Legal Theory, **11** (2005), 143–162. Printed in the United States of America
Published by Cambridge University Press 0361-6843/05 $12.00 + 00

CRIMINALIZATION AND COMPENSATION

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There are only two species of justice: distributive justice and rectificatory justice. Distributive justice is primarily concerned with the distribution of rights and duties to members of society by way of society's institutions. Included in this concern for a just distribution of rights and duties is a concern for those members of society who are disadvantaged in their opportunities to participate in the benefits of social cooperation. When such disadvantages arise, distributive compensation is due to these members of society as a means of removing the disadvantage. To compensate for something is to counterbalance it; to give something equivalent in value to the thing. "The root of 'compensate' is "to weigh," that is to weigh different things together in order to establish a balance between them . . . 'compensation' carries the connotation of providing something *equivalent* in value to that which has been lost."[1] In the case of distributive compensation, this rendering of an equivalent in value is done in order to alleviate some disadvantage or natural loss that is thought to pose an undue hindrance on members of society.

Rectificatory justice, on the other hand, is the species of justice employed as a means of addressing those situations that arise when the requirements of a just system of distributive justice have broken down. Although the aim of rectificatory justice is clearly remedial, since it purports to remedy these situations, its specific aim is to take an unjust situation and set it right. Part of what is typically required to right an injustice is to provide compensation.[2] Indeed, it is perhaps more common that when we think of compensation as a matter of justice, what comes to mind is making up for losses resulting from some injustice rather than the alleviation of some disadvantage that is not the result of any injustice. When an injustice occurs, those upon whom the injustice has been perpetrated often suffer a loss for which compensation is thought to be due. It is this sort of compensation, namely, rectificatory compensation, that I shall be concerned with in this article.

My aim arises from the controversy over rectificatory compensation for the descendants of Africans who were enslaved in North America. I offer a

1. Loren E. Lomasky, Persons, Rights, and the Moral Community 142 (1987).

2. Restoration and an apology may also be required. *See* Rodney C. Roberts, *Justice and Rectification: A Taxonomy of Justice, in* Injustice and Rectification 7 (Rodney C. Roberts ed., 2002), for a fuller account of my taxonomy of justice.

https://doi.org/10.1017/S1352325205050068 Published online by Cambridge University Press

contribution to the clarity of this debate by showing how a recent argument against rectificatory compensation for the descendants of American slaves fails.

I. CRIMINALITY AS COMPENSATORY CONSTRAINT

A. The Criminalization Argument

In a recent article in this journal, Stephen Kershnar argues against rectificatory compensation for the descendants of American slaves. My concern in this discussion is with what I call the *criminalization argument*. According to Kershnar:

> Blacks commit a substantial number of crimes, including a disproportionately large number of violent crimes. For example, approximately one black male in four is incarcerated for the commission of a felony. . . .[3] [and] during recent periods they have constituted 50% to 60% of the arrests for murders and 50% of the arrests for rape.[4]

Armed with these statistics, Kershnar reasons:

> 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, [i.e.], some criminals and their families, this may reduce the compensation that is owed.[5]

For Kershnar, the difficulty presented by this "offset," as he calls it, "challenge[s] the notion that on average any sum is owed to the descendants of slaves . . . 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."[6] Moreover, he emphasizes the problem of "crime-related offsets" because he thinks that such offsets "are owed by a significant portion of the descendants."[7]

Since the criminalization argument calls for a constraint on the extent of rectificatory compensation for the descendants of American slaves, the constraint only applies when such compensation is due. Hence I shall suppose that the slave descendants are due compensation. This being the

3. Stephen Kershnar, *The Inheritance-Based Claim to Reparations*, 8 LEGAL THEORY 243, 261–262 (2002). Given Kershnar's use of "compensation" and "reparation," I take it that the latter amounts to something like rectificatory compensation.
4. *Id.* at 259.
5. *Id.* at 262.
6. *Id.* at 263.
7. *Id.* at 267.

https://doi.org/10.1017/S1352325205050068 Published online by Cambridge University Press

case, there is no need to address justificatory arguments for compensation, including legal arguments of unjust enrichment. Moreover, any concerns about statutes of limitations are rendered moot.[8] Finally, we need not engage questions concerning the counterfactual issues typically thought to arise from cases of compensation for past wrongs, especially since a counterfactual conception of compensation is itself problematic.[9]

B. The Importance of the Criminalization Argument

It is important that philosophical analysis be brought to bear on the criminalization argument (hereafter, CA). As Bernard Boxill warns, since rectificatory issues such as this "can be very complex, there is considerable room for maneuvering, and creating distractions, and consequently for superior sophistication to be decisive, even against the truth."[10] So if the CA distracts us from thinking properly about compensation, we are obliged to say precisely why this is so. Kershnar himself emphasizes the importance of the CA to our thinking about rectificatory compensation for the slave descendants. However, the reason he provides in support of this emphasis, namely, that crime-related offsets "are owed by a significant portion" of the descendants of American slaves, begs the question in favor of the CA.

Kershnar admits that he does not know "[w]hether this offset exceeds the compensation owed," and so rightly characterizes this question as an "epistemic difficulty."[11] However, he fails to realize that his reason for emphasizing crime-related offsets presents its own epistemic difficulty: he claims to *know* that a significant portion of the descendants of American slaves are criminals. So even if it is true that blacks commit a substantial number of crimes, including a disproportionately large number of violent crimes, since neither the U.S. Department of Justice's Bureau of Justice Statistics nor, to my knowledge, any other government entity distinguishes between those blacks who are descendants of American slaves and those who are not, no one knows the extent to which crimes in America are committed by slave descendants. This being the case, the reason Kershnar provides in support of his emphasis on crime-related offsets begs the question in favor of the CA.

