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THE INHERITANCE-BASED CLAIM TO REPARATIONS

Stephen Kershnar
State University of New York College at Fredonia

I. INTRODUCTION

The notion that the current descendants of slaves are owed compensation for slavery is one that receives widespread discussion and support. For example, in 1989, Representative John Conyers of Michigan proposed legislation that would create a commission to explore the effects of slavery on both African-Americans and the United States. More recently, Randall Robinson, in *The Debt: What America Owes to Blacks*, argued that an important step toward healing racial division and helping poor African-Americans is to compensate blacks for slavery.[1] Also, a well-known group of civil-rights and class-action attorneys, including Harvard law professor Charles Ogletree and Johnnie Cochran, is putting together a lawsuit seeking reparations for the descendants of slaves.[2] The debt on some estimates involves trillions of dollars.[3] In this paper, I argue that the descendants of slaves were not harmed by slavery since they owe their existence to slavery. I then recognize that they may have a claim to compensation based on their having inherited their ancestors' (i.e., the slaves') claim to compensation. I argue that the inheritance-based claim is defeated by a number of concerns, particularly doubt surrounding the existence and amount of this inheritance-based claim, concerns about offsets (sums that must be subtracted from compensation), and problems concerning the identity of any contemporary public or private entity that owes compensation. Note that in this essay I will not discuss harms that were not the result of enslavement and hence I set aside some of the claims put forth on behalf of current African-Americans.

1. Randall Robinson, THE DEBT: WHAT AMERICA OWES TO BLACKS (2001).

2. *Reparations for Slavery*, 1 (CBS News television broadcast, 2000), *available from* www.cbsnews.com/stories/2000/11/04/national/main246998.shtml.

3. Larry Neal and James Marketti estimate that the value of unpaid income to slaves amounts to $1.4 trillion and $3.4 trillion respectively. Dinesh D'Souza, THE END OF RACISM 69 n.18 (1995) *citing* Richard F. America, ed., THE WEALTH OF RACES: THE PRESENT VALUE OF BENEFITS FROM PAST INJUSTICES (1990).

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II. SLAVERY DID NOT HARM THE DESCENDANTS OF SLAVES[4]

The compensatory-justice justification of reparations involves an attempt to rectify a compensable injury that resulted from slavery. This requires a comparison of the actual world in which the injured party lives to a relevantly similar possible world in which this party lives but where the unjust injuring act never occurred, in order to identify the degree of harm brought about by the unjust injurious act. Identifying the effects of this act allows us to estimate the amount of compensation owed to certain racial minorities, e.g., individual African-Americans. The problem is that some unjust injuring acts, particularly acts of slavery, led to intercourse and the later creation of the ancestors of many members of minority groups.[5] Hence, among the relevant possible worlds there is no case in which these individuals exist and in which the injustice, e.g., slavery, did not occur. As a result, the counterfactual test does not allow us to measure or even understand the existence of a compensable injury to these persons.[6]

A. Compensatory Justice and Token Harms

Compensatory justice aims at eliminating or rectifying unjustifiable gains and losses. The usual concern of compensation is the nullification of the victim's losses, the reordering of her affairs so as to make her whole again.[7] It generally relies on a comparison of the actual world in which the injured party lives to a relevantly similar possible world in which this party lives but where the unjust injuring act never occurred.[8] Just compensation places the person in qualitatively the same position she would have been had she lived

4. Parts of sections II and III come from *Are the Descendants of Slaves Owed Compensation for Slavery?*, 16 J. APPLIED PHIL. 95-101 (1999).

5. The underlying assumption here is that the identity of one's parents is an essential property of a person. On some accounts, this follows from the more general principle that the origin of an object is essential to it. Saul Kripke, *Naming and Necessity, in* SEMANTICS OF NATURAL LANGUAGE 351 n.57 (2nd ed., Donald Davidson and Gilbert Harman, eds., 1972). These accounts probably depend on a physicalist account of personal identity. The idea for this point comes from Geoffrey Madell, THE IDENTITY OF THE SELF 80-87 (1981). In addition, for simplicity I have chosen to focus on slavery. However a similar argument can be made with regard to Native Americans, interned Japanese-Americans, etc., since unjust treatment affected the mate selection and reproductive choices of members of these groups.

6. This argument can be seen in Christopher W. Morris, *Existential Limits to the Rectification of Past Wrongs*, 21 AM. PHIL. Q. 175-182 (1984); Michael E. Levin, *Reverse Discrimination, Shackled Runners, and Personal Identity*, 37 PHIL. STUD. 143 (1980); Ellen Frankel Paul, *Set-Asides, Reparations, and Compensatory Justice*, 33 NOMOS 119 (1991); Onora O'Neill, *Rights to Compensation*, 5 SOC. PHIL. & POL'Y 81 (1987). George Sher also brings up this argument, although he does so in a different context; George Sher, *Compensation and Transworld Personal Identity*, 62 MONIST 388-390 (1979).

7. Jeffrie Murphy & Jules Coleman, PHILOSOPHY OF LAW 159 (2nd ed., 1990).

8. I leave the aside the issue of whether there is a single relevantly similar possible world or an infinite sequence of them. Also, because there might be such an infinite sequence, I have chosen to focus on the relevantly similar rather than the nearest possible world.

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in the possible world. Since the purpose of the compensatory-justice justification is to place the injured person in the qualitatively same position she would have been in but for the unjust injurious act, the justification requires that we be able to determine the amount of compensation that is necessary to place her in this position.

This test for harm needs to be tightened up, however, since one need not be worse off in this world than in the possible world in which the unjust act did not occur in order to be owed compensation as a matter of justice.[9] To see this, imagine two delinquent boys who agree that the one, A, will push the next innocent bystander into the path of a particular truck, but that if he should fail the other one, B, will then push the bystander into the truck's path. A victim, C, who was pushed into the path of an oncoming truck and injured as a result of A's push could not legitimately complain that he was better off in the world in which A did not perform his unjust act. This is because he would have been hit by the same truck at the same time even if A did not push him. Compensatory justice however still demands that A pay C damages since C would not have suffered the token harm that he did but for A's act, even though, in the absence of A's act, C still ends up with the same type of injuries. The background idea is that the agent who performs an act is an essential property of that act and the harm that that act produces, and hence B could not have performed the same act token as A performed nor could he have caused the same token harm.[10] So the issue becomes whether the descendants of slaves would have suffered the same token harm in the relevant comparison world where slavery is not instituted.

The focus on token harms allows us to escape the following sort of argument against compensation for slavery.

> If we could make sense of the effects of slavery on the descendants of slaves, we cannot be sure that the effects are harmful. Slavery may have had a net positive effect on the descendants by giving them access to advanced technology and greater wealth they would otherwise not have had access to. If we measure the comparative positions of current African-Americans and current Africans in terms of income, civil rights, education, or economic opportunity, slavery would have produced a net benefit for the descendants of slaves, and hence it does not support compensation.[11]

The problem with this argument is that it assumes that the claim to compensation rests on the *net effects* of slavery rather than on slavery's

9. This example comes from Lawrence Lombard.

10. This view fits nicely with, but is not entailed by, Alvin Goldman's definition of an act token as the exemplifying of an act property by the agent at a particular time (and possibly in a particular manner); Alvin Goldman, A THEORY OF HUMAN ACTION 10 (1970). It also relates to the idea that an event's cause is an essential feature of it. Peter van Inwagen, *Ability and Responsibility*, 87 PHIL. REV. 201-224 (1978). On this view, the properly structured counterfactual is an epistemic guide but not the actual criterion for a token harm.

