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# German Reparations After The Second World War

**Richard Buxbaum\***

To someone my age, some of the previous comments smack of the venial sin of Presentism. For some of us, 1961 is not all that long ago; we can test the question of past versus present comprehension of the changing American views of race and ethnicity by looking at the span of our own adult lives. I do not believe that we were ignorant of the realities of America's particular legacy of slavery nor its consequences.

Yesterday, this issue—the historical foundation of present consciousness—puzzled me. So, let me begin with a personal recollection. I remember many wild discussions about race while at Cornell in 1946. One reason for this focus was that I was placed in a dormitory with about five hundred undergraduates. Just in our small third-floor annex, there were about fifteen African Americans. I later learned the reason for this concentration, as I doubt there were more than twice that number in the entire undergraduate population. The university administration, in its wisdom, felt both that the African Americans would be comfortable with each other and, judging by the self-professed “progressive” leanings of the fifteen or so Whites on that floor—apparently as reflected in our application essays—we would not have any issues with this “integration.”

In other words, even at a northern college like Cornell, there was an unstated or implicit segregated residential dormitory policy in 1946. But, the discussions we had about this phenomenon certainly did not suggest historical amnesia, let alone quiescent acceptance of this policy. My conclusion, therefore, is that while, on one hand, there is an increase in real knowledge today when measured against earlier times—there is a new digging out of the historical truth—on the other hand, each generation must have its own look at history. Each generation must review history as it is relevant to that generation in its current situation. I do not dare comment on this in any knowledgeable way myself. Nevertheless, I have to get this much off my chest: I disagree with the notion that the young people I knew at that age and at that time had a false

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or innocent sense of what they or the world were about. What they did have was the resigned or non-resigned recognition that they lived in a society in which the majority did not share their understanding of their past. However, that did not mean that they did not understand their past or had no views on how society would or should change.

In short, I am against the notion that the past was not understood by those for whom it was the present. The debates around Marxism in the late thirties, when I first became conscious of these things, and around Colonialism in the mid-forties, were quite real and quite sophisticated. I suspect that can be said of each age when viewed without the anachronistic distortion of a Presentist lens. The most one can say in favor of retrospective insight is captured in Hegel's aphorism that the Owl of Minerva flies only at twilight;<sup>1</sup> or, for the merely middle-aged among you, in Frank Zappa's aphorism that if you understood the significance of an event as it occurred then you weren't actually experiencing it.

Now to the topic suggested by the title of this Section. The word "Lessons" I did not like and did not choose. It's a little journalistic or patronizing. But, I might say something about the work I have done, including some of my own personal participation, on the issue of reparations. Following the atrocities of World War II, reparations were largely associated with Jewish victims, although the subject is broader than that. In so reviewing, we may come upon some evaluations and experiences about that period that may bear on the issues of this Symposium.

Let us begin with one obvious point, and not a comfortable one. I wonder if you could guess the main reason why, in the case of Germany, reparations after World War II do not tell us much that would be useful for the consideration of reparations for American slavery and its legacy? The reason is very simple: Germany lost the war. An interesting thought experiment, and one that might provide a more useful reflection on the slavery-reparations issue, is to imagine a situation in which Germany had won the war. Over the next few generations, and in a slow and evolutionary way, the sickness and fever that had misled that population into these horrors would have slowly abated. A new generation of children would come along with a little more questioning of that recent past. Then a generation of grandchildren would come that begins even more questioning of this past—indeed directly challenging its allegedly mainstream understanding—and so forth. If that sounds applicable, as a generational process, to the United States 150 years—five full generations—after slavery, so be it.

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1. GEORG WILHELM FRIEDRICH HEGEL, *THE PHILOSOPHY OF RIGHT* 30 (\*Encyclopædia Britannica, Inc. 1990) ("When philosophy paints its grey in grey, one form of life has become old, and by means of grey it cannot be rejuvenated, but only known. The Owl of Minerva, takes its flight only when the shades of night are gathering.").

At what time in that sequence of “alternative history” might issues of reparations have arisen for the wrongs done to people who had been decimated at that time and whose properties were stolen or lost? We would be in a situation—not in terms of a simple and mutually disrespectful comparison of atrocities, but at least in terms of the sequences and cycles of history and remembrance and so forth—closer to that of the United States today than to the actual European situation after World War II. At that time in Europe, reparations followed almost immediately after the commission of the atrocities. After all, the victors reacted appropriately to the carnage. An obligation to make good of the harm its regime had caused saddled Germany. It accepted that obligation. It had no choice but to accept.