Moreover, by claiming that a "significant portion" of the descendants of American slaves are criminals, the CA, in conjunction with some of the

8. *See* Rodney C. Roberts, *Is There a Moral Statute of Limitations on the Injustices Perpetrated Against Blacks in America?, in* REPARATIONS FOR AFRICAN AMERICANS: ARGUMENTS FOR AND AGAINST (Howard McGary ed., forthcoming), on statutes of limitations and the slave descendants; Roberts, *The Morality of a Moral Statute of Limitations on Injustice*, 7 J. ETHICS 115 (2003); and Roberts, *Another Look at a Moral Statute of Limitations on Injustice*, J. ETHICS (forthcoming), on statutes of limitations generally.

9. *See* Rodney C. Roberts, *The Counterfactual Conception of Compensation*, METAPHILOSOPHY (forthcoming).

10. Bernard R. Boxill, *Washington, Du Bois and Plessy v. Ferguson*, 16 LAW & PHIL. 299, 316 (1997).

11. Kershnar, *supra* note 3, at 262.

https://doi.org/10.1017/S1352325205050068 Published online by Cambridge University Press

other claims advanced by Kershnar, helps to perpetuate a negative image of the descendants of American slaves in particular and African Americans in general. An example of such a claim can be found in Kershnar's rejection of any link between slavery, with its progeny of racial injustice, and the current economic state of blacks in America. He claims that, inter alia, "there is strong evidence to believe that there are genetic differences in the average intelligence of racial groups and that such differences will likely affect a group's economic performance."[12] Although Kershnar acknowledges the controversy surrounding *The Bell Curve*, his cited support for this claim,[13] he is apparently unaware that "[t]he 1998 American Anthropological Association Statement on 'Race' was partly prompted by a desire to correct the public misinformation cast by Herrnstein and Murray's *The Bell Curve*. The 1998 AAA Statement on 'Race' began with a claim that biological human races did not exist." Hence, as Naomi Zack rightly reasons, "*if races do not exist*, then regardless of whether or not there is some *g* or 'general intelligence' factor and regardless of whether, or to what degree, that factor has a genetic component or is heritable, *it is logically impossible that there could be a connection between the genetics of IQ and the genetics of race*."[14]

It is important, therefore, that philosophical analysis be brought to bear on the CA.

II. WHY THE CRIMINALIZATION ARGUMENT FAILS

A. Individuals and Groups

The most that Kershnar is willing to admit is that the "token harm of lost inheritance, and this harm alone," is ground for the claim of rectificatory compensation on behalf of the slave descendants. On his view, "*qua* group[,] blacks do not have a legitimate claim to compensation, although *qua* collection [of individuals], blacks or the descendants of slaves may have a claim to compensation."[15] Hence "compensation is owed to individuals, not to a group."[16] But while the CA purports to be an argument against *individual* compensation, it relies on claims about a *group* for its support.

If it is correct to think that we ought to reject the conception of slave descendants as a group having a legitimate claim to rectificatory

12. *Id.* at 258–259.

13. *Id.* at 259 n. 41.

14. NAOMI ZACK, PHILOSOPHY OF SCIENCE AND RACE 105 (2002), citing American Anthropological Association, *Should the AAA Adopt a Position Paper on "Race"?* ANTHROPOLOGY NEWSL. 38 (1997). *See also* FAYE J. CROSBY, AFFIRMATIVE ACTION IS DEAD; LONG LIVE AFFIRMATIVE ACTION 54 (2004): "*The Bell Curve* made the embarrassing mistake of confusing within-group variation and between-group variation. Many psychology and sociology textbooks have by now pointed out the mistake (and other mistakes) to introductory students, but the general public may have been left with the impression that Harvard professor Richard Herrnstein and his co-author Charles Murray were making a credible argument."

15. Kershnar, *supra* note 3, at 256.

16. *Id.* at 257.

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compensation, then surely we ought not to conceive of the entire population of African Americans as a group possessing this claim. But all that can be reasonably inferred from the assertion that "*Blacks* commit a substantial number of crimes," is the conclusion that crime-related offsets may apply to some blacks. Since no conclusion regarding any *particular* black who is a descendant of American slaves with a legitimate rectificatory claim can logically follow from this assertion, the CA draws a conclusion (viz., that rectificatory compensation for each particular slave descendant ought to be reduced) that is not entailed in its premises. Consequently, the CA commits the fallacy of missing the point.

Some might object to this analysis, arguing that it misstates the CA. According to this objection, since it claims only "*to the extent that*" crime-related offsets "affects a substantial portion of the black community," and since it holds only that such offsets "*may* reduce the compensation that is owed," the CA does not miss the point—it claims only the mere *possibility* that crime-related offsets apply to the descendants of slaves. Suppose we concede this objection. As soon as we do, the best that can reasonably be said about the CA is that it is a weak argument. But we need not make this concession. Kershnar's claim that crime-related offsets "are owed by *a significant portion* of the descendants," seems to make clear that the CA is being advanced as a strong argument. Indeed, the CA is hardly worth mentioning if it is to be interpreted as a weak argument and if "significant portion" does not imply at least something approaching "a majority." This being the case, the CA must also be claiming that this significant portion of slave descendants to whom crime-related offsets apply follows from the "substantial number of crimes" committed by blacks. Since Kershnar thinks that rectificatory compensation can be due only to individuals, and since no conclusion regarding any particular black Americans who are descendants of American slaves with legitimate rectificatory claims can logically follow from his claim about black Americans as a group, the CA does in fact commit the fallacy of missing the point, and the objection does not go through.