11. Versions of this argument can be found in Dinesh D'Souza, THE END OF RACISM 113 (1995); and Ellen Frankel Paul, *Set-Asides, Reparations, and Compensatory Justice*, 119.

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having produced *token harms* to the descendants of slaves. Consider the following analogy. Using a bat, Alice intentionally shatters Betty's arm. As a result, Betty refocuses her efforts from sports to academics, eventually leading to a flourishing medical career. If it has not yet been paid, it intuitively seems that Alice still owes Betty compensation even though the attack on the whole benefited Betty.[12]

B. An Analogy: The Wrongful Refusal to Have an Abortion

Joel Feinberg argues that there are cases where a wrongdoing can be recognized even where the counterfactual test is unusable.[13] Perhaps his approach can be used to explain how the descendants of slaves can be said to have a compensable injury as a result of the mistreatment of their ancestors.

Feinberg asserts that there are cases in which a woman should have aborted her fetus—where the fetus is defective and likely to live in pain—because it would have been better for the baby not to have existed than for it to have been born. He argues that, in cases like these, the baby is not harmed because the actual world in which the baby exists cannot be compared to the most similar possible world in which the woman aborted the fetus, because the baby never existed in that world. But the infant, on his analysis, has been wronged because the refusal to have an abortion produced a baby without its birth rights, which are welfare rights that protect (in most people) interests that are necessary to the fulfillment of other more ultimate interests no matter what they turn out to be.

To see why Feinberg's account fails to support the notion that the wrongdoing of slavery produces a compensable injury in the descendants of slaves, we need to consider the two main accounts of wrongdoing.

On one account of wrongdoing, one person wrongs a second person only if the first sets back a legitimate interest of the second.[14] This account may or may not require that the agent be culpable for her act. On this account, every wrongdoing is a harming. Since by hypothesis the infant is not harmed, it follows that the infant is not wronged. An analogous argument applies to the alleged wronging of the descendants of slaves.

On a second account of wrongdoing, one person wrongs a second person only if the first performs a prima facie morally impermissible act (or omission) that fails to satisfy a duty owed to the second. This account also may or may not require that the agent be culpable for her act. Underlying this account is the notion that there is a duty not to bring suffering persons into existence, since the presence of this suffering would be bad for these persons and since the absence of this suffering is neutral if not good (even

12. My assumption here is that the notion of proximate cause cannot by itself ground the relevant intuition.

13. Joel Feinberg, HARM TO OTHERS 95-104 (1984).

14. *Id.*, 95-104.

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though there is nobody to experience the absence).[15] This comparison involves not a comparison of two possible states of the person, i.e., a state where she exists and one where she does not, but rather a comparison of two states of affairs, i.e., one with the suffering person and one without her. Hence, on this account, the baby is wronged but not harmed by the person who brought about the state of affairs, even though the opposite state of affairs would not have benefited the nonexistent baby.

However, even if the state of affairs in which a person suffers is inferior to a state of affairs in which she does not exist, this inferiority does not ground a legitimate claim of compensation on behalf of the suffering person. And even if the second account can get around this objection, we still cannot say that the descendants of slaves were wronged but not harmed by slavery. On the second account, a baby may be wronged if it would have been preferable for it not to have existed at all than for it to have existed with its defects. The same cannot be said for the descendants of slaves, many of whom are flourishing, and hence the analogy falls apart.

Hence the descendants of slaves are not owed compensation on the basis of slavery being a harmless wrongdoing.

C. An Attempt to Show that the Descendants of Slaves Exist in the Relevant Possible World

One objection is that, contrary to my initial argument, the same African-Americans exist in both the relevant possible world and the actual world. Since they are better off in the former world, slavery gives rise to a legitimate claim of compensation on behalf of current African-Americans.[16] The idea underlying this objection is that since the relevant possible world contains the same African-Americans as the actual world, it is more similar to the actual world than possible worlds that do not have these persons and hence is the appropriate baseline for comparison. In the relevant possible world, the objection goes, the same African-Americans exist, because the persons who were slaves in the actual world but not the relevant possible world voluntarily came to America and chose to reproduce with the same persons that they reproduced with in the actual world.

The purpose of the relevant counterfactual is to determine those effects that result from the injuring act. To do so, the relevant possible world should include the condition of a person wrongfully injured in the actual world in the most similar world in which the injuring act did not occur. Since we use the differences between the actual world and the relevant possible world as a measure of the effects of the unjust wrongdoing, the relevant possible world must be identical to the actual world up until the

15. This idea comes from David Benatar, *Why It Is Better Never to Come into Existence*, 34 Am. Phil. Q. 345 (1997).

16. The idea for this objection comes from Michael Tonderum.

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time of the injuring act. Hence we determine the conditions under the relevant possible world by assuming that the conditions in it are (pretty much) identical with those in the actual world up until the time of the injury, and then envisioning the most probable outcome if the injuring act had not occurred. Here an outcome is probable relative to the evidence that we currently have rather than probable in any metaphysical sense.

The above objection, however, holds fixed many significant postinjury acts and conditions, such as acts of intercourse between specific persons and the movement of specific Africans to America. These significant postinjury acts can plausibly be held fixed only if the preinjury conditions in the relevant possible world differ from conditions in the preinjury actual world. But this difference would defeat the purpose of the counterfactual, which is to identify those effects of the unjust wrongdoing.[17] An example may help to illustrate the error. The objector may claim that in the relevant possible world, white slave traders would not have coerced (and might have paid) the persons who were slaves in the actual world but not in the relevant possible world to come to America, thereby allowing for the movement of the same Africans to America. This arrangement seems plausible, however, only if vast economic changes and changes in the widely accepted beliefs occurred in the period immediately preceding the American slave trade. But since in any usable world these changes would predate American enslavement, they must be left out of the relevant possible world. Hence in the relevant possible world some of the Africans might not have met in America and reproduced as they did in the actual world, and hence the relevant possible world would not contain the same persons as the actual world. Here I am assuming that the identity of a person's parents is an essential property of her. The objector might reply that my response is a problem for any counterfactual in which enslavement does not occur. However, if this is correct, then what this shows is that in the case of enslavement there is no plausible account of the relevant counterfactual that can be used to justify a claim for compensation.

D. Counterintuitive Results of This Model of Harm

One concern with the model of harm that I adopt in this section is that it has some counterintuitive implications. On this model, a benefit (or harm) is a promotion (or setback) of a person's particular interest compared to a counterfactual baseline.[18] Depending on the account one adopts, this baseline is a function of the person's likely or morally permissible degree of satisfaction with regard to that particular interest. A benefit (or harm) on this account relates to the promotion (or setback) of a particular interest relative to the baseline, and since a given act can affect different interests in different ways, it can produce both a benefit and a harm.

