but seemingly outside his analytic structure.

16. See p. 7 (“[C]omparative law is instrumental in establishing a ‘liberating distance’ from the dominant legal consciousness, thus uncovering the political and moral (often hidden) significance of legal doctrine. However, in order to be able to enjoy this important advantage, the comparativist should refer to legal systems that are set in environments which are culturally remote from our contemporary Western circumstances.”).

17. Of course, people will still have an incentive to appropriate others’ resources if their chance of being successfully sued is less than 100%. Nevertheless, awarding net profits acts as a more significant ex ante deterrent for potential appropriators than awarding fair market value (assuming that the appropriator can put the resource to an unusually valuable use).
better use and retain any difference between the harm inflicted and the gain received. Dagan characterizes such a culture as sharing-oriented and offers Talmudic law as an example of this more communitarian ethos, noting that: "It seems safe to conjecture that the Judaic doctrinal rules are more of the sharing type" (p. 61). Across cultures, then, the tone or shape of restitution partakes of and in turn helps to constitute ingrained national values (p. 39).

This may in fact be the case, but the Talmudic case study Dagan provides is not entirely parallel to the American law examples. Dagan effectively uses the American system to demonstrate intracultural variation, but he does not provide comparable detail on the Talmudic law side. He focuses instead on a single (though apparently much-parsed) hypothetical: "[W]here the defendant derives a benefit and the plaintiff sustains no loss, for example where the premises of the plaintiff-landowner were not for hire (so that the harm was zero), and the defendant-squatter had no alternative accommodations" (p. 113). In such a case a Talmudic "exemption rule" applies, permitting the squatter-defendant to keep the amount he was enriched by the trespass. This outcome, Dagan claims, reflects the ethos of sharing embedded in the Talmudic law. The rule does not apply, however, the moment the plaintiff suffers some harm. Further exceptions to the "exemption rule" also limit its applicability so that the rule does not tell us much about the Talmudic ethic as a whole or give much footing for making an intercultural comparison.18

The "exemption rule" may indeed reflect a religious ethos concerned with sharing. It might be possible to generalize from this one example and explore how Talmudic civil law embodies a communitarian concern in other, unexpected cases. It might also be possible to demonstrate that the Talmudic law of restitution differs from the American law with regard to specific resources, perhaps from culturally different understandings of the relevant resource. Yet Dagan does not make the direct comparison, leaving the reader to infer the contrast between American and Talmudic law.

Dagan concludes with a look at international law, where he attempts to find a coherent ethos regarding compensation for governmental expropriation.19 We find this chapter the least persuasive because the issue of expropriation in international law remains a

18. Those further exceptions include cases where the plaintiff protests (pp. 120-21), where there is any positive enrichment to the defendant in the form of profits (pp. 121-24), and where the defendant is willing to pay (pp. 124-27). Dagan has, however, chosen an example that is central to Talmudic civil law.

19. As an aside, when an individual takes your resource without permission, we call it "appropriation"; when a government takes the resource, we term it "expropriation."
source of conflict, not coherence. More generally, this material raises some questions about Dagan's method itself. He notes that the effort to identify a national "socio-economic ethos" cuts across "numerous different traditions" and "ideological conflicts" (p. 51), but he nevertheless claims to capture some generalized "essence" of specific societies and legal systems — American, Talmudic, and international. Can an ethos be so easily distilled? The stereotype that Americans value negative liberty is ubiquitous, but hard to pin down. Do Texans value negative liberty more than Michiganders? Conservatives more than liberals? The vast array of American values does not easily accommodate a single national ethos.

Our natural objection to being neatly categorized perhaps obscures some plausible truth to Dagan's claim. Americans may be more committed to negative liberty than people in some other countries. On the Talmudic side, it is hardly surprising to find a religious code concerned at some level with sharing, for one would expect to find the same in every other religion's ethical texts. But how does this aspirational document connect with the national ethos of contemporary Jews? Of Israelis? And, while it is improbable enough to discern a coherent ethos within a national or religious culture, we find ethos hunting even less credible at the international level.

A second difficulty with Dagan's presentation is how to tease apart the relationship between intracultural attitudes towards personhood and an intercultural ethos of sharing. For any particular resource, a difference in the restitutionary remedy between two legal systems is susceptible to either a resource-specific or national ethos explanation. Imagine, for example, that the American legal system has more control-oriented restitutionary remedies for unjust enrichment involving cars than the (updated) Talmudic response. This difference could equally result from an idiosyncratic attachment to cars in American culture as it could from a pervasive Talmudic emphasis on sharing transportation. Figure 2 suggests two ways in which the Talmudic system might differ from the American. Under the Sharing Interpretation, the Talmud places a systematically higher value on sharing and thus offers lower restitutionary remedies for each resource on the personhood continuum. By contrast, according to the Personhood Interpretation, the Talmud places different personhood weights on particular resources so that some resources receive more protection than in the American system, some less, some coincidentally the same. Dagan does not offer

20. See, e.g., Mark W. Janis, An Introduction to International Law 246-47 (3d ed. 1999) (noting that whether there are "customary norms of international law providing international minimum standards that all states must meet regardless of treaty obligations is highly controversial, the positions of the Western states being much at odds with those of Third World nations").
a sufficiently parallel or detailed comparison to allow the reader to decide whether Talmudic law is systematically more sharing-oriented, or whether it simply treats some particular resources as more invested in a person’s essence than does the American system.