One way to explain how this fallacy might be obscured is by way of what Patricia Williams calls a "conceptual cloak." As Williams explains, the social lot for black men is "made far grimmer" than that of black women "by their having been used as the emblem for all that is dangerous in the world, from crime to disease. The conceptual cloak that makes any white criminal anomalous in relation to the mass of decent white citizens is precisely reversed for black men: *any* black criminal becomes *all* black men."[17] Under this conceptual cloak, any number of blacks convicted of crime necessarily includes the slave descendants.

17. Patricia J. Williams, The Rooster's Egg: On the Persistence of Prejudice 185 (1995) (emphasis added).

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B. Criminal Wrongdoing and Moral Wrongdoing

A further difficulty with the CA is that it viciously conflates criminal and moral wrongdoing. According to H.L.A. Hart, "[t]he criminal law is something which we either obey or disobey," and if we disobey or break what its rules require, "what we have done is legally 'wrong.' . . . The punishment or 'sanction' which is attached by the law to breaches or violations of the criminal law is . . . intended to provide one motive for abstaining from these activities."[18] Hence "when physical sanctions are prominent or usual among the forms of pressure" to adhere to a rule, we are inclined to classify such a rule as a form of law.[19] Sanctions in the case of moral rules, on the other hand, "may be limited to . . . appeals to the individuals' respect for the rule violated," or "may depend heavily on the operation of feelings of shame, remorse, and guilt."[20] Indeed, John Stuart Mill thinks that the ultimate sanction of all morality is "a subjective feeling in our own minds."[21] This is not to say that morality is a wholly subjective and emotional matter. One ought to expect that compelling morally weighty reasons have been advanced in support of any given moral rule such that it makes sense to think that failure to adhere to it constitutes moral wrongdoing. Rather, I mean only to point out that there is a fairly clear distinction between criminal wrongdoing and moral wrongdoing.

American slavery was not a crime. Although much of the global community (sans the United States) has recognized "that slavery and the slave trade are a crime against humanity and should always have been so, especially the transatlantic slave trade,"[22] and it is an accepted notion in international law that brutal acts like those involved in the enslavement of Africans, acts involving "large and systematic actions, often cloaked with official authority," do indeed constitute crimes against humanity,[23] slavery was not an act punishable by law in the United States. Indeed, the enslavement of Africans was embraced from this nation's infancy. As Justice Marshall reminds us:

> The denial of human rights was etched into the American Colonies' first attempts at establishing self-government. When the colonists determined to seek their independence from England, they drafted a unique document cataloguing their grievances against the King and proclaiming as "self-evident" that "all men are created equal" and are endowed "with certain unalienable Rights," including those to "Life, Liberty and the pursuit of Happiness." The self-evident truths and the unalienable rights were intended, however, to apply only to white men. . . .

18. H.L.A. HART, THE CONCEPT OF LAW 27 (2d ed. 1994).
19. *Id.* at 86.
20. *Id.*
21. JOHN STUART MILL, UTILITARIANISM 29 (George Sher ed., 2d ed. 2001).
22. *Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, South Africa, 31 August–8 September, 2001*, at 11, U.N. Doc. A/CONF. 189/12 (2002), *at* http://www.unhchr.ch/html/racism/index.htm.
23. BLACK'S LAW DICTIONARY 378 (7th ed. 1999).

https://doi.org/10.1017/S1352325205050068 Published online by Cambridge University Press

> The implicit protection of slavery embodied in the Declaration of Independence was made explicit in the Constitution, which treated a slave as being equivalent to three-fifths of a person for purposes of apportioning representatives and taxes among the States. Art. I, sect. 2. The Constitution also contained a clause ensuring that the "Migration or Importation" of slaves into the existing States would be legal until at least 1808, Art. I, sect. 9, and a fugitive slave clause requiring that when a slave escaped to another State, he must be returned on the claim of the master, Art. IV, sect. 2. In their declaration of the principles that were to provide the cornerstone of the new Nation, therefore, the Framers made it plain that "we the people," for whose protection the Constitution was designed, did not include those whose skins were the wrong color. . . .
>
> The individual States likewise established the machinery to protect the system of slavery through the promulgation of the Slave Codes, which were designed primarily to defend the property interest of the owner in his slave. The position of the Negro slave as mere property was confirmed by this Court in *Dred Scott v. Sandford*, 19 How. 393 (1857), holding that the Missouri Compromise—which prohibited slavery in the portion of the Louisiana Purchase Territory north of Missouri—was unconstitutional because it deprived slave owners of their property without due process. The Court declared that under the Constitution a slave was property, and "[t]he right to traffic in it, like an ordinary article of merchandise and property, was guarantied to the citizens of the United States. . . ." *Id.*, at 451. The Court further concluded that Negroes were not intended to be included as citizens under the Constitution but were "regarded as beings of an inferior order . . . altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect. . . ." *Id.*, at 407.[24]

So while a host of moral arguments could (and were) brought against American slavery, since no legal arguments grounded in U.S. law were available, American slavery did not constitute criminal wrongdoing. Consequently, the rectificatory compensation owed to the slave descendants is clearly grounded in *moral* wrongdoing.