17. I leave aside the issue of whether or not causal statements reduce to counterfactual statements.

18. This model can be seen in Feinberg, HARM TO OTHERS, 53-54.

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One counterintuitive result of this model is that parents do not benefit a person by conceiving her. This is because there is no possible world in which she exists and is not conceived by them. Yet persons have a strong sense of gratitude toward their parents and this emotional fact suggests that the parents did confer a benefit. The strong sense of gratitude may be explained by the parent's efforts toward their child after birth. However, in the case of a parent who gave a child up for adoption, such an explanation will not work. I suggest that the sense of gratitude is mistaken (or at least the judgment that generates it is), although positing such a widespread error does provide some reason to doubt my account.[19]

My claim is that since present-day persons would not have existed if their parents had not conceived them, these individuals cannot benefit from conception. An objector might claim that this does not follow.[20] He might argue that given that a person *X* actually exists, we can meaningfully ask "How much value-for-*X* does this counterfactual world have?" even if *X* does not exist in that world. If the world is one in which *X*'s parents did not conceive her, then it seems that the world has zero value for her. It would then follow that if *X*'s life is actually worth living, then she was benefited. There are two things to note about this objection. First, if successful, it does not weaken my argument, since most descendants of slaves have lives worth living and thus were benefited by slavery. Second, this objection assumes that a world in which a person does not exist can have *value for her*. This is an error if a thing must exist in order to be a subject of properties.[21]

Another counterintuitive result is that the same treatment can be a benefit to one person and a harm to another, since it may promote the interest of the first while setting back the interest of the second.[22] However, this does not seem problematic once we recognize that a benefit or harm is a function of the effect on a person and that the same act may have different effects on different people (or even on the same person). So, for example, making a job offer to one person may benefit her, given her desperate state, and offend another, given her career success.[23]

19. Derek Parfit argues that causing a person to exist does *benefit* her even though it does not make her position any *better*. Derek Parfit, REASONS AND PERSONS 487-490 (1984). This account rests on a broader view of benefits and harms than the one I invoke above, but, if successful, it can account for the gratitude in question.

20. I owe this objection to Neil Feit.

21. This idea comes from Larry Lombard.

22. This point comes from Seana Valentine Shiffrin, *Wrongful Life, Procreative Responsibility, and the Significance of Harm*, 5 LEGAL THEORY 122 (1999).

23. A third counterintuitive result of this model is that it suggests that there is no morally significant difference between equivalent failures to prevent harm and to provide a benefit, since both can be measured in terms of a similarly sized deviation from a counterfactual baseline. *Id.*, 127-131. This is problematic in that it intuitively seems much worse to harm someone than to refuse to benefit her. The intuitive notion can be accounted for in part by the fact that the imposition of harm but not the failure to provide a benefit often involves a right infringement. It can also be accounted for in part by the fact that the imposition of harms usually reflects a worse moral character than the failure to provide a benefit.

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E. Objections to This Model of Harm

An objector might challenge my reasoning on the grounds either that the counterfactual analysis does not determine whether slavery is harmful or that it does and I have applied it incorrectly.[24]

An objector might make the following argument. That a person exists in the appropriate possible world (e.g., a world close to our own, except that it has no slavery) may be a presupposition of her having been harmed by slavery in the real world. But if the presupposition fails, it does not follow that the person has not been harmed. What follows is that we cannot say that she has been harmed and cannot say that she has not been harmed. However, harm is a comparative notion. A person is harmed by an event only if she would in some sense have been worse off than she would have been had this event not occurred. Hence, where a person does not exist in the appropriate possible world relative to slavery, it follows that she is not harmed by it.

Even if harm is a comparative notion, the objector might point out that slavery does not consist of the act of initial enslavement alone. Rather, it consists of an extremely large number of particular acts (and omissions) whereby slavery is maintained. For example, consider where a person lives in slavery for *n* days and where slavery is abolished the next day. Consider the slave's final day in slavery, i.e., the *n*th day. If he were freed on that day, then he would live that day in America as a free man. The harm done to him on that day by the acts that maintain slavery is to be measured relative to a baseline, i.e., his living that day in America as a free man. The acts that maintain slavery also harm his descendants if they would have been better off had the slave been freed that day. This last point is plausible only up to the point where the first postslavery generation is created.[25] Before the point of creation, if the slave had been freed, then in some, if not many, cases the slave would have reproduced with different persons or done so at a different time, thus using different genetic material, and this would have produced a different line of descendants. My assumption here is that a person's parents (i.e., her causal origin) and genetics (i.e., structural blueprint) are essential features of her. This alone prevents the descendants from having a compensatory claim relating to some, if not most, of the time during which generations of their ancestors were enslaved. Also, note that if the maintenance of slavery did not produce a token harm for the slave's descendants, then no claim to compensation is generated. To see this, consider that an ex-slave might have been killed or disabled as a result of his participation as a soldier in the Civil War.

24. I owe both of these helpful objections to the anonymous reviewer.

25. Note that the point at which the last generation of slaves reproduced need not be the moment at which a person comes into existence, since on many accounts a being does not become a person at conception. I leave aside discussion of the idea that reproduction occurs when the slave's progeny becomes a person rather than at conception.

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For the last generation of slaves during the period of time following reproduction, the acts that maintained slavery may well have harmed the slaves' descendants. This alone does not ground a claim to compensation, since such a claim requires both a harm and an infringement of a claim (that is, distinct from the claim to compensation). Since a harm is merely a setback to an interest, there are ways of setting back a person's interest without infringing on a claim. For example, if Al wins over the heart of Bob's fiancée, Al harms Bob without owing him compensation. It is not clear that enslaving a person and releasing him right before reproduction violates a duty to his progeny. Such a violation presupposes that a person has a claim that others not harm her parents before she comes into existence.[26] This involves a rather expansive view of persons' claims on others. If such expansive claims exist, and I doubt they do, then the acts maintaining slavery for the last generation of slaves may well generate a claim to compensation in at least some of their descendants.

F. Conclusion

Slavery itself has probably not resulted in a compensable injury to the descendants of slaves. If the descendants have a legitimate claim to compensation, then there must be other grounds for the claim.

III. COMPENSATION MAY BE OWED TO THE DESCENDANTS OF SLAVES AS A RESULT OF A LEGITIMATE INHERITANCE CLAIM

A. Compensation as the Justified Removal of Unjust Benefits

A descendant of slaves may not exist in the relevant possible world and hence cannot legitimately claim to have been harmed in the actual world. Still, in the actual world, white males have benefited from past injustices by gaining unwarranted self-esteem[27] or an unfair competitive advan-

26. Recent case law seems to sharply restrict the ability of children to recover for harm to their parents. Ferriter v. Daniel O'Connell's Sons, Inc., 413 N.E. 2d 690 (Mass. 1980), held that children may recover for loss of society and companionship as a result of injuries done to their parent, but only if the children are minors who are dependent on the parent for nurture and development. Similar results occur in Berger v. Weber, 303 N.W.2d 424 (1981) and Weitl v. Moes, 311 N.W.2d 259 (Iowa 1981). It is not clear whether recovery under this line of cases requires that the children exist at the time the injury occurred, although such restrictions might in any case reflect pragmatic concerns.

27. Thomas Nagel and George Sher identify this as an unfair advantage that white males gain as a result of prior unjust acts. Thomas Nagel, *Equal Treatment and Compensatory Discrimination*, 8 PHIL. & PUB. AFF. 360 (1973); George Sher, *Preferential Hiring, in* JUST BUSINESS 48 (Tom Regan, ed., 1983).

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tage[28], and it may be argued that compensatory justice requires that these benefits be returned.

The problem with this compensatory account is that even if white males have benefited from these past unjust acts, compensatory justice does not require that the unjust gains be transferred from them to uninjured parties. Such a move would at most transfer the injustice in the distribution of unjust benefits rather than eliminating this benefit. For example, imagine that Alice steals Betty's Mercedes Benz, sells the car, and uses the money to finance an expensive medical-school education for her daughter, Carol, although Carol does not know of the source of this money. Carol has a medical-school degree that is, at least in part, the result of an unjust act. However if the value of this degree, or any part of it, is transferred to an innocent third party, this does not eliminate the injustice but merely transfers it, and compensatory justice does not require this sort of transfer. In the case of affirmative action, for example, if some of the unjust benefits of slavery are transferred from white males to racial minorities who have not been injured (at least not from slavery), this merely transfers the unjust benefits from one innocent person to another.