This level of detailed comparison, however, goes beyond Dagan’s project. He succeeds in his more important goal of revealing that restitutionary remedies may have a coherent structure explained by the intracultural factors and intercultural ethoses he identifies. Regardless of the precision of his comparisons, Dagan shows that methods of valuation can embody vastly different social values. His theory provides a theoretical context for thinking more systematically about the problem of valuation in law. Valuation of gain or harm, often dismissed as a merely technical matter, reflects normative principles at the core of a national legal ethos. Applied to the problem of restitution, Dagan’s framework explains otherwise incongruous measures of recovery.

More generally, Dagan addresses the undertheorized link between concrete measures of valuation and abstract social values. If his approach succeeds, then it should be able to teach us something about new situations — such as the restitutionary practices in diverse transitions from socialist to market economies. Restitution is not only an interesting theoretical puzzle, as Dagan shows, but also a value-laden policy adventure in much of the world today.
III. PUTTING RESTITUTION TO THE TEST

Restitution has been a core element of postsocialist transition, transferring the equivalent of billions of dollars in resources to prior owners. While the recent frenzy of restitution has been most extensive in Eastern Europe, new programs keep popping up elsewhere as well. The programs’ forms are as numerous as the countries that are adopting them. The question we take up here is whether the diversity among restitution programs expresses something more than interesting curiosity or contingent political fact. Recent literature on restitution, mainly describing postsocialist transition in Eastern Europe, does not help solve the puzzle. Some commentators suggest that restitution reflects attempts by weak new governments to distinguish themselves from communist predecessors; others say that restitution may be an expedient way to shift resources to private ownership. Perhaps the programs represent simple power politics. Perhaps not. These accounts fail to make sense of the variety of restitutionary rules.

Dagan’s method suggests a more useful way to think about restitution, going beyond dry technicalities to the guts of nation-building. Choices about who gets what back may help us discern core national attitudes towards important resources. Note, though, that just as Dagan’s approach helps explain postsocialist restitution, real-world practice, in turn, challenges and refines Dagan’s theory.

A. The Relationship Between Privatization and Restitution

Most of the time we acquire property through purchase or through some other method that accepts the prior owner’s title as legitimate. When a country shifts away from socialism, however, this basic equation is disrupted and policymakers are cast out into an uncertain wilderness of first principles. State property, including


23. See also Gelpern, supra note 22, at 317 (“Extremely popular despite their uncertain economic significance, reprivatization initiatives offer insights into the nation-building agendas of the governments which preside over them.”). Note that in the transition literature, the term “reprivatization” is synonymous with “restitution.”
nearly everything with economic value, is put up for grabs. And because people do grab, decisions about restitution programs must be made quickly before "spontaneous privatization" (a nice, post-socialist term for wholesale theft of state assets) renders the problem moot.24

Before defining a restitution program, a country must decide which resources to keep public — parks? railroads? streets? — and which to transfer to private ownership. They may transfer resources through a privatization program — giveaway vouchers? sales? auctions? — or through restitution. Each of these initial decisions is fraught with political meaning. Privatization of a factory by sale or auction partly legitimizes the prior socialist ownership of the factory, even as it practically makes funds available for the new reformist government. Giveaways of apartments to the current occupants imply that those occupants already rightfully own the apartments while recognizing their real need for a place to stay. Each mode of privatization carries its own verdict on the prior property regime.25

The relationship between restitution and privatization in postsocialist reforms is perhaps a useful one to note. Wherever it reaches, restitution denies the claims of current occupants or state owners. Restitution reknits a country with its distant past, excises the socialist period, and labels as unjust any intervening ownership. In Dagan's terms, the more that restitution prevails, the more it may reveal a national ethos committed to negative liberty; while privatization may suggest (in a surprising twist) a greater ethos of sharing.

Consider the ratio of privatization to restitution programs as one moves from west to east across Europe. While all the countries have privatized widely, the former East Germany also has a far-reaching restitution program, the Central European countries have some restitution, and Russia has none.26 Consistent with Dagan's theory, the Russians lived the longest under a nominally sharing-oriented socialist regime and they have the shallowest tradition of entrepreneurship (even before the Soviets, the Tsar's feudal system left little room for dispersed individual landownership). East Germany, conversely, retained a robust private property regime even under communist rule, maintaining a control-oriented concep-


25. See Gelpern, supra note 22, at 315; Stack, supra note 22, at 1221 ("In theory, then, restitution sought to achieve a degree of parity between historic injustices and current economic needs.").

26. See generally Gelpern, supra note 22.
tion of private property rights that perhaps finds new voice in the country's restitution laws.

B. The Variety of Restitution

Vindicating precommunist ownership through restitution raises diverse problems. Notice, however, how closely the situation parallels Dagan's basic paradigm but on a massive scale. Socialist rulers divested people of their property in forced transfers (now deemed unjust) to new owners whom the state believed could make more valuable use of the expropriated resources.

While restitutionary programs vary tremendously in their details, we group the variety along four main axes: (1) The types of lost resources that may be restituted — only real property? corporate stock? prison time? (2) The people who can benefit — only living citizens? exiles? corporations? religious communities? (3) The form that restitution takes — the land itself? roughly equivalent land? current or former fair market value? partial cash payment or voucher? And (4) the time period that restitution covers — excising only the socialist period? stretching back to cover Nazi expropriations of Jews and others?

Each point is fiercely contested, and each helps us to reflect on Dagan's project. Just as Dagan pares away the multitude of restitutionary paradigms to focus on a single case, we focus on a single contrast, between the Czech Republic and Hungary, to motivate our discussion. The former East Germany and Russia may work as well. So may Poland and Lithuania. Our pairing is open to a similar criticism as Dagan's paradigm — that a different choice may result in quite a different story. We offer the same defense as does he: we are only testing his method, not offering an exhaustive account of postsocialist restitution. With those disclaimers, we note that the Czech Republic and Hungary form a sufficiently complex comparison to start thinking about how national practice, national ethos, and attitudes towards property and personhood might interact in postsocialist transition.