It accepted its obligations because the Allied Occupation Powers<sup>2</sup> were Germany. Until 1949, there was no Germany in the sense of a state that was part of an international community of states. At least in the West, in the later Federal Republic, the obligation of reparations and compensation were accepted as the first condition of regaining sovereignty. This is the treaty issue; specifically the so-called Partial Transfer of Sovereignty Treaty.<sup>3</sup> The new German state was obliged, as an element of regaining sovereignty, to pass domestic legislation modeled on pre-sovereignty Allied Occupation legislation, compensating the racially and politically persecuted victims of Nazism, for both property losses and—for what at that time of course was the more straightforward and obvious issue—for the loss of life, liberty, and health.<sup>4</sup>

Now, it should be obvious that this is not analogous to the U.S. debate on slavery and post-slavery reparations. In post-war Europe, there was an immediate imposition of both a legal obligation and of a force-fed political and educational restructuring of the German mind, society, and culture. The latter took somewhat longer to take effect than the legislatively based compensation, but by and large, it did take effect.

The anti-Semitism, other antis, and the xenophobia of the Third Reich, did not die out in one swoop on May 8, 1945.<sup>5</sup> I was in the U.S. Army from 1953 to 1957, stationed in Germany. The attitudes and belief systems that fed the National-Socialist takeover were by no means fully dissipated during what was still as much an imposed situation as a spontaneous change from below. The real democratization and change of political, social, and cultural norms in Germany came over a period of two to three generations, not over the period of a week or month in mid-1945. That is the background. That is why I say there

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2. France, the United Kingdom, the United States, and the Union of Soviet Socialist Republics.

3. Internal Restitution & Compensation, Convention on the Settlement of Matters Arising out of the War and the Occupation of May 26, 1952, chs. III-IV, 6 UST 4117, 4151, 332 UNTS 219 (1959) [the “Partial Transfer of Sovereignty Agreement”].

4. *Id.*

5. The signed surrender of Germany was ratified in Berlin on May 8, 1945.

is relatively little in that situation that is analogous enough in the social and historical sense to be of great use to the slavery reparations debates of today.

That said three or four things, over the past fifty years, nonetheless suggest that some elements of that time might be thought about and reflected on in the current period and in the context of the domestic American debates. One is the limited eligibility for compensation that is largely based on the distinction between property and person. The dead are dead. Most of the injured have also died. The remaining victims of slave and forced labor, many of them physically, mentally, and perhaps spiritually damaged are, if alive at all, in their late seventies or older. The question of compensation for them is not a terribly interesting matter to the powers that be. That does not mean there has not been compensation. But, my sense of how the European scene has gone is that the issue of compensation dies with the immediate victims. We notice this idea now, in the last fluttering of the flame that is Germany's current settlement. It is stimulated, of course, by the American class action litigation (to which I'll return later in this paper).

Let us look at the settlement in Germany—the ten billion German marks, five billion of which is to be contributed by German industry—and reflect on how it will be collected and distributed. In order to be eligible to participate in that ten billion mark fund, you must have survived as a slave laborer or a forced laborer until almost the present day—specifically until February 1999.<sup>6</sup> A descendant's successors cannot inherit the claim. Roughly ninety percent of the slave laborers and forced laborers in the German war machine died before February 1, 1999. By definition, they got no benefit from that settlement, nor will their heirs, their children, or their grandchildren. That is what the litigation that created this settlement, and that is legitimately hailed as an important watershed, comes down to: paying the 800,000 identifiable survivors of those camps and of those work barracks<sup>7</sup>—that is under one million of the fourteen million or so who were in this machine.<sup>8</sup> Of that fourteen million population—made up of eight and a half million forced laborers brought into Germany from occupied countries, concentration camp inmates (largely Jews), political prisoners, Gypsies,<sup>9</sup> so-called “a-social types,” and homosexuals and (at least as to the Jewish category) largely worked to death for labor—about 800,000 are

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6. Gesetz zur Errichtung einer Stiftung für Erinnerung, Verantwortung, und Zukunft [Law on the Creation of a Foundation for Remembrance, Responsibility and the Future], August 2, 2000, BGBl II 35 (2000) (based on U.S.-Germany: Agreement concerning the Foundation “Remembrance, Responsibility and the Future,” July 17, 2000, U.S.-F.R.G. 39 I.L.M. 1298 (2000)).

7. *Id.*

8. *See, e.g.*, STUART E. EIZENSTAT, IMPERFECT JUSTICE 239 (2003) (containing an estimate of ten million forced laborers accepted during the U.S.-German negotiations leading to the Agreement).

9. On this nomenclature, see Walter O. Weyrauch, *Romaniya: An Introduction to Gypsy Law*, 45 AM. J. COMP. L. 225 (1997).

left. It would be about 150,000 more if the board of directors of the foundation administering this fund agreed to include a group not contemplated during the settlement negotiations—the Italian military internees who, after the fall of the Mussolini regime in 1943, suddenly were no longer members of the Axis, but were transformed into forced laborers and shipped to Germany for the remaining two years of the war. Their claim for inclusion was denied.