B. Models of Compensation

One might argue that the slaves are owed compensation, but since they have died, their moral claims are transferred to their inheritors, usually their descendants, through implicit inheritance practices or through a will.[29] I am assuming here that the right of the original property owner to give away her property and the right of the inheritor to receive the property are essential elements of property rights and that property rights entail prima facie moral duties. According to this account, if the enslaved person had not been enslaved in the relevantly similar possible world, and if the slave's inheritors are the rightful owners of the slave's property, and if the inheritors of the slave's property are likely her descendants, then compensatory justice supports compensation being owed to the slave's descendants. Note that this account does not rest on the claim that the current descendants of slaves were harmed by slavery, and thus it escapes concerns that relate to their nonexistence in the relevant possible world.

A different but related account is that the slave retains her moral claim to compensation even after her death, and this claim survives her death. On this account, the descendants never own the claim to compensation but merely assert it on behalf of the deceased slaves, in the same way in which

28. George Sher and Judith Jarvis Thomson identify this as an unfair advantage that white males gain as a result of prior unjust acts. George Sher, *Justifying Reverse Discrimination in Employment, in* THE AFFIRMATIVE ACTION DEBATE 73-75 (Steven M. Cahn, ed., 1995); Sher, *Preferential Hiring*, 48; Judith Jarvis Thomson, *Preferential Hiring, in* EQUALITY AND PREFERENTIAL HIRING 38-39 (Marshall Cohen, et al., eds., 1977).

29. The idea for this objection comes from Lawrence Powers.

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an estate's trustee may claim (both morally and legally) the right to recover money owed to the deceased after she dies. On this account, the descendants have a second-order right to assert the first-order rights of the deceased slaves, and the compensation is owed to the slaves themselves. And given that the trustees of the slaves' estates are probably their descendants, the descendants may choose to distribute the money to themselves.

This second model does not have an inheritance element, since current blacks never have a right against the party that owes compensation. My assumption here is that in general a third-party beneficiary does not have a (first-order) right against the person against whom the right is held. I do allow that the descendants have a second-order right against whoever owes a debt of compensation to the slaves. The second-order right here is analogous to the way in which a corporate officer has the legal standing to demand the satisfaction of the corporation's claim without himself being the claim-holder. Perhaps the officer does not have a right so much as a narrow, contract-based power. By analogy, the descendant has the (moral) power to demand the satisfaction of the debt that is owed to the slave.

The point has been raised whether the better analogy is that the descendants are the trustees or the beneficiaries of a constructive trust.[30] A constructive trust is not a trust but a legal remedy imposed by a court in cases involving unjust enrichment and either fraud or unconscionable conduct.[31] It need not reflect the intent of the property owner. Examples of cases in which it is used include where a beneficiary kills the testator or where he suppresses a later will. In contrast, a trust is an intended arrangement where a trustee manages, invests, or safeguards the trust assets for the benefit of certain beneficiaries. Both are legal entities. The moral analogue here is the arrangement where the slave retains rights to the property (i.e., the claim to compensation), but the descendant is either the administrator or the intended beneficiary. In some cases, the intended beneficiary is picked out via the slave's counterfactual intent, since in many cases the slave did not recognize that she is owed compensation and thus did not form an intent or desire as to how it ought to be distributed upon her death. Since the slave's counterfactual intent would likely have been that her descendants fill both roles, I think that both models are useful for getting at the moral analogue.

The idea that a person may have a moral claim or an interest in receiving just compensation even after her death can be seen in Joel Feinberg's account of postmortem harms.[32] Feinberg argues that a person's interest may survive her death even though she does not survive her death. Feinberg's idea is that her particular goals and desires can be satisfied or frustrated by events that she is not aware of and that occur after her death.

30. The idea for the constructive trust model comes from George Schedler.
31. Black's Law Dictionary (5th ed., 1979), s.v. "Constructive trust."
32. Feinberg, Harm to Others, 79-95.

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For example, Ms. Cohen's desire that her son, Eric, become a rabbi may be satisfied by her son's achievement even after Ms. Cohen dies (and thus ceases to exist). On Feinberg's account, since a person's interests can be satisfied by events or states of affairs that occur after her death, that person's interests survive her death. Feinberg asserts that while a subsequent event may *make it true* that a surviving interest is set back, the event does not *cause* the interest to be set back. Since, on his account, the makes-it-true relation is not indexed to a particular time, postmortem events may satisfy or set back (i.e., harm) a person's interests. For example, Eric's graduation from rabbinical school makes it true that his mother's desire is satisfied and hence makes it true that during his mother's lifetime a significant desire of hers is satisfied.

In the case of the descendants, if failure to pay compensation to the slave sets back the slave's interest in being treated in a just manner, the postmortem failure may be an unjust omission that grounds a legitimate claim to compensation.

Note that neither this account nor the earlier inheritance account assumes that the descendants must exist in the relevantly similar possible world in order to have a legitimate claim to compensation. And the second account does not even assume that the descendants of slaves have a significant claim to compensation, since on this account any failure to pay compensation is wrongful primarily because it sets back the first-order rights or interests of the slaves. These objections thus avoid the problem of the nonexistence of the descendants of slavery in the relevantly similar possible world without slavery while at the same time they provide a reason to think that compensatory justice supports compensatory programs such as affirmative action and the payment of reparations. This is not to say that such compensatory programs are, all things considered, morally justified, for they may still be overridden by conflicting moral reasons.

C. The Argument for the Inheritance Model

The inheritance model is a better model than the one in which the slave retains her right to compensation and her descendants act as the trustees of her claim. This is because giving money to the descendants would often not satisfy the slave's right. The idea behind the trustee model is that the slave has a right to compensation, and that this compensation should be given to the person or persons to whom the slave wanted it to go to or at least would have wanted it to go to had she thought about it. It seems likely, however, that in a significant number of cases the slave would have preferred that the compensation be given to groups other than descendants several generations removed. For example, she may have preferred that it be given to her close friends, African relatives, or the Baptist Church.

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A proponent of the trustee model may respond that the slave probably did desire (or would have desired had she considered it) that the compensation be given to her children or grandchildren. The proponent might then reason that the slave's children or grandchildren probably did desire (or would have desired had they thought about it) that the money be given to their children or grandchildren, and so on. On such a model, the trusteeship would end up with the descendants of slaves getting the money via interlocking desires. The problem with this solution is that the slave would probably have desired not just that her wealth go to certain to persons but that her claim be transferred as well. Given this desire, it is not clear why one would hold that the slave's right is retained by her rather than transferred to her descendants via interlocking desires.

One might object that the inheritance model mistakenly assumes that inheritance of claims can exist in a moral sense that is independent of the conventions that characterize legal inheritance. There is a view of inheritance that does allow it to be conceptually preinstitutional. If inheritance is in principle merely a gift (or a contract), and if gifts (or contracts) are a type of promise, and if promises are preinstitutional practices that create moral duties in the promisor, then inheritance is preinstitutional.[33] On this account, a claim of inheritance is nothing more than a claim to be given the object of a promise. Now this may differ from the legal institution of inheritance, which includes both mandatory and default rules with regard to the disposition of a person's property. Such rules may be justified by other concerns, e.g., fairness, utility, concern for the welfare of the deceased spouse and children, but they are not essential features of inheritance. If this is correct, then the inheritance model is consistent with preinstitutional rights and hence independent of legal conventions or institutions.