1. Restitution in the Czech Republic

Restitution in the Czech Republic is one of the largest such programs in Eastern Europe. Favoring a policy of "natural" restitution (an interesting word choice as we shall see), the Czech government is restoring a still inestimable amount of property to its precom-
Truck drivers, shoe moguls, western bankers, human rights activists, elderly men and women with distant memories of expropriated properties, and heirs to ancient estates are among the many people repossessing property in the former Czechoslovakia (now separated into the Czech Republic, where we focus our attention, and Slovakia, which we do not examine). The Czech Republic's sweeping restitutionary program codifies normative policy decisions along each of the four axes that are controversial in Eastern European transition.

Three Czech laws together create a comprehensive program of restitution. All three laws codify a preference for "natural" restitution, which gives property back to its "original" owner. When the property's value increased significantly during communist possession, however, monetary compensation is sometimes awarded, equivalent to fair market value at the time of expropriation. This alternative is subject to strict monetary caps on the cash any single claimant may receive, the balance being paid in riskier state securities. For the most part, not surprisingly, most nonagricultural

30. See Gelpern, supra note 22, at 359-60 ("[R]emarkably few figures are available to gauge the cost of restitution in the Czech Republic."). The figure of $10 billion is often quoted, but not verified. See id.

31. See, e.g., Janet Guyon, Noble Rot: As the Czechs Return Confiscated Property, Real Estate Languishes, WALL ST. J. EUROPE, May 6, 1993, at 1 (33-year-old banker in Monte Carlo, who had never been to Czechoslovakia, became a Czech prince through his father's restitution claims); Kitty McKinsey, Bata Shows You Can Go Home Again: 56 Years After Fleeing, Shoe King Is Inspiration in Land of His Birth, TORONTO STAR, NOV. 21, 1994, at D4; Marjorie Miller, Noble Try to Reclaim Heritage, L.A. TIMES, July 3, 1994, at 1A (80-year-old Joseph Kinsky, who regained his castle after years working in communist uranium mines); Shailagh Murray, Real Estate: Prague Property Prices a Case for Kafka, WALL ST. J. EUROPE, Jan. 31, 1994, at 36; Hannah Rothschild, Coming Home, DAILY TELEGRAPH, Mar. 12, 1994, at 38 ("[A family friend] lost everything in 1948. He went to live in a woodman's cottage and got a job driving trucks for a former employee. Last year, at the age of 74, he got his estates back. His boss was heard to say, 'I have lost my best driver but at least I've got my best landlord back.").

32. The Small Restitution Law, enacted in 1989, restores private residences, small businesses, stores, and workshops expropriated between 1955 and 1959. See, e.g., Burger, supra note 22, at 486; Renzulli, supra note 22, at 178. The second law, the so-called Large Restitution Law, was enacted in 1991 and provides restitution for most other, larger property expropriated after 1948 and not covered by the Small Restitution Law. See, e.g., Burger, supra note 22, at 486; Gelpern, supra note 22, at 336. Finally, agricultural land is restored under a different regime codified by the Federal Land Law. Because agriculture was one of the few economic sectors to perform better than disastrously under communist rule, the Czech government was loath to disaggregate productive collective farms and threaten the nation's food production. See Burger, supra note 22, at 487.

33. See Crowder, supra note 22, at 239-40; see also Burger, supra note 22, at 485-86 ("The concept of returning tangible real or personal property to rightful owners or their heirs seems at first sight simple enough. . . . The lapse of forty years, after all, was not long enough to have erased memories of who had owned what. Nor were the public records, albeit modified by the Marxists, rendered useless for identifying lawful owners of properties as recorded before the . . . 1948 coup.").

34. See Crowder, supra note 22, at 242.

35. See Gelpern, supra note 22, at 338. ("Cash compensation under the Large . . . Restitution Law may not exceed . . . about $1,000").
property decreased in value during communism and "[m]any of the properties are returned in poor condition or beyond repair from years of neglect."36

As with all restitutionary schemes in Eastern Europe, the Czech program met with substantial internal political resistance. Three principal objections were frequently voiced. First, the laws only cover property that was expropriated between the start of the communist regime in 1948 and its end in 1989 and thus exclude Jewish claims for property seized by the Nazis and claims by Sudeten Germans for property seized after the war by the Czechs.37 Second, the Czech program excludes foreigners and even Czech nationals living abroad from claiming restitution.38 This decision has generated controversy within expatriate Czech communities as it severely limits the scope of the restitutionary claims that might otherwise be available.39

Ultimately, however, the most salient objection is to the form of restitution; restoring property in kind comes with efficiency and distributional consequences. Many political actors argued for privatizing property instead by selling it to the highest bidder.40 Selling the resources would be relatively more likely to transfer assets to people motivated to use them effectively without muddying title. Privatization sale proceeds would simultaneously give the bankrupt new government resources to fund crucial programs — such as improving infrastructure and coping with emerging environmental disasters — or for making restitution.41

Nevertheless, restitution went forward on the massive scale originally contemplated. The complex implementation of Czech restitution has even taken priority over the slow process towards privatization.42 Commentators have alternatively charged natural restitution with both economic catastrophe43 and fiscal salvation for