This is consistent with Kershnar's view, since he thinks that the inheritance model is "independent of legal conventions or institutions."[25] Given its moral grounding, any reasonable offset to the rectificatory compensation due to the slave descendants should provide morally weighty reasons for thinking that a reduction in this compensation is called for. Since the CA relies upon claims of criminal wrongdoing and not moral wrongdoing, and since no connection has been established between its claims and the morality of the actions in question, the CA viciously conflates criminal wrongdoing and moral wrongdoing and thus fails to provide a rationale for thinking that crime-related constraints are applicable in this case.

24. Regents of the University of California v. Bakke 438 U.S. 265, 388, 389, 389–390 (1978) (Marshall, J., concurring in the judgment in part and dissenting in part).

25. Kershnar, *supra* note 3, at 255.

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A likely objection to this analysis would claim that, since what is criminal is so often immoral, especially where felony crimes are concerned, the conflation of the criminal with the moral found in the CA is benign. Hence this conflation ought not to weigh against it. The problem with this objection is that by dismissing the need to establish the immorality of the crimes relied upon in the CA, it grants an affirmative answer to the question the CA begs, namely: Are all the crimes appealed to in the CA examples of moral wrongdoing?

Consider the claim of black arrests. Not only does it not follow from being arrested that one has in fact committed a crime, the commission itself is not necessarily entailed in having been convicted (the typical way in which we measure crimes committed). This is an especially salient point with respect to black men in America. As Sheri Johnson reports, when race is the only variable in mock jury studies, "statistically significant differences can be interpreted as reflecting a causal relationship between race and guilt attribution."[26] Additional findings, when "read with those concerning race and guilt attribution, suggest that for *most* white subjects, bias against black defendants is based upon subconscious stereotypes."[27] Hence it is reasonable to think that "if a black defendant faces an all-white jury, he faces a substantial risk that the assessment of his guilt will be affected by his race."[28] So, given the unjust treatment of black men by the U.S. criminal system, there are many cases in which blacks, despite statistics to the contrary, are not even guilty of criminal wrongdoing.[29] The conflation of criminal and moral wrongdoing found in the CA is therefore vicious and so weighs against it.[30]

These first two difficulties with the CA suggest what may be its fundamental flaw.

C. The Black Experience

The black experience in North America has been one of perpetual racial injustice from the arrival of the first Africans in the early seventeenth century to the present day. If the CA has a fundamental flaw, it is that it relies

26. Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1626 (1985).

27. *Id.* at 1637.

28. *Id.* at 1656.

29. I forego the standard phrase "criminal justice system" since, for reasons that will soon be abundantly clear, it begs the question in favor of a system that is in fact just.

30. In light of my analysis of Kershnar, and as in most discussions of black criminalization, I have mentioned only black men. However, as Angela Davis points out, "[a]lthough women constitute a statistically small percentage of the overall prison population (7.4 percent), the rate of increase in the incarceration of black women surpasses that of their male counterparts"; Angela Y. Davis, *From the Prison of Slavery to the Slavery of Prison: Frederick Douglass and the Convict Lease System, in* FREDERICK DOUGLASS: A CRITICAL READER 339, 340 (Bill E. Lawson & Frank M. Kirkland eds., 1999). *See also* Julia S. Jordan-Zachery, *Political Implications of Criminalizing Black Women*, SOULS, Spring 2003, at 42, for a discussion of the criminalization of black women.

https://doi.org/10.1017/S1352325205050068 Published online by Cambridge University Press

upon an impoverished perspective on this experience; in particular, it relies upon a perspective on the black experience that does not include the criminalization of blacks in America.[31] Ignorance of this criminalizing reality allows undue credence to be given to the criminality ascribed to blacks in the CA. Consequently, many are likely to be persuaded by the CA's apparent cogency.

The words of Justice Marshall are again instructive; he notes that:

> It is unnecessary in 20th-century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact. The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured. The dream of America as the great melting pot has not been realized for the Negro; because of his skin color he never even made it into the pot.[32]

The racial injustice of which Justice Marshall speaks ought not to be mistaken for "mere" discrimination; rather, as Derrick Bell points out, "[o]ur careers, even our lives, are threatened because of our color."[33] This is due in great part to an unjust criminal system. For black folk, a system that purports to exist solely as a means of protecting the innocent from criminals also functions as a means by which innocent people who look like themselves are criminalized. Black folk "have less confidence than whites in the courts and are far less approving of the police." A healthy mistrust of the police is supported by "their shared experience of discrimination in formal and informal law enforcement settings."[34] Frederick Douglass describes this sort of criminalizing discrimination by way of the "one-drop rule":

> One drop of Teutonic blood is enough to account for all good and great qualities occasionally coupled with a colored skin; and on the other hand,

31. Perspectivalism is an epistemic position that "suggests that in order to acquire the knowledge to make moral judgments, one ought first draw on the widest variety of perspectives, reflecting the experiences of the variety of groups of which even the most apparently homogeneous society is composed"; JULIE MCDONALD, CONTEMPORARY MORAL ISSUES IN A DIVERSE SOCIETY 638 (1998). Moreover, as a number of thinkers have recently argued, "to assume that the social dynamics of gender, race, ethnicity, social class, and sexual orientation are philosophically irrelevant is to give privilege to the perspective of those in society least disadvantaged by racial, ethnic, social class, and gender identities." *Id.* at x.