D. Groups Are Not Owed Compensation

Some proponents of reparations argue that blacks *qua* group have a legitimate claim to compensation.[34] If a group is understood as something other than a collection of individuals (or in some cases a collection of individuals standing in certain relations to one another), then such a claim is problem-

33. On some accounts, promises are a type of conventional speech act that has illocutionary force. John Searle, *What Is a Speech Act? in* PHILOSOPHY OF LANGUAGE 120-125 (2nd ed., A. P. Martinich, ed., 1990); John Searle, *How to Derive "Ought" from "Is," in* THEORIES OF ETHICS 101-114 (Philippa Foot, ed., 1990). On such an account, they may be independent of institutions (bodies that have authority over others) even if they are dependent of conventions. The notion that contracts and gifts are types of promises is defended in Charles Fried, CONTRACT AS PROMISE (1981).

34. Bernard R. Boxill, BLACKS AND SOCIAL JUSTICE 153-154 (2nd ed., 1992). Michael D. Bayles discusses the idea that reparations are owed to groups and not to individuals but not does not clearly endorse the idea; Michael D. Bayles, *Reparations to Wronged Groups, in* THE AFFIRMATIVE ACTION DEBATE 15-18 (Steven M. Cahn, ed., 1995).

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atic.[35] This is because an entity can have a legitimate claim of justice only if it has the capacity to enjoy different levels of well-being, i.e., a life that can go better or worse. This can be seen in that all three types of justice, i.e., retributive, compensatory, and distributive, are concerned with levels of well-being. An entity can enjoy different levels of well-being only if it has desires, and a being can have desires only if it is conscious.[36] It is hard to imagine an entity that cannot be healthy or ill, comfortable or uncomfortable, happy or unhappy, satisfied or unsatisfied, or successful or frustrated with regard to a project, having its life go better or worse. Plants, for example, may thrive or not thrive, but it is hard to see how their lives might go better or worse. Hence, *qua* group, blacks do not have a legitimate claim to compensation, although *qua* collection, blacks or the descendants of slaves may have a claim to compensation.

E. The Amount of Inheritance

According to the inheritance model, descendants are owed the compensation owed to their enslaved ancestors. Compensation for slavery should attempt to place a slave in the position that she would have been in but for slavery. If a person is enslaved, some damages may be required for quality of life lost when the person was forcibly removed from Africa. This may include lost access to the slave's family, friends, and culture. If the slave is then forced to work in the United States or the Colonies, this also calls for compensation.[37] That a slave would have died but for the institution of slavery does not undermine her claim to compensation. For example, consider the case where pain and suffering worth $500,000 is imposed on a slave who is raped by her master, whereas, had she not been enslaved, she would have been gang-raped (far more frequently) and slaughtered by an aggressor rival tribe in Africa. This is because token harms (harms individuated by some feature or features of their causal history) are not necessarily determined by the possible world picked out by the absence of the victimizing act or set of acts.

35. This is not to say that current membership is an essential condition of a group. Instead, the group's claims might be parasitic on the claims of whatever collection of persons stand in certain relations and either has the proper causal-historical links to the collection that founded the group, or is in an ancestral relation to this collection. This approach suggests but does not obviously commit me to the notion that the initial membership and relations binding these group members are essential conditions of it.

36. Some of the ideas for this argument come from George Sher, *Preferential Hiring*, *in* JUST BUSINESS 36-37; and Michael Tooley, *Abortion and Infanticide*, *in* THE RIGHTS AND WRONGS OF ABORTION 58-65 (Marshall Cohen, et al., eds., 1974).

37. George Schedler objects that compensation for slavery is not owed for coerced labor on the basis that the relevant baseline is a world in which the work is not done or done by other workers. On this account, the relevant baseline world is not a world in which the slave does the work and is compensated for it. George Schedler, RACIST SYMBOLS & REPARATIONS 101, 107-109 (1998). Still, in the world in which slavery occurs, the slave's interest in receiving just compensation for one's work is set back.

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Other things being equal, the amount of compensation owed to an injured person as a matter of justice is that amount of wealth that is required to place her at the point of indifference. This is the point at which she is indifferent between being injured and compensated and being uninjured.[38] One method for determining the amount of damages for slavery is to imagine the *ex ante* transaction where a potential slave is asked to determine the minimum price for her to accept a particular chance, e.g., *n*%, of being enslaved. The compensation owed is then set equal to the amount divided by *n*%. For example, if a person were to accept a 10% chance of being enslaved for $1 million dollars, then the amount of damages owed would be $10 million. This model has the advantage of allowing the slave herself to determine the disvalue of slavery. It also gives us a practical guide, since we can look at the actual premium workers charge on dangerous professions as a crude guide to this amount.[39] In specifying this counterfactual, we would have to fix the person's context, e.g., her level of wealth, expectations, risk aversion, and country of residence, a task that lies outside the scope of this paper.[40] The standard is a function of the slave's individual preferences, although for practical reasons statistical generalizations may have to be relied upon. A second method involves an estimation of the slave's lost income based on the market value of a free worker performing the labor done by the slave. This method measures the actual wages lost by a particular slave and could be used along with the first method.

F. Conclusion

The claim of descendants of slaves to compensation for slavery is dependent upon their owning the slave's claim to compensation via inheritance. Insofar as this right has been infringed upon, they have suffered a token harm. This token harm does not depend on their having been harmed by slavery or on the slaves retaining their rights to compensation. The token harm of lost inheritance, and this harm alone, grounds their claim to compensation for slavery. This compensation is owed to individuals, not to a group, and is equal to the amount of resources required to place them at the point of indifference.

38. The other-things-being-equal condition screens out a range of irrelevant variables, e.g., irrational preferences and evidentiary problems.

39. David Friedman, *What Is "Fair Compensation" for Death or Injury?*, 2 INT'L REV. L. & ECON. 85 (1982).

40. Other adjustments would also have to be made. For example, there may be a diminishing marginal utility for injured parties that ought not be factored into the compensation that is owed. Friedman, 82-83.

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IV. OBJECTIONS TO REPARATIONS

A. The Metaphysical Objection: The Claim Divides over Successive Generations

On the above account, the inherited claim is divided among increasingly large numbers of descendants as successive generations come about. As a person's descendants branch out over successive generations, each generation gains only a portion of the earlier generation's claim. For example, if a black man is owed $1,000,000 in compensation, and his claim is divided up equally between ten great-grandchildren, each will have a claim worth no more than $100,000 plus interest. Of course the interest owed may be substantial, given the length of time over which the claim has persisted.

B. The Epistemic Objection: Problems in Assessing the Amount Owed

Over several generations, epistemic problems arise in identifying the descendants of slaves as the inheritors of the slave's claim. The notion that a claim would have been passed on through successive generations is made less likely by the proliferation of factors that lead families over generations to lose wealth, sell off claims in return for immediate benefits, or disinherit one another. These factors make it unlikely that later descendants would have a portion, let alone the whole, of their ancestor's claim. Even the notion that, as a collection, current black descendants of slaves would hold the claims to compensation of the slaves also depends on a denial of transference between the group of descendants and others that is improbable.

An additional epistemic problem arises with regard to the amount of the original claim. Other than by a counterfactual free market in which persons sell themselves into slavery, it seems hard to assign a value to the loss of liberty, pain and suffering, degradation, etc. The slave's (and her family's) *ex ante* wealth and expectations about quality of life in Africa would play a large role in determining the counterfactual contract price. In assigning the disvalue of slavery, a potential slave would compare the disvalue of a life in slavery to the value of resources being provided to her family and village. The idea behind the resources being provided to the slave's family and village rather than the slave herself relates to the notion that a slave is legally owned by the master. Hence any resources given to a slave can, and probably will, be confiscated by her master, thus making such payments of dubious value.