36. Crowder, supra note 22, at 254; see also Neff, supra note 22, at 369.
38. See Renzulli, supra note 22, at 178-81; Stack, supra note 22, at 1242-43. But see Neff, supra note 22, at 372 (arguing that the restriction may be less prohibitive than some Czech expatriates believe).
39. See Neff, supra note 22, at 372.
40. See id. at 370.
41. See Bönker & Offe, supra note 22, at 48.
42. See Neff, supra note 22, at 370.
43. See, e.g., Gelpern, supra note 22, at 325-26 ("Arguments that an extensive restitution of property in kind is the fastest form of privatization is [sic] a fiction. . . . Instead of speeding up privatization, it would actually slow it down and prolong it perhaps for decades." (quoting BBC Summary of World Broadcasts, Feb. 15, 1991, available in LEXIS, World Library, BBCSWB File)); Crowder, supra note 22, at 252-56 (describing the "problems resulting from restitution in kind").
the Czech Republic.\textsuperscript{44} All, however, appear to agree that natural restitution signals a strong commitment to protecting private property.\textsuperscript{45} The Czech Republic's comprehensive program is often contrasted with Hungary's more limited restitutionary policies.\textsuperscript{46}

2. Restitution in Hungary

Hungary took a substantially different path from the Czech Republic. Often described as "limited" compensation, Hungarian restitution provides no natural restitution but instead pays fixed rates for property taken by the communists.\textsuperscript{47} The fixed values applied to property usually restore only a token percentage of the property's actual value. Claims up to $2,300 are compensated in full; the next $1,150 are compensated 50%; the next $2,300 get 30%; and amounts above these totals get 10% up to a maximum compensation of about $57,000.\textsuperscript{48}

Hungarian restitution is not "limited" merely because of the undervaluation of restorable property. The form of the restitution, too, is more restricted than in the Czech Republic. Instead of cash, the Hungarian government pays original owners their compensation in state-created coupons.\textsuperscript{49} While these coupons are freely tradable securities, they are not fully liquid for five years and are intended to be used to repurchase state-owned property.\textsuperscript{50} The modest Hungarian goal is "partial indemnification, not reprivatization."\textsuperscript{51} Although early versions of the restitution laws allowed farmers to use their coupons to redeem their precommunist land holdings, the Hungarian Constitutional Court struck down this provision on the grounds that "it discriminated against former owners

\textsuperscript{44} See, e.g., Neff, supra note 22, at 369-70 (describing the economic success of Czech restitution resulting from its comprehensive protection of property ownership).

\textsuperscript{45} See Gelpern, supra note 22, at 318 (calling the Czech program "all-out restitution"); Neff, supra note 22, at 369.

\textsuperscript{46} See Gelpern, supra note 22, at 316; Bönker & Offe, supra note 22, at 11-12.

\textsuperscript{47} See Gelpern, supra note 22, at 328 ("Hungary's limited compensation program reflects an atypical influence of the technocrats in its post-socialist politics...."). Gelpern may overstate the significance of the political factors: initial restitution laws in Hungary provided for natural restitution.

\textsuperscript{48} See Gray et al., supra note 6, at 309; see also Gelpern, supra note 22, at 344; Neff, supra note 22, at 373-74. The scale incorporates a complicated set of valuation guidelines: “For non-agricultural real estate, compensation is measured in proportion to the area ... depending on the present location. Classifications include Budapest, provincial towns, villages and vacant lots outside any of the enumerated areas.” Gelpern, supra note 22, at 344. Equally specific guidelines determine the restitutable value of corporations depending on the size of the workforce employed at the time of the expropriation. See id.

\textsuperscript{49} See Gelpern, supra note 22, at 344-46.

\textsuperscript{50} See Neff, supra note 22, at 374.

\textsuperscript{51} Id. at 376. Again, "reprivatization" means "restitution" in the transition literature.
of urban and industrial property, who were not given the possibility of natural restitution."

On the other hand, Hungarian restitution is broader than its Czech counterpart in two interesting respects: first, it reaches back to 1939 so it covers Nazi expropriations of Jews; and second, restitution can be granted to nonnationals and nonresidents. Given its other restrictions, these looser requirements may seem surprising. These factors have not, however, resulted in the anticipated flood of restitutary claims. The Hungarian National Compensation Office, operating out of a former brothel, has needed to extend deadlines for filing claims several times for apparent lack of interest in the program. As of 1996, five years after Hungary’s original restitution law was enacted, only seventy-five percent of restitution coupons had been issued, with a face value of approximately $650 million. This is dramatically less than the two to four billion dollar price tag originally anticipated. Hungary’s restitution has proceeded on a much smaller scale than its Czech neighbors’ program.

C. Gaps in the Existing Literature

1. Why Restitute Property At All?

Facing substantial political opposition, the Czech Republic and Hungary nevertheless persevered with restitutary programs. The short-term economic cost of restitution has been high, hardly a surprise. In particular, natural restitution overburdens weak new legal institutions because of problems associated with unclear title, the condition of the property being returned, and the creation of numerous wrenching conflicts between current and former owners. Even the Hungarian program creates a substantial legal and administrative headache. The best reasoning counsels against restitution at all. As Jon Elster has written:

> It is important to keep in mind that essentially everybody suffered under Communism. Whereas some lost their property, others — many others — had opportunities denied to them through the arbitrary or tyrannical behavior of the authorities. . . . It would be abdi-

52. See Gray et al., supra note 6, at 309 n.111; see also Peter Paczolay, Judicial Review of the Compensation Law in Hungary, 13 Mich. J. Intl. L. 806, 813-17 (1992); Bünker & Ofte, supra note 22, at 34 ("It took three decisions of the Hungarian Constitutional Court to limit the preferential treatment for land. According to the first draft of the . . . law, expropriated land would have been given back, whereas other kinds of confiscated property would have been only compensated.").