32. Regents of the University of California v. Bakke 438 U.S. 265, 400–401 (1978) (Marshall, J., concurring in the judgment in part and dissenting in part). *See also* J. Angelo Corlett, *Racism and Affirmative Action*, 24 J. SOC. PHIL. 163, 172 (1993): "the prevalence and general or universal nature of racism . . . makes it highly unlikely that any African-American escapes the clutches of significant harm (not merely offense) due to racism."

33. DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 3 (1992).

34. William J. Bowers, Benjamin D. Steiner, and Marla Sandys, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 180 (2001).

https://doi.org/10.1017/S1352325205050068 Published online by Cambridge University Press

> one drop of negro blood, though in the veins of a man of Teutonic whiteness, is enough on which to predicate all offensive and ignoble qualities. In presence of this spirit, if a crime is committed, and the criminal is not positively known, a suspicious-looking colored man is sure to have been seen in the neighborhood. If an unarmed colored man is shot down and dies in his tracks, a jury, under the influence of this spirit, does not hesitate to find the murdered man the real criminal, and the murderer innocent.[35]

Hence, as was suggested in our discussion of criminal and moral wrongdoing, "[t]he black accused needs only to be 'seen' to be guilty of a prior offense. His color is the evidence. He is guilty of blackness."[36] Consequently, we often expect to have our civil liberties threatened in the virtual police state that is the black reality. For blacks, "every day is a day at the front" in America's race war.[37]

As Lewis Gordon describes it, life at the front begins in childhood:

> The black child learns what to do *when* he is approached for shoplifting, *when* he is approached for assaulting another, *when* he threatens the welfare of white children, *when* he is stopped by the police. This moment of being stopped by the police, this (it seems) inevitable moment, stands waiting out there like fate. For the black adult, this *when* is transformed into DON'T. DON'T jog, for he might be mistaken for a criminal in flight; DON'T walk through areas that appear affluent, for he might be mistaken for a burglar; DON'T shop with his hands in his pockets, for he might be presumed shoplifting or, worse, concealing a weapon; DON'T drive an expensive automobile, for he might be presumed to have stolen it; DON'T even consider behaving ambiguously in public with a white spouse.[38]

Charles Ogletree seemed to be summing up life at the front and its rules against, inter alia, Driving While Black (D.W.B.), when he observed that "we all really have the phenomenon called 'living while black.' It's inevitable."[39]

35. Frederick Douglass, *The Color Line, in* FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS 648, 650 (Philip S. Foner ed., 1999).

36. LEWIS R. GORDON, BAD FAITH AND ANTIBLACK RACISM 102 (1995).

37. ISHMAEL REED, ANOTHER DAY AT THE FRONT: DISPATCHES FROM THE RACE WAR, at xxix (2003).

38. GORDON, *supra* note 36, at 102. *See, e.g.*, Bryonn Bain, *Walking While Black: The Bill of Rights for Black Men*, AMSTERDAM NEWS (New York), April 27–May 3, 2000 at 4: "On Sunday, October 18, 1999, I was taken from the corner of 96th Street and Broadway by the [New York Police Department] and held overnight in a cell at the 24th Precinct in New York City. While home from [Harvard law] school for the weekend, I was arrested for a crime I witnessed someone else commit."

39. Charles J. Ogletree, Jr., quoted in KENNETH MEEKS, DRIVING WHILE BLACK: HIGHWAYS, SHOPPING MALLS, TAXICABS, SIDEWALKS: HOW TO FIGHT BACK IF YOU ARE A VICTIM OF RACIAL PROFILING 83 (2000). *See also* Herb Boyd, *Cops Bash Down Wrong Door Again*, AMSTERDAM NEWS (New York), April 8–April 14, 2004, at 3: "Unlike Alberta Spruill and Calvin Washington, both of whom died after their homes were mistakenly invaded by the police, Robert Gillard is still alive. Like Washington, Gillard, 60, has had surgery on his heart—a quadruple bypass in January."

https://doi.org/10.1017/S1352325205050068 Published online by Cambridge University Press

Violation of these rules of engagement can have detrimental, even fatal, effects. Thirty-one-year-old black businessman Jonny Gammage was a victim of D.W.B. while driving a late-model sports car through an all-white suburb of Pittsburgh, Pennsylvania. Unarmed and suspected of no crime, he was asphyxiated to death by five police officers within seven minutes of being stopped. Charges were filed against only three of the officers, and two of those cases were dismissed. Following the acquittal of the remaining officer by an all-white jury, Gammages's mother remarked: "We gave the system a chance to work, and it didn't work. *I didn't believe the people who told us the system doesn't work for Blacks. I believed it would work. But I don't believe that anymore.*"[40] Of course, a black man need not be actually driving his car to become a victim of police brutality; sometimes just sitting in one's car suffices. This was the case with twenty-three-year-old Aswon Watson when he came out of a barber shop in Brooklyn, New York, and got into his car. One of the three plainclothes officers who rolled up on him said "You're dead, nigger!" and started shooting. Eighteen bullet wounds later, Watson was dead. Although a grand jury was convened, the police were never indicted.[41]

According to the Stolen Lives Project, even though many newspaper accounts fail to report the race or ethnicity of individuals killed by police, the primary targets of police brutality are blacks and Latinos. Where race or ethnicity of the victims was known, the Project found that over three-fourths are people of color, that many of them are young, and that most of the victims are male. Moreover, they found that in the majority of killings by police, those who were slain "were unarmed and/or either committed no crime or were involved in a situation that should have been settled without shooting."[42] Although police departments typically refuse to release information concerning killings by police, the Project uncovered "over 2,000 law enforcement homicides between 1990 and 1999."[43]

For those innocent black men who manage to get sent to prison rather than to the morgue,some, after years of unjust incarceration, are lucky enough to be released. Of the 114 people released from death rows across the country on evidence of their innocence since 1973, nearly 46 percent are black.[44] Case in point: the incarceration of Aaron Patterson. Patterson was released from prison after seventeen years of incarceration in Illinois, most of it on death row. Patterson was convicted of murdering an elderly couple in Chicago in 1986, despite no physical evidence against him, his claim that the police tortured him during twenty-five hours of questioning, repeated claims of innocence, and never having signed a statement. Governor George

40. STOLEN LIVES PROJECT, STOLEN LIVES PROJECT, STOLEN LIVES: KILLED BY LAW ENFORCEMENT 16 (2d ed. 1999) (emphasis added).