The epistemic problem cannot be solved via an assumption that but for slavery or past discrimination blacks would have the same income and distribution of positions as whites. This is because there is strong evidence to believe that there are genetic differences in the average intelligence of

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racial groups and that such differences will likely affect a group's economic performance.[41] Also, there are probably differences in sociocultural beliefs, attitudes, and values between different groups.[42] While not genetic, these are deeply embedded factors that are also likely to affect a group's economic performance. There are also destructive behaviors that are not the result of discrimination and that likely produce inequality between racial groups. For example, in the mid-1990s blacks had nearly a 70% out-of-wedlock birthrate.[43] Since out-of-wedlock births are associated with many destructive behaviors, e.g., crime, attitudes and activity leading to out-of-wedlock births have harmful effects on the black community. Blacks also commit a disproportionately large amount of violent crimes. For example, during recent periods they have constituted 50% to 60% of the arrests for murders and 50% of the arrests for rape (and these rates match the frequency distribution of victims' reports).[44] Out-of-wedlock births and violent crimes are in general voluntary acts for which moral responsibility rests on the agent who performs them. When such acts form a general pattern in the black community, they produce an unequal distribution of income and wealth when compared to other racial groups. The effects of this destructive behavior must be disentangled from those injuries that result from the loss of inheritance, and this is a daunting task. When combined, these epistemic problems make the decision as to the amount of damages owed for lost inheritance highly speculative.

One objection likely to arise here is that the differences in intelligence, sociocultural beliefs and values, crime rates, etc. between the descendants of slaves and other U.S. populations are the effects of slavery and related oppression, e.g., segregation and widespread racism.[45] This claim is not

41. Richard J. Herrnstein and Charles Murray argue for the existence of such differences in THE BELL CURVE (1994), ch. 13. Their argument has received a lot of criticism. For example, some authors have argued that that racial mistreatment and not genetics may account for the data that are used to support the notion of high intraracial heritability of IQ. Ned Block, *How Heritability Misleads about Race*, 56 COGNITION 99-128 (1995); C. Jencks, RETHINKING SOCIAL POLICY 99, 107 (1991); and Andrew Hacker, TWO NATIONS 27 (1992). Others object that the inference from genotype to phenotype with a particular IQ that underlies the finding of interracial genetic differences in intelligence is flawed because the phenotypical patterns may change when we consider unobserved environments. Block, *id.*, figs. 4 and 5; D. Layzer, *Science or Superstition: A Physical Scientist Looks at the IQ Controversy, in* THE IQ CONTROVERSY 194-241 (N. Block & G. Dworkin, eds., 1976). There are also general objections to the inference from IQ test scores to different genetic aptitudes. Among the more general objections are that there is no such thing as intelligence (as opposed to multiple distinct abilities); even if there is such a thing as intelligence, it is not measured by IQ tests; and in any case, environmental factors alone explain intra- and intergroup differences. The summary of the different objections along with a critical response to them occurs in Michael Levin, WHY RACE MATTERS (1997), chs. 3-4; and Max Hocutt & Michael Levin, *The* Bell Curve *Case for Heredity*, 29 PHIL. SOC. SCI. 389-415 (1999).

42. An extended defense of this claim is provided in Thomas Sowell, CIVIL RIGHTS: RHETORIC OR REALITY? (1984).

43. U.S. Dept. of Commerce, STATISTICAL ABSTRACT OF THE UNITED STATES 2000, 70 (2001).

44. T. Gest, *A Shocking Look at Blacks and Crime*, U.S. NEWS & WORLD REPORT 53-54 (Oct. 16, 1995); Hacker, TWO NATIONS, 181; N.A. Wiener & M.E. Wolfgang, *The Extent and Character of Violent Crime in America, 1969 to 1982, in* VIOLENCE 32 (Neil Alan Weiner et al., eds., 1990).

45. I owe this objection to an anonymous reviewer.

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obvious. For example, interracial adoption studies provide evidence that there is a genetic explanation of interracial differences in intelligence.[46] If intelligence affects such things as poverty, schooling, welfare dependency, parenting, and crime, then there is a nondiscriminatory explanation of some of the interracial differences in these areas.[47] However, even if these genetic explanations fail, we think that many persons, even ones from rotten social backgrounds, are morally responsible for a good deal of their acts despite the etiology of these actions. If this is correct, then it further seems that a person may not collect for harmful or self-destructive behavior for which he is fully responsible. To see this, consider a situation in which a man gets his car dented due to another driver's negligence. As a result of his anger over the accident, he gives his wife a severe beating, thereby grounding a just claim in her to compensation. It intuitively seems that the negligent driver may not be made to pay the husband's debt to his wife despite the driver's having caused her injury. I leave aside what accounts for this result, e.g., intervention by a morally responsible agent, the unforeseeability of this result, the limited scope of the driver's duty, or the lack of proximate causation. If we assume that justice presupposes that the victim and wrongdoer are morally responsible parties, and I think we should, then any blanket denial of responsibility would undercut the descendants' claim of compensatory justice.

The slaveholders are long dead, and the wealth of the taxpayer population has been formed in large part through voluntary actions, thus creating a powerful moral claim against overcompensation of the descendants. This claim rests on the value of respecting reasonable expectations, protecting legitimate property rights, promoting economic efficiency, and perhaps also satisfying economic desert. An extended defense of this claim will take us too far afield, but I note that many justifications of property rights and free-market transactions are independent of claims about the justice of the initial acquisition of resources.[48] Given this powerful claim on behalf of taxpayers and given the speculative nature of the descendants' claim, the case for compensation should be rejected.

46. Studies of identical twins raised in different families show a high degree of similarity in intelligence. This suggests that intelligence is to a significant degree heritable. These studies are summarized in T. J. Bouchard, *The Genetic Architecture of Human Intelligence, in* BIOLOGICAL APPROACHES TO THE STUDY OF HUMAN INTELLIGENCE (P. A. Vernon, ed., 1993). Adoption studies show that black children have IQ test scores closer to their genetic parents than their adopted white parents. This suggests the interracial difference in intelligence is genetic. R. Weinberg, S. Scarr, & I. Waldman, *The Minnesota Transracial Adoption Study: A Follow-up of IQ Test Performance at Adolescence*, 16 INTELLIGENCE 117-135 (1992). Herrnstein and Murray estimate that the black-white difference in intelligence is significant (one standard deviation) and that roughly 60% of it is hereditary. Herrnstein & Murray, THE BELL CURVE, 276-280, 298-299.

47. Herrnstein and Murray, chs. 5-12.

48. For example, an efficiency-based defense of property rights can be found in Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV.: PROC. & PAPERS 347-359 (1967). A desert-based defense of income earned via sacrifice can be found in Joel Feinberg, DOING AND DESERVING 88-94 (1970); and a general defense of desert as the object of one's hard work can be found in George Sher, DESERT (1987), ch. 4.

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In addition, merely having benefited from a wrongdoing is not enough to establish liability. To see this, consider the following case:

> Jim, a white American, is the second-best tennis player in the world, second only to a Chinese-American, Frank. As a result of Frank's superiority, Jim makes only one-third the money that Frank makes. One weekend however, Frank is out on the town with his white girlfriend, and is viciously beaten and stabbed by a racist Brooklyn mob. This mob has no connection to Jim. Jim, now freed of competition from Frank, wins more tennis tournaments and, as a result, his income triples. Jim has thus directly benefited from an injustice done to Frank.[49]

Intuitively, Jim does not owe two-thirds of his winnings to Frank. This is despite the fact that but for the injustice, Frank would have won the money. Whether this result is explained by Jim's income being at least in part the result of desert, legitimate property rights in the tournament's owners, or the role of merit is an issue that need not be resolved here.