53. See Gelpern, supra note 22, at 343, 347.

54. See id. at 348, 363.


56. See Gelpern, supra note 22, at 363.

57. See Crowder, supra note 22, at 249-57.
trary and wrong to single out one group of victims — the owners of
tangible property — for compensation. . . . Property rights are, in my
opinion, among the least rather than most inviolable rights. Those
protecting individual dignity, autonomy, and privacy are much more
central. . . . Full compensation to some of the victims cannot be de-
defended as a second-best approximation to the ideal of universal com-
pensation, if that ideal itself is meaningless. 58

Given these arguments, why restitution? Some commentators
have suggested that long-term economic gains may offset any cur-
rent economic slowdown. 59 Restitution is undoubtedly a "tech-
nique to build a private economy," 60 at least in part. It may serve as
a signaling mechanism to Western investors that their investments
will be protected — "restitution enhances the credibility of eco-
nomic reform by demonstrating the government's belief in the vir-
tues of private property." 61 Also, it transfers resources to former
owners who may then trade them to more productive users than
socialist owners. The complexity of large-scale restitution, how-
ever, weakens the efficiency point just as Elster's arguments under-
mine justice claims. In the Czech case, the commitment to natural
restitution is perplexing. Full monetary recovery is as strong a sig-
naling mechanism, but it would permit the current government to
sell land to the highest bidder and create clear title. 62

Economic policy can perhaps help explain Hungary's more lim-
ited program of restitution. The country began transition with a
heavy debt load and, perhaps, could not afford to restore as much
as its neighbors. 63 Why, though, if fiscal constraints were of such
concern, would Hungary have expanded the group of people eligi-
ble for restitution to include foreigners? Perhaps Hungary made a
sophisticated decision to adopt a modest program for all, while the
Czechs decided on more comprehensive restitution for native
Czechs alone. But this distinction only begs the question of why a

58. Jon Elster, On Doing What One Can: An Argument Against Post-Communist Restitu-
tion and Retribution, E. EUR. ConsT. Rev., Summer 1992, at 15, 16-17. Other commentators
have explored restitution through the lens of moral duty. See Offe, supra note 7, at 43
("[T]he moral objection may be raised that it is unfair that, within the universe of victims of
the old regime, the subset of expropriated owners of productive assets alone can [claim restitu-
tion]."). After analyzing the legitimacy of the original expropriations according to both de-
ontological and consequentialist standards, Bönker and Offe conclude that moral arguments
cannot justify restitution. See Bönker & Offe, supra note 22, at 47.

59. See Crowder, supra note 22, at 262 ("[P]roviding the Czechs with some sense of jus-
tice for the egregious wrongs committed by the communists appears to be a necessary step to
growing the cause of democracy and economic reform. Not taking this step might have re-
sulted in a much worse long range outcome for the Czechs. ").

60. Bönker & Offe, supra note 22, at 11.

61. Id. at 21; see also Crowder, supra note 22, at 240, 250.

62. See Crowder, supra note 22, at 257-58 (objecting to natural restitution because of its
inefficiency).

63. See Gelpen, supra note 22, at 330.
country would prefer one approach to another. The difference between the Hungarian and Czech programs reflects more than the depth of their respective pockets. Both were broke. While economic interests must surely be motivating some of the choices in the restitutinary movement, they cannot provide a fully satisfying story and do not adequately explain restitution's various contours across resources, even in the two neighboring countries we are considering.

2. Why Natural Restitution?

Full restitution of economic value seems unlikely enough, but returning specific plots of land to their owners from half a century ago seems incredible. Two plausible justifications have been given for natural restitution. In the first days of transition, only discredited former communists had sufficient resources to purchase property sold on the market. Natural restitution was an expensive attempt to keep the property out of their hands (and even more crucially for the Czechs, a way to keep property away from potential German buyers). Natural restitution, however, may not have been up to this task. Because of the level of disrepair of most real property, many entitled owners refused to file restitutionary claims. The result has sometimes been the transfer of vast quantities of land to outsiders — the only people who can afford to maintain the property. Natural restitution may be largely motivated by a desire to keep property out of ex-communist and German hands, but its effects are conflicting at best and counterproductive at worst.

Natural restitution remains intuitively appealing in a manner not captured by economic concerns — putting an elderly widow (or more likely, her heirs) back in her childhood apartment, the one she has longingly walked by for five decades. Somehow, then, restitution participates in a moment of personal and cultural definition. When a country signals its change to a new regime, it sends a message to its own citizens, at least as much as to foreign investors. Yes, restoring property indicates a renewed commitment to private ownership, but it also distinguishes the new regime's commitments from its communist predecessors' illegitimacy.

64. See It Still Hurts, THE ECONOMIST, May 21, 1994, at 58 (noting that Vaclav Havel, the Czech President, was "adamantly opposed to compensation" for the 2.5 million Sudeten Germans expelled at the end of WWII); see also Ofé, supra note 7, at 42 n.59.
65. See Crowder, supra note 22, at 254-55. "George Lobkowicz, a European banker who had never been to Czechoslovakia, recently became a Czech prince, and his family became one of the country's biggest landowners as a result of the restitution laws." Id. at 255.
Restitution has sometimes been cast in terms of "national rebirth and 'moral purification,'" an attitude that may explain the preference for natural citizens and the precision with which governments choose the dates for restorable expropriations. Limiting the class of people eligible to claim restitution helps create a mythical cultural identity; it serves as a tacit statement about who counts as "real" Czechs or Hungarians in these newly emerging states. Shlomo Avineri noticed that most former socialist countries, including the Czech Republic, chose cut off dates for restitution that coincided with the most ethnically pure moment in the country's history. In the Czech case, this was just after the Nazis had murdered the centuries-old Jewish community, and the Czechs had brutally expelled an equally rooted German community. Similarly, the Lithuanians chose the moment when the Jews and the Poles had been murdered and kicked out; the Poles when the Jews, Germans, and Russians were gone; and so on. Restitution, then, serves as part of national myth making, linking people to an imagined (or hoped for), ethnically pure past; that is, linking today's citizens to the "natural" owners of national private property.