41. *Id.* at 25.

42. Karen Saari, *Introduction to* STOLEN LIVES PROJECT, *supra* note 40, at iv–v (2d ed. 1999).

43. STOLEN LIVES PROJECT, *supra* note 40, at 13.

44. Death Penalty Information Center, *Innocence and the Death Penalty*, *at* http://deathpenaltyinfo.org/article.php?did=412&scid=6.

https://doi.org/10.1017/S1352325205050068 Published online by Cambridge University Press

Ryan described Patterson's case and those of three other men who had heretofore been stranded on death row as "manifest injustice," since the men had been tortured by the police into confessing to crimes they did not commit.[45]

Knowledge of the criminalizing reality of racial injustice, criminalizing discrimination, the equating of blackness with guilt by citizens and law enforcement, phenomena like Driving While Black, the killing of black men by police, and the many instances of unjust incarceration casts serious doubt on the criminality ascribed to blacks in the CA and thus on the cogency of the CA.

Some might object to my account of the black experience on the grounds that it paints a one-sided picture of black males. Surely not all black males are innocent victims of the criminal system. Since it is probably not the case that most blacks are innocent, this account of the black experience ought not to weigh heavily against our acceptance of the CA. First, nothing I have said suggests that all or even most black males are innocent victims of the criminal system. Rather, I have tried to show that blacks rightly perceive that they are routinely subjected to unjust treatment by that system.[46] Second, even when black males are presumably guilty as charged, they are still subjected to unjust treatment compared to white male criminals. Studies in Florida, Georgia, Ohio, and Texas conducted during the 1970s "found that the victim's race was an important determinant of sentence, and that black offender/white victim cases were the most likely to result in the death penalty."[47] Indeed, it was found that in Ohio and Florida, "there were 127 cases of whites killing blacks, and not one of these murderers was sentenced to death. At the same time, blacks who killed whites in these states had about a 25 percent chance of receiving a death sentence."[48] Hence Stephen Nathanson concludes that these findings:

> strongly suggest that judgments about the seriousness of crimes and the amount of blameworthiness attaching to criminals are strongly influenced by deep-seated racial prejudices. It appears that judges and juries regard the killing of a white by a black as a more serious crime that the killing of a black by a white. Thus, they judge that blacks killing whites deserve more severe

45. Sharon Cohen, *Exonerated Death Row Inmate Still Simmers with Anger*, DAILY REFLECTOR, November 2, 2003, at D1, D4. *See also Prison Release*, JET, May 5, 2003, at 9; *North Carolina Man Wrongfully Imprisoned for Rape and Murder Is Released After Serving 18 Years*, JET, January 19, 2004, at 14; and *Two Chicago Men Freed by DNA after Serving 27 Years in Prison, Sue City Officials*, JET, June 21, 2004, at 22, for other recently discovered cases of unjust incarceration.

46. *See* Johnson, *supra* note 26, at 1619: "The widespread perception among minorities that the criminal justice system treats them unfairly probably has its origin in very large numbers of individual observations; experiences in particular cases are reported back to the minority community and form the basis of generalizations. . . . [C]ase studies by detached court observers, though limited in number, tend to corroborate this perception."

47. *Id.* at 1623.

48. Stephen Nathanson, *Should We Execute Those Who Deserve to Die? in* PHILOSOPHY OF LAW 879, 886 (Joel Feinberg & Jules Coleman eds., 7th ed., 2004).

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> punishments than whites killing blacks. Given the bluntness of our ordinary moral judgments and the deep roots of racial prejudice in our society, it is perhaps not surprising that these results occur.[49]

More recently, Amnesty International USA reported that, while the U.S. population is 75 percent white and only 12 percent black:

> Since 1976, blacks have been six to seven times more likely to be murdered than whites, with the result that blacks and whites are the victims of murder in about equal numbers. Yet, 80 per cent of the more than 840 people put to death in the USA since 1976 were convicted of crimes involving white victims, compared to the 13 percent who were convicted of killing blacks.[50]

This is wholly consistent with Justice Blackmun's observation that "[e]ven under the most sophisticated death penalty statutes, race continues to play a major role in determining who shall live and who shall die."[51] Consequently, "[f]rom initial charging decisions to plea bargaining to jury sentencing, African-Americans are treated more harshly when they are defendants, and their lives are accorded less value when they are victims."[52]

Others might be inclined to object to the very fact that I have offered a sense of the black experience at all. According to this objection, even when the black experience is acknowledged, since "the numbers don't lie" (a few innocent blacks aside), it has little bearing on the statistics employed in the CA as evidence of black criminality. Consequently, the black experience and hence the black perspective have little bearing on the cogency of the CA. The criminality of black males is quite clear. It is simply a fact that as of 2001, black males had a 16.6 percent imprisonment rate versus a mere 2.6 percent for white males. Moreover, an estimated 32 percent of black males will enter state or federal prison during their lifetimes, compared to only 5.9 percent for white males.[53] What this objection fails to recognize, however, is that a true understanding of the black experience in America entails a prima facie skepticism toward crime statistics regarding blacks.