Nor can the epistemic problems be solved via a setting of compensation equal to the disgorgement of ill-gotten gains. This is because disgorgement is not directly related to the attempt to return the descendants to the position they would have been in but for the harmful act or omission.[50] In general, a person who injures another may have an unjust gain that differs from the victim's unjust loss. Consider the following case. Jane has $10,000 in the bank and has it invested at a 6% rate of interest. Susan then steals the money and invests it in a risky technology company whose stock subsequently skyrockets, resulting in Susan's stock (at least that part purchased with Jane's money) being worth $200,000. Here Susan's unjust gain is far greater than the sum needed to compensate Jane for her loss.[51]

C. The Offset Objections: Violent Crime and Welfare Benefits

Blacks commit a substantial number of crimes, including a disproportionately large number of violent crimes. For example, approximately one

49. This example comes from *Strong Affirmative Action Programs at State Educational Institutions Cannot be Justified via Compensatory Justice,* 11 PUB. AFF. Q. 354 (1997). A similar point can be found in Louis P. Pojman, *The Moral Status of Affirmative Action, in* MORALITY IN PRACTICE 247 (5th ed., James P. Sterba, ed., 1997).

50. Here I am not committing myself to the stronger claim that compensatory justice allows a debt of compensation to be discharged by a person other than the one who caused the harm. Such a view is defended in Jules Coleman, *Corrective Justice and Wrongful Gain,* 11 J. LEGAL STUD. 421-440 (1982).

51. This point invalidates an argument from George Schedler. He argues that since slave owners did not receive any ill-gotten gains (at least by the end of the Civil War), they do not owe any compensation on these grounds. Schedler, RACIST SYMBOLS & REPARATIONS, 114-115. However, given the above point, it can be seen that whether they benefited is irrelevant to the issue of whether they owe damages for the token harm they have caused.

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black male in four is incarcerated for the commission of a felony (note that this figure includes both violent and nonviolent ones).[52] Given that crimes that victimize others ground a claim to compensation in the victim, the compensation for lost inheritance must be offset by such claims to compensation against those who have committed such acts or those who have benefited from the inability or refusal of aggressors to pay compensation. To the extent that this affects a substantial portion of the black community, e.g., some criminals and their families, this may reduce the compensation that is owed. Whether this offset exceeds the compensation owed introduces yet another epistemic difficulty, and the problem gets even murkier when we consider the party against whom the offset applies.

One other offset that is mentioned in the literature and that is worth considering is that accompanying the welfare state. Michael Levin argues that in the United States there is an enormous transfer of wealth from whites to blacks every year. He argues that since blacks make considerably less money on average than do whites, since blacks constitute about 40% of welfare dependency, and since income taxes are progressive, there is a net annual white-to-black transfer of about $75 billion.[53] Using 1990 dollars, this is equivalent to a Marshall Plan for blacks every three years. Such payments probably do not count toward any reparations owed, since the money is given out in a manner that is unrelated to reparations and is instead based on need.

Consider the case where a wealthy benefactor, Al, negligently breaks the leg of his grandson Stan. Before he can pay for that injury, Al dies and his estate, using its discretion, decides to transfer to each of his three grandsons, including Stan, $300,000. Does this satisfy the debt? If the estate labels the money to Stan as payment plus a gift, then it does (assuming this amount is more than the debt), whereas if it does not do so, then the case gets murkier. The problem here is that there is an issue as to whether transfers of wealth that are not intended to satisfy a debt of compensation, are not labeled as such, and are not accompanied by a relevant type of illocutionary act can satisfy a debt of compensation. It seems that this is likely not the case where the money is given to the injured party in satisfaction of an independent moral claim (e.g., the moral claim that all those in need receive equal treatment). Hence this white-to-black transfer will probably not satisfy even a portion of the debt owed for slavery.

52. Michael Levin, *Responses to Race Differences in Crime*, 23 J. SOC. PHIL. 5 (1991); *citing The Black-on-Black Crime Plague*, U.S. NEWS & WORLD REPORT 54 (Aug. 22, 1988). For the figures on violent crimes, *see* IV.B above.

53. Michael Levin, WHY RACE MATTERS, 259. I suspect that Levin underestimates the degree of the transfer since he underestimates the progressivity of the income tax, but I will leave aside such an argument as it is irrelevant in this context.

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D. Conclusion

The division of the claim lessens a descendant's claim to compensation. The offset difficulties challenge the notion that on average any sum is owed to the descendants of slaves. This is because many of the persons who claim compensation on the basis of lost inheritance may end up owing more money to fellow citizens than they are owed. The epistemic difficulties cloud the case for reparations, since they highlight the fact that the claim to reparations must compete against the claim to whatever grounds private ownership of property and that the relative strength of the reparations claim depends on the accurate assessment of amount of lost inheritance. Since the accurate assessment is unlikely, the case for reparations weakens considerably.

V. WHO OWES COMPENSATION

The persons who captured, traded, and owned slaves as part of the American slave trade are no longer alive and do not have current estates. If compensation is owed, the issue arises as to the entity that ought to pay it. The proponents of compensation often propose that the federal government pay out the compensation. Other entities that might be asked to pay compensation are state governments and the beneficiaries of the persons who captured, traded, and owned slaves.

A. The Federal Government

1. The Federal Government's Role in Permitting Slavery

In general, the federal government permitted but did not cause enslavement and the slave trade to occur. Generally, a party does not owe compensation for harm to another for a refusal to act unless the refusal infringed upon a special duty that was owed to the harmed party. This special duty might rest on either a contract or a special relationship. However, neither is present in this case. There was no contract between the potential slaves and the federal government, nor did the institution of slavery violate the terms of the prewar Constitution. This is because the Constitution explicitly recognized slavery, e.g., Article I, Section 2. In addition, the federal government's role was explicitly limited (by Article I, Section 8) to certain enumerated functions. These do not include preventing injustices committed by the states or private individuals. One might argue that the federal government had a special relationship to all of its citizens based on whatever justification warrants the federal government's authority and that this special relationship gave rise to the duty in question. This does not follow,

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however, since the government's authority is limited to a specific list of enumerated powers, and this structure precludes action designed to satisfy the alleged duty.

To the extent that the federal government did cause or actively maintain slavery, this argument ought to be rejected. An example of where the federal government may have maintained slavery was via its enforcement of the fugitive slave laws.[54] However, to the extent that the federal government merely permitted the laws to be enforced by state or private agents and to the extent that state governments nullified them, the federal government's causal role is lessened. Among the states that nullified these laws were Massachusetts and Vermont in 1843, Illinois in 1853, and Wisconsin in 1854. Also, the federal government would then owe compensation only to those slaves and their descendants for whom the enforcement of these laws kept them in slavery, whether this occurred by force, deterrence, incapacitation, or by a contribution to the viability of the slave trade. Thus whether the fugitive slave laws involved the government causing or maintaining slaves depends on the empirical issue of whether its agents, e.g., federal marshals, actively recaptured or helped to recapture escaped slaves.

2. National Identity

George Schedler argues against reparations based on the notion that the prewar federal government is not strictly identical to the postwar federal government. His argument for this rests on a change in the fundamental assumption of racial inequality that can be seen in the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments.[55] This argument is at the least incomplete and probably incorrect. A legal system can change some of its more fundamental laws so long as it does so in a way that satisfies the rule of recognition (the litmus for what shall constitute a law in a particular system of law). If this were not the case, then it would be a contradiction to say that a nation has changed some of its fundamental laws, and it is not. Schedler might argue that the postwar legal changes did not satisfy the rule of recognition because of the process in which the Southern states were coerced into ratifying these amendments. However, at the very least such an argument would have to be made and would require the further argument that a particular system of law is an essential property of a nation.