Avineri's understanding of restitution leads us nicely into Dagan's framework. What myth is a country creating or evidencing through its restitutionary scheme? If restitution does not result only from contingent political and economic facts, then Dagan's theory suggests that each country's program may embody important — and importantly different — socioeconomic characteristics. Identifying these differences opens another level of subtlety through which to understand postsocialist societies.

66. Gelpern, supra note 22, at 323 (borrowing terminology from Vratislav Pechota, Privatization and Foreign Investment in Czechoslovakia: The Legal Dimension, 24 VAND. J. TRANSNAT'L. L. 305, 308 (1991)).

67. See Gelpern, supra note 22, at 356 ("All of the reprivatization initiatives generally bypass or subordinate the claims of ethnic minorities, most of which had been expropriated in succession prior to the relevant cut-off dates . . . .").

68. Shlomo Avineri, Lecture at the Conference on Restitution in Eastern Europe, Central European University, Budapest, Hungary (June 18-19, 1993).


72. For example, we are assuming that Hungary's limited restitutionary program was a result of more than the poor showing of its prorestitution party at the polls. See Offe, supra note 7, at 26-27; Gelpern, supra note 22, at 318 (arguing that "the likelihood of passing strong restitution measures varies inversely with the strength of the left and the technocrats in the political arena" which in turn depends on "the manner of each country's transition from state socialism."). There should be an interesting story to tell beyond these political accidents.
D. Postsocialist Restitution Through the Dagan Prism

What can Dagan's approach tell us about the Czechs and Hungarians? And what do their experiences tell us about his theory? Dagan's framework suggests we look for messages hidden in postsocialist restitution programs. Interpreting these messages requires some work. The remainder of this review is a tentative first step.

1. Of Control and Well-Being

First, consider natural restitution. To the Czechs, it may signal condemnation of certain expropriations and a commitment to particular victims of communism; to outsiders, it may signal a better investment climate with renewed respect for private property. Intuitively, natural restitution seems like a strong commitment to individual liberty and a rejection of sharing through forced transfers. It appears to stand in sharp contrast to Hungary's limited compensation. This preliminary conclusion may be too simple, however. In Dagan's hierarchy of restitutionary values, return of the rundown original property does not vindicate either the original owner's control or her well-being. What is going on?

According to Dagan's translation scheme, restitutionary remedies that vindicate control do so by removing a potential expropriator's *ex ante* incentives to take property unjustly. Natural restitution fails this test. According to the Czech program, communist expropriators return property only when it makes them no worse off than before the taking. In the rare cases when the communists increased the property's value, the original owner does not benefit. Dagan would term the unusual rationale motivating this system "well-being or control"; it permits recovery of only the lesser of fair market value and profits and is rarely used. Dagan notes,

> [T]he well-being or control rationale reverses forced transfers only in so far as the remedy does not diminish the defendant's *ex ante* level of welfare. This creates an incentive effect of encouraging forced transfers . . . . [which] not only encourages efficient transfers, but encourages all transfers indiscriminately. This may be the reason why the well-being or control rationale is not evident in any case or statute covered by this book. It can thus be safely omitted from our translation scheme. [p. 21]

73. See Bönker & Offe, *supra* note 22, at 21.

74. See Neff, *supra* note 22, at 369 (describing the Czech law that requires original owners of the rare property that has increased in value to remit the difference to the expropriator). The Large Restitution Law, however, may be ambiguous in its treatment of property that has increased in value. The relevant baseline may be the date when the Law went into effect and not the date of the original expropriation. Under this interpretation, the original owner is only responsible for compensating increases in value since 1991 when the Large Restitution Law was enacted. See Gelpern, *supra* note 22, at 338 n.81.
Dagan omits the rationale too quickly. Maybe it is missing from stable market economies, but Czechs, among others, have chosen this as their focus for restitution. Natural restitution sends a message: not of the vindication of personhood through protection of property, but nearly the opposite, that the communists could gamble with your land and then, when they lost, return it to you in shambles. In the Czech Republic, the property returned is often more of a liability than an asset, property the state willingly gives back.\textsuperscript{75}

By offering a percentage of the property’s fair market value up to a fixed ceiling, Hungary also adopts an \textit{ex post} level of recovery that reinforces the \textit{ex ante} incentive to expropriate. Hungary’s system is based on the rationale of well-being. It aims to restore the original owner to some fixed percentage of her \textit{ex ante} level of wealth. While this is not precisely a valuation scheme that Dagan considers, the remedy suggests to future expropriators that they have little to fear from this method of restitution. Expropriators have effectively been granted an entitlement to use the property, while being called on to restitute only a fixed and minimal percentage of its actual value. The Hungarian system, however, includes the following caveat: the fair market value of property valued at less than $2,300 is restored in full. For smaller property, then, Hungary’s purportedly limited restitution is even stronger than Czech natural restitution; in Hungary, people’s well-being is fully vindicated with respect to their smaller and perhaps more personal assets. This is indeed a surprising result.