As Charles Ogletree has observed, ours is "a dual justice system. It is not just based on race, but built on race. [It cannot be explained] under any

49. *Id.*

50. Amnesty International USA, *Death by Discrimination: The Continuing Role of Race in Capital Cases*, 10 (April 2003), *at* http://www.amnestyusa.org/abolish/reports/dp_discrimination.pdf. *See also* Bowers, Steiner, and Sandys, *supra* note 34, at 265–266, providing "data not merely on the race of the defendants and their victims, but on real black and white jurors in actual cases who have made the life and death sentencing decision."

51. Callins v. Collins, 998 F. 2d 269 (5th Cir. 1993), *cert. denied*, 510 U.S. 1141, 1153 (U.S. Feb. 22, 1994) (No. 93-7054) (Blackmun, J., dissenting).

52. Amnesty International USA, *The Death Penalty Is Racially Biased*, *at* http://www.amnestyusa.org/abolish/racialprejudices.html.

53. U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Criminal Offenders Statistics*, *at* http://www.ojp.usdoj.gov/bjs/crimoff.htm.

https://doi.org/10.1017/S1352325205050068 Published online by Cambridge University Press

theory other than race, how we have . . . two million people [in jail] and one million are African American. African Americans are not more inclined to be criminals. African Americans are not genetically more violent. There is a system that creates these problems."[54] In the light of an accurate and robust understanding of this experience, statistics attesting to black criminality are not simply assumed to be factual. Rather, one is inclined to suppose, inter alia, "that crimes committed by blacks are more likely to be reported than are crimes committed by whites, or that crimes committed by blacks are more likely to meet with conviction, or that blacks are not as likely as whites to be charged with a lesser crime. The statistics, then, would be skewed against blacks in favor of whites."[55]

D. White Fear

If it is true that "[f]ew whites are able to identify with blacks as a group,"[56] then it would hardly be surprising to find that most whites would lack an understanding of the black experience and its relevance to the CA. Perhaps the one phenomenon that has the greatest influence on the inability to gain this understanding is white fear. Michael Moore observes that "[a]s white people, we've been lulled into thinking it's safe to be around other white people. We've been taught since birth that it's the people of that *other color* we need to fear. *They're* the ones who'll slit your throat!"[57]

Moreover, this image of blacks, in particular black males, is given strong reinforcement by the mass media. Moore describes his experience with the mass media thus:

> when I turn on the news each night, what do I see again and again? *Black* men alleged to be killing, raping, mugging, stabbing, gangbanging, looting, rioting, selling drugs, pimping, ho-ing, having too many babies, dropping babies from tenement windows, fatherless, motherless, Godless, penniless. "The suspect is described as a black male . . . the suspect is described as a black male . . . THE SUSPECT IS DESCRIBED AS A BLACK MALE. . . ." No matter what city I'm in, the news is always the same, the suspect always the same unidentified black male. . . .

54. Charles J. Ogletree, Jr., *Reparations for the Children of Slaves: Litigating the Issues*, 33 U. MEM. L. REV. 245, 262 (2003).

55. Laurence Thomas, *Statistical Badness*, 23 J. SOC. PHIL. 30, 31 (1992). *See also* Bowers, Steiner, and Sandys, *supra* note 34, at 180: "Blacks are more likely to believe that decisions to bring criminal charges, and to impose capital punishment are tainted with racial bias."

56. BELL, *supra* note 33, at 4.

57. MICHAEL MOORE, STUPID WHITE MEN . . . AND OTHER SORRY EXCUSES FOR THE STATE OF THE NATION! 57 (2001). *See also* Tim Wise, *School Shootings and White Denial*, ALTERNET (2001), *at* http://www.alternet.org/story.html?StoryID=10560. Following the Columbine, Colorado, and Santee, California, school shootings, Wise observed that "white people live in an utter state of self-delusion. We think danger is black, brown and poor, and if we can just move far enough away from 'those people' in the cities we'll be safe. If we can just find an 'all-American' town, life will be better, because 'things like this just don't happen here.'"

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> I believe we've become so used to this image of the black man as predator that we are forever ruined by this brainwashing.[58]

Moore's observations are supported by "[a] substantial body of research [that] demonstrates the influence of racial stereotypes in attributions of criminality, and opinion polls [that] show that the public identifies blacks as more prone to criminality than other racial groups."[59]

In light of this public perception, it should come as no surprise to find an implicit appeal to white fear in the CA. But the CA does not implicitly appeal to white fear by way of its claim of black criminality alone. It also makes an implicit appeal to white fear by way of its focus on particular crimes. By citing the sorts of crime that whites are particularly fearful of being the victims of at the hands of blacks rather than those crimes most often committed by blacks, the CA makes an implicit appeal to white fear. The CA employs the claim that blacks commit a disproportionately large number of violent crimes, then points to the arrests of blacks for murder and rape. Since the point is to advance a strong argument by bringing out the commission of a disproportionately large number of violent crimes, it stands to reason that the most prevalent violent crimes would be employed in the CA. This being the case, since rape is not among the most prevalent violent crimes, including rape in this set of crimes seems to make sense only if it amounts to an appeal to white fear.