The second issue remains: what compensation? Although ten billion German marks sounds like a large amount, the individual payments have never risen above the non-trivial. I do not want to deny that somebody in the Ukraine in strained circumstances would find the money useful, but this compensation has never risen above roughly five thousand dollars per person.<sup>10</sup> For the forced laborers who were not in concentration camps it is around \$2,500 per person.<sup>11</sup> That is the compensation. This is what all the publicity has been about. The lesson in this for American slavery reparations may be that direct compensation to individual claimants might be less than adequate, especially if you add to it the generational question in the United States. I am not arguing that it should not be done. But both the European experience and the available funds—including government and private sector contributions—suggest that the mountain labored and brought forth a mouse.

Yet this individual recovery is not trivial in a larger sense. There is the symbolic acceptance, particularly by the German private sector, of shared responsibility for this history—a responsibility that had never, until now, found acceptance. Even now, it is an acceptance only of the moral, not the legal obligation. It is considered a moral duty to pay, but it is strictly stated as a non-legal duty.<sup>12</sup> But, the acceptance of some moral obligation on the part of the private sector is not a light thing. Even if it was driven in part by economic pressures, it is nonetheless real. And, even the relatively modest compensation is not trivial given the situation of many of these elderly recipients, many living in Eastern European countries that are not lavish in what they can distribute as social security.

By analogy to the American scene, this direct compensation program is probably not the central issue. What was interesting—and has some relevance to our discussion—is the question of property, but not in the obvious sense. The direct return of property—that is, return of property to the very people from whom it was taken generations ago—is probably not, on the whole, an analogous situation for the United States. Even in Europe—in a much shorter timeframe, and with much more property at issue—this has not been an easy program to implement. The easiest was, of course, for those who were

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10. Foundation Law, art. 9 (The maximum statutory figure is [old] DM 15,000 [approx. seven thousand dollars] but unverified reports from the organizations in charge of distributions suggest this level is rarely reached.).

11. *Id.*

12. Foundation Law, Preamble.

deported and whose houses were taken over by the government. It is possible to get title to a house after twelve years have passed. But, as the experience with Communist or State-Socialist expropriation showed, in East Germany or in some of the other eastern countries, that kind of property return did not work on the whole. People who had property taken in 1947 in the post-war regime of Poland have had, on the whole, little success getting restitution of that property (even though it is “only forty-five years” and the victims or their direct descendants are still alive). It has not worked very well because of the obvious issues of intervening and legitimate, but conflicting, claims that unavoidably develop over even relatively short time periods.

What is perhaps most interesting about the European post-war experience is communal rehabilitation: the reestablishment of the foundations of destroyed Jewish communities and their social and cultural identities, particularly in the Central and Eastern European states. Jewish communal organizations could be rebuilt in Poland or in the Ukraine. Educational institutions, including religious schools, could also be rebuilt. The community could recreate, in a sense, its disrupted or destroyed continuity. That is something that is perhaps relevant to the current American reparations debate, whether in cultural identity or in more straightforward economic development terms. In this sense, new arguments for reparations may be a continuation of old discourses about wealth redistribution and capital formation.

My final point examines the combination of economic pressure and legal recourse. The settlement I discussed did not come about out of the blue sky. It came about only after very well planned class action cases were filed in the United States—actions that hit these enterprises in their pocketbooks and thus their nerves. These actions bore on what we called this morning their instrumental lives. Some simply worried about their goodwill. Others, like the insurance industry and the banks, were subject to regulation, and therefore worried about the legal right to continue participation in American economic activity. The banking commissioner of New York, for example, might try to withdraw the license of Deutsche Bank if it did not begin to get serious about opening their records to show whether and where the deposits made before the war might still be located.

My late colleague from Missouri, Richard Jennings,<sup>13</sup> whom some of you in the audience remember, also once spoke about mules, as we were doing this morning. He always reminded his students that the first thing you do is hit the mule with a two-by-four, not to get it going, but to get its attention so you can talk about getting moving. That is what litigation has done. It got attention. How to get moving once you have this attention involves a much wider political debate but that there is a role for this kind of action is clear.

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13. (Boalt '39) U.C. Berkeley Professor Emeritus; expert on corporate law and securities regulation; †1999.

In the end, suing your own government for the actions of the society that the government reflected, actions of a century and a half ago—even if more recent actions perpetuated that old legacy—is a somewhat different proposition from that of forcing a defeated enemy government to agree to reparations and compensation in the immediate aftermath of the injustices it committed. The two situations are not analogous enough to let anyone take too much comfort in their comparative discussion.



**PART 3:**  
**MODELS OF REPARATIONS FOR**  
**SLAVERY**