Viewed in Dagan’s terms, the Czech and Hungarian transition programs no longer seem to fall on opposite sides of the restitutionary spectrum. Both countries are enacting limited property protection that may reinforce the perverse incentive to expropriate. The sharpest contrast in restitutionary approaches, then, is not between natural and monetary restitution.\textsuperscript{76} Rather, both programs stand together in contradistinction to other programs, such as that enacted in the former East Germany, in which the government restores either the property itself or its current fair market value,

\textsuperscript{75} See Crowder, \textit{supra} note 22, at 254. The property is not returned free and clear. Already dilapidated buildings may have tenants who cannot be evicted and for whom basic services must continue to be provided. “Protective rent controls place owners in a precarious situation by not allowing rent increases to keep pace with maintenance costs.” \textit{Id.} at 256.

\textsuperscript{76} This, despite commentators’ implicit assumptions to the contrary. See, e.g., Gelpen, \textit{supra} note 22, at 316 (“At the other end of the spectrum [from the Czech Republic], Hungary has granted former owners near-nominal compensation in capital vouchers.”); Youngblood, \textit{supra} note 71, at 645 (“[Restitutionary programs] range from no restitution to the return of all property taken by the former government.”); Bönker & Ofte, \textit{supra} note 22, at 11-12.
whichever the original owner prefers.\textsuperscript{77} Germany’s “well-being and control” remedy — also applied to the most protected resources in American restitution law — removes \textit{ex ante} incentives for future expropriators to take property unjustly by restoring the \textit{greater} of fair market value and profits. The Czech Republic and Hungary provide no such disincentive.

Dagan’s approach has already provided a powerful and counterintuitive insight: rules valuing restitution may reveal normative positions even more clearly than do rules on the physical form of recovery.

2. \textit{Eastern Europe and the “Personhood” of Property}

What does the general decision to vindicate \textit{well-being or control} tell us about underlying social values? Here, Dagan’s framework is indeterminate but still useful. The Czech and Hungarian laws may be able tell a story about their relationships with particular restituted resources, or they may equally well reflect each country’s socioeconomic ethos.

Within the Czech Republic, restitution’s political success was tied to the personal significance of the resource at issue. For example, passage of the Small Restitution Law can be explained, in part, because the law “returned small property of greater personal significance to a larger number of people than did the subsequent laws.”\textsuperscript{78} As Czech policy moved away from core resources, opposition increased. Even within a general framework of limited natural restitution, the Czechs created a hierarchy similar to the one Dagan reports in the American legal context. While the restitutionary remedy does not vary across resources in the Czech Republic — natural restitution is exclusively favored — differing political reactions to the various stages of restitution strengthen Dagan’s claim that the rules reflect a people’s relationship to different resources.

Looking to the personhood quotient of a resource opens a new way of perceiving Hungarian restitution. Instead of a mere economic necessity, Hungarians’ sliding scale grants greater protection to items of smaller economic value but perhaps more personal meaning. By giving full fair market value for smaller losses, the Hungarians vindicate the most acute interests people had, not in great concentrations of wealth, but in ordinary things like the family apartment. Dagan’s framework helps explain, and perhaps justify, Hungary’s approach.

\textsuperscript{77} See Rainer Frank, \textit{Privatization in Eastern Germany: A Comprehensive Study}, 27 \textit{VAND. J. TRANSNATL. L.} 809, 833 (1994). This principle is subject to several important exceptions that limit natural restitution. See id. at 833-38.

\textsuperscript{78} Gelpem, \textit{supra} note 22, at 327.
3. The Ethos of Expropriation

The personhood quotient of a resource is only one side of Dagan's analytical coin. Flipping now to the other, each country's social ethos may also make its respective restitutitory programs more intelligible. The restitutitory rules reflect how people today understand the legitimacy of the original expropriation. Countries that judge the communists more harshly now may place more emphasis on higher restitutitory awards, to the extent they can afford them.79 Both the Czechs and the Hungarians suffered communist rule and Soviet invasion, and today both go to considerable lengths to distinguish themselves from their political predecessors.

A generation of communist rule could have plausibly affected each country's sharing ethos — an ethos shift that may be reflected in its restitutitory awards.80 Dagan does not explore this issue in his case studies; rather, he takes the ethos as a given, an exogenous rather than endogenous variable in restitutitory programs. Contrast, for example, East Germany's socialist regime, "where small business presence was tolerated in manufacturing and service sectors, [with] the Czechoslovakian Communist government [that] nationalized practically all business to the state or operated these business in the form of cooperatives."81 Did more intensive socialist rules shift attitudes so that people became less invested in particular material resources?

The original Czech expropriation was on an enormous scale: "since 1945, the Czech lands had undergone the largest-scale nationalization in the region."82 Whether this reflected a preexisting national view of sharing or marked a radical shift, communal ownership was ubiquitous by the time the communist regime fell. The Czech's aggressive attack on private property perhaps created — or did it reflect? — a willingness to permit forced transfers of resources. In turn, perhaps this willingness can begin to explain why Czech restitution protects only well-being or control, while East Germany protects well-being and control. In other words, the form of restitution may teach us that Czechs had more tolerance for com-

79. See Gelpern, supra note 22, at 330 ("[T]he extent of compensation can be only as great as the country's load-bearing capacity permits." (quoting speech by Imre Konya, parliamentary leader for the Hungarian Democratic Forum, Political Parties in Brief, BBC Summary of World Broadcasts, Feb. 20, 1992, available in LEXIS, World Library, BBCSWB File)).