Schedler's argument is also irrelevant. Consider this analogy. If Sony buys Toyota, then, in the absence of a contractual condition to the contrary, Sony assumes all of Toyota's debts and assets. If the postwar federal government

54. The fugitive slave laws refer to federal laws passed in 1793 and 1850 and to the Constitution, Art. IV, Sec. 2. The 1793 law, for example, permitted slave owners and their agents to apprehend fugitives in any state or territory but did not give judges the power to issue arrest warrants or require federal marshals to assist owners. The federal marshals played an active role in the enforcement of these laws. Michael F. Holt, THE POLITICAL CRISIS OF THE 1850S 89-90 (1978).

55. Schedler, RACIST SYMBOLS & REPARATIONS, 117.

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legitimately replaced the antebellum government, then, in the absence of a contractual condition to the contrary, the postwar government assumed all of the prewar government's debts and assets. In the case of the alleged two governments, there is no such contractual condition, and hence the postwar government would still hold such debts.

On a side note, if one assumes, and I think one should, that the Civil War was an illegal war of aggression, then the federal government's debt to blacks would have to compete with its debt to Civil War–era Southerners and their descendants. This would introduce a need for a theory of debt prioritization.

B. State Governments and the Beneficiaries of the Slave Trade

The case for state governments being required to pay compensation is stronger than that of the federal government, since the former are not contractually prevented from protecting the basic rights of their citizens and since the states played a more active role in maintaining slavery than the federal government did. Also, it might be argued that enough U.S. citizens have benefited from slavery to require, as an administrative matter, that the citizenry pay compensation. However, the above epistemic, metaphysical, and offset problems still weigh against requiring payment from the state or the citizenry.

In addition, the case for requiring payment from the beneficiaries of slavery is even weaker, since having benefited from an unjust practice does not by itself establish a duty to compensate the victim. As a matter of compensatory justice, a person owes compensation for a harmful injustice only if he was causally involved in the injustice or his token benefit is the same as the victim's token harm (e.g., he received a stolen good). The idea behind this account is that compensatory justice is concerned with the rectification of rights-infringing harm.[56] Where a person harmed another, even in the absence of fault, such rectification is, as a matter of justice, required of the agent that brought about the harm. Also, where a person innocently receives a stolen good, the person lacks the procedural pedigree required for legitimate ownership of it, and it ought to be returned to the person who has it.[57] However, where a person merely benefits from an

56. This account is dependent on a theory of interests and rights. This is common with regard to theories of justice, e.g., retributivism, which also depend on a theory of these elements. Note that the demands of compensatory justice may differ from the tort law and portions of contract law, since the law is often motivated and justified in terms of utilitarian concerns that are probably not a part of justice. For example, it is argued that where the optimal method of accident avoidance is greater care rather than less economic activity, efficiency favors a negligence criterion for liability. William T. Landes and Richard A. Posner, THE ECONOMIC STRUCTURE OF TORT LAW (1987), ch. 3, *esp.* 70.

57. George Schedler points out that in law an innocent buyer may sometimes receive legal ownership despite his purchasing tainted goods. For example, where an owner entrusts his goods to a merchant who deals in goods of that type and who sells them to an innocent

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injustice, as in the case of the tennis professionals Jim and Frank, the benefit may have proper procedural pedigree. If this is correct, then current U.S. citizens do not owe compensation to the descendants of slaves if a substantial portion of them did not did not receive a particular good that has been stolen or defrauded from a victim, and this is likely the case.

It might be objected that most wealth in the United States is tainted by past injustice. The idea here is that if a tangible good was acquired via an injustice, then its pedigree prevents legitimate ownership unless it is returned to the victim of the injustice or her inheritor.[58] This is analogous to the way in which a false premise in an otherwise sound argument undermines the conclusion. However, this objection proves too much, since, given the sea of injustices that has characterized human history, this threatens to undermine almost all current ownership. To the extent that one adopts a procedural account of current private property rights, there has to be a time frame that limits the scope of injustices that will undermine the legitimacy of particular holdings. I leave aside the issue of whether this limitation is metaphysical or merely epistemic.

This objection weakens where the property has changed form over successive generations. Consider a case in which a person stole a cow in the 1850s and used it to buy supplies to start a business that he gave to his children, who then sold it to pay for the medical education of their children. In such a case, there is no concrete entity that is passed down, and the gains are mixed with the labor of the different persons. The epistemic difficulties in assessing the value taken and the contribution of different persons probably make this objection succeed only at the cost of undermining the dominant nonconsequentialist justifications of private property and thus of compensatory justice. This is because there is a close link between compensatory justice and a system of private property rights. In particular, it is hard to see how a system of individual nonpunitive liability could occur in a system in which persons are not assigned control over particular resources. Perhaps the two could occur together in a system justified via forward-looking reasons.[59] If, however, such a justification does not suc-

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purchaser, the owner cannot recover the goods against the innocent purchaser. The law holds that the owner has implied that the merchant is the owner or has authority over them. Steven Emanuel, PROPERTY 11-12 (4th ed., 1993); and the UCC 2-402, especially §2. This feature is probably justified by the efficiency gain that occurs by eliminating the incentive for purchasers to investigate the lineage of goods or buy insurance to cover the risk that they are tainted.

58. The idea is discussed in Robert Nozick, ANARCHY, STATE, AND UTOPIA 152-153, 230-231 (1974); and David Lyons, *The New Indian Claims and Original Rights to Land*, *in* READING NOZICK 355-379 (Jeffrey Paul, ed., 1981). The situation is more complex, since where the victim and her inheritors and intended beneficiaries are all dead, an account must be given of the status of the good. For example, does it revert to being unowned? Does it become common property?

59. Some consequentialist accounts posit that moral entities such as desert and rights in part determine the goodness of a state of affairs; e.g., Fred Feldman, *Adjusting Utility for Justice: A Consequentialist Reply to the Objection from Justice*, *in* WHAT DO WE DESERVE? 259-270 (Louis P. Pojman & Owen McLeod, eds., 1999); and Amartya Sen, *Rights and Agency*, *in* CONSEQUENTIALISM AND ITS CRITICS 187-223 (Samuel Scheffler, ed., 1988). Nothing in principle prevents the consequentialist from including certain principles of (or rights to) compensatory justice into her account.

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ceed, and I suggest but do not defend the claim that it will not, then the objection undermines itself by undercutting a requirement of compensatory justice.

VI. CONCLUSION

Slavery harmed the slaves but not their descendants, since slavery brought about their existence. The descendants gain the slaves' claims via inheritance. However, collecting the inheritance-based claim runs into a number of difficulties. First, every descendant usually has no more than a portion of the slave's claim, because the claim is often divided over generations. Second, there are epistemic difficulties involving the ownership of the claim, since it is unlikely that a descendant of a slave several generations removed would have retained the claim of inheritance, given the loss of wealth and disinheritance that often characterizes families. There are also problems in determining the amount of inheritance. This is in part because of the problems of calculating the effects of offsets, especially crime-related offsets, which are owed by a significant portion of the descendants. Even if this inheritance claim can be established with sufficient confidence, certain entities may not be asked to pay it. The federal government does not owe compensation, since as a historical matter it permitted but did not cause enslavement. The beneficiaries of slavery do not owe compensation, since merely receiving the benefit of an unjust activity does not by itself generate a debt of compensation. When combined, these problems constitute an overwhelming case against reparations.

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