80. The communist government in Czechoslovakia engaged in systematic efforts to eradicate almost all forms of private ownership. For over 40 years, then, Czech citizens were indoctrinated into communal ownership and the government's right to collectivize people's land and expropriate their property. See Renzulli, supra note 22, at 170-74.

81. Neff, supra note 22, at 370.

82. Gelpern, supra note 22, at 324-25; see also Crowder, supra note 22, at 240 ("You can't understand the scope of the challenge... until you realize that here we don't own anything other than our toothbrushes.")
Revaluing Restitution

munist nationalization than did the Germans, whose restitution programs reflect more complete rejection of communist nationalization. Or maybe East Germans just had richer patrons — Dagan’s theory is not really designed to help us distinguish these cases.

The cutoff dates for restitution may also give some insight into national ethoses, beyond the symbolic myth-making role we have already discussed. Immediately after World War II, the Soviets expropriated land in East Germany that is not being restituted now. This results partly from the deal the Soviets made when they left Germany in 1989, but also from a sense of the legitimacy of the initial Soviet actions punishing the Nazis and breaking up feudal estates of the discredited Junker class. Similarly, in the Czech Republic, “[t]he intensity and breadth of opposition to the Czech Restitution Law [with an earlier recovery date] is evidence of popular belief in the justice of these post-war expropriations, and the persistent assumption of the collective guilt of Germans.” The perceived legitimacy of the original expropriation affected the restitution debate. Dagan’s approach focuses on a national ethos of sharing versus individualism, but the postsocialist experience shows that this variable is itself responsive to historical events.

More bluntly, people seem more sharing-oriented when their government is sharing around a disfavored group’s property. In other words, when designing restitution laws people ask (and commentators should ponder): sharing with whom? It is not only the quantum of personhood invested in a resource that matters, but whose resource is at stake. Perhaps a restitution program reflects the innocuous judgment that heirs and distant generations have less personhood wrapped up in a piece of property than living and present citizens. More invidiously, the idea of sharing can be used to exclude disfavored groups from claiming restitution.

Recognizing that sharing orientation depends in part on the social status of the original owner also explains limitations on who can file restitutionary claims. Why exclude Czech citizens living abroad? Why not permit foreigners to recover property? The simple answer is that the Czech Republic has come to view their precommunist expropriations as relatively legitimate, by contrast with Hungary, which has not.

83. See supra section III.C.2.
84. See Crowder, supra note 22, at 243; Stack, supra note 22, at 1221-22.
86. See, e.g., Youngblood, supra note 71, at 646 (discussing Poland’s proposed restitutionary plan which distinguishes between property taken by the Polish government and property taken by the Communists, claiming that “the latter is merely a cost of war,” and distinguishing between property taken pursuant to communist law and property taken outside the law.).
We find ourselves surprised to describe the Czech Republic, with its nationalistic, natural restitution approach, as perhaps more sharing-oriented than Hungary with its limited cash vouchers. The details of the programs, though, help qualify our understanding of each national ethos. Compared with the Czechs, the Hungarians evidence a relatively stronger individualist ethos by reaching back to 1939 and they demonstrate a less nationalistic version of the sharing ethos by restituting limited resources to a wide community. The ethos of sharing, which seems to have a warm and fuzzy aspect in Dagan’s Talmudic story, reveals a nationalistic and exclusive undertone when run through the Eastern European example.

Thinking about the Czechs sent us back to our Talmudic sources (rather, we cadged advice from those who know). Apparently, the Talmud would not distinguish in Dagan’s core example between the Jewish and Gentile squatter; neither would owe restitution to the landowner. Elsewhere, however, Talmudic law differentiates sharply the obligations Jews owe to each other and to non-Jews. The Talmud may require sharing within the group, but not with outsiders. In the Talmud, as in Eastern Europe, attitudes toward sharing turn out to be complex and contextual, dependent as much on the definition of community as on the personhood of resources.

IV. Conclusion

Dagan offers a useful new tool for thinking about comparative law. Rather than losing ourselves in technicalities, an occupational hazard that drives comparative scholars to abandon the field, Dagan shows how we can extract the social values embedded in the private law. Using his method, we can parse the core social values hidden in any area of law. The technicalities of unjust enrichment reveal compelling stories about property, personhood, and national ethos. When put to a practical test, Dagan’s approach opens a window on the frenzy of restitution across the former socialist world, an issue of practical and political significance that has received almost no theoretical attention. Dagan provides the intellectual tools we need to start the job.

87. See, e.g., Steven D. Fraade, Navigating the Anomalous: Non-Jews at the Intersection of Early Rabbinic Law and Narrative, in THE OTHER IN JEWISH THOUGHT AND HISTORY 145, 147-58 (Laurence J. Silberstein & Robert L. Cohn eds., 1994). For example, Fraade analyzes a passage from the Mishnah which discusses the remedy for one ox goring another ox. If both oxen belonged to Jews, the live one was to be sold and its profits divided between both owners — a sharing rule. However, if a non-Jew’s ox was gored, no compensation was due, and if the ox of a non-Jew gored the ox of a Jew, full compensation had to be paid — a damages rule imposed against outsiders. Id. at 147. Though Talmudic interpretations of obligations owed to non-Jews have evolved since medieval times, disparate treatment continues to trouble interpreters. See generally JACOB KATZ, EXCLUSIVENESS AND TOLERANCE (1961) (examining the complex and reciprocal evolution of Jewish and Gentile attitudes toward each other); DAVID NOVAK, JEWISH-CHRISTIAN DIALOGUE 26 (1989) (emphasizing the Noahide Laws which form “the rubric for the formulation of Jewish views of non-Jews”).