I trust it is already clear that the use of arrest statistics is at best problematic in light of the black experience in America. Second, the Bureau of Justice Statistics, which I suspect is the most reliable source of data on individuals incarcerated in the United States, does not, as near as I can tell, provide a racial or ethnic breakdown of inmates based on the particular crimes for which they were convicted. Third, the available data for 1995 show that of the estimated 989,007 prisoners in custody at state correctional institutions, 47 percent are incarcerated for violent offenses. Seven types of violent offenses are listed: murder, manslaughter, rape, other sexual assault, robbery, assault, and other violent offenses. In terms of the percentage of prisoners incarcerated for violent offenses, robbery ranks first (29 percent), murder second (23 percent), and assault third (20 percent). Rape ranks fifth (8 percent).[60] Of the 88,101 inmates sentenced to federal prisons that year, less than 13 percent were sentenced for violent offenses. Four types of offenses are listed: homicide, assault, robbery, and other violent offenses, the latter including, inter alia, kidnapping and rape. In terms of the percentage of prisoners sentenced for violent offenses, robbery again ranks first, here with an overwhelming 56 percent, assault is second

58. Moore, *supra* note 57, at 58.

59. Bowers, Steiner, and Sandys, *supra* note 34, at 179.

60. U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Correctional Populations in the United States, 1995*, 9, tbl. 1.11 (1997), *at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cpius95.pdf.

https://doi.org/10.1017/S1352325205050068 Published online by Cambridge University Press

(23 percent), other violent offenses are third (12 percent), and homicide is fourth (9 percent).[61]

Given the apparent aim of employing crime statistics in the CA, it is clear that robbery ought to be on any list of the most prevalent violent crimes, along with murder or assault. Given the list of only two crimes provided by the CA, and given the relatively low percentage of violent crimes that are rapes, including rape on this list does much less in the way of providing empirical strength for the CA than would robbery or assault. Since including rape rather than a more prevalent crime yields a far less compelling CA, it would seem that the only plausible reason for including rape is to provide strength for the argument in some other way. Since the way in which it does so is neither empirical nor logical, it makes sense to think that rape is included on this list (whether consciously or not) to take advantage of the *visceral* work its presence is likely to accomplish by way of an implicit appeal to white fear. But how does including rape in the set of crimes employed by the CA make an implicit appeal to white fear?

The CA makes an implicit appeal to white fear by invoking the "white fear that black men will ravish white women,"[62] as well as the "historical practice of lynching black men for alleged sexual offenses against white women" and the "ever-present social taboo regarding interracial sexual relations."[63] This "myth of the black rapist" is grounded in the view that because of the bestial nature of their race, black men are naturally prone to rape.[64] "In the history of the United States, the fraudulent rape charge stands out as one of the most formidable artifices invented by racism. The myth of the Black rapist has been methodically conjured up whenever recurrent waves of violence and terror against the Black community have required convincing justifications."[65] Given the ranking of rape among violent crimes, and given the persistence of the myth of the black rapist, including rape in the CA amounts to an implicit appeal to white fear. Consequently, the CA is likely to gain unwarranted strength from the visceral attraction it holds for many whites.

61. *Id.* at 11, tbl. 1.13.

62. Tommy L. Lott, *Frederick Douglass on the Myth of the Black Rapist, in* FREDERICK DOUGLASS: A CRITICAL READER, *supra* note 30, at 313, 314.

63. *Id.* at 313.

64. *Id.* at 314.

65. ANGELA Y. DAVIS, WOMEN RACE & CLASS 173 (1981). *See also* Ishmael Reed, *Buck Passing: The Media, Black Men, O.J., and the Million Man March, in* BLACK MEN ON RACE, GENDER, AND SEXUALITY: A CRITICAL READER 46 (Devon W. Carbado ed., 1999) ("Black men have become the sacrificial lambs for all male evil. . . . With respect to rape, for example, and as the white feminist Andrea Dworkin has observed, white men often employ and invoke the image of the black male rapist to obscure, deny, or excuse their own participation in this crime"); and Patricia Hill Collins, *Introduction* to IDA B. WELLS-BARNETT, ON LYNCHINGS 21 (2002) (At a time when the lynching of blacks was fairly commonplace in the South, Wells-Barnett "indicted White men as the actual perpetrators of crimes of sexual violence against African American men via lynching and African American women via rape"). *Cf.* JAMES ALLEN, WITHOUT SANCTUARY: LYNCHING PHOTOGRAPHY IN AMERICA (2000) for graphic representations of the lynching phenomenon.

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E. The Profitability of Criminalization

The CA also gains unwarranted strength from the criminalization phenomenon itself. Since criminalization is profitable both financially and politically, whites may have a prima facie attraction to any claims that help to foster the perception of black criminality. In terms of financial gain, prisoners, many of whom are black males, are employed as near-slave laborers. "Although the use of prison labor at this point is not extensive, it is growing. In addition to government agencies, private companies such as TWA, Chevron, Starbucks, IBM, Motorola, Honeywell, Boeing, and Microsoft use prison labor." Private companies also profit by contracting to supply food and telephone services to prisoners. Inmates are charged "approximately six times the average long-distance rate by companies such as AT&T, Sprint, and MCI."[66]

In terms of political gain, "[t]he strategic placement of prisons in predominantly white rural districts often means that these districts gain more political representation based on the disenfranchised people in the prison, while the inner-city communities they come from suffer a proportionate loss of political power and representation."[67] Given the financial and political profit to be realized from high levels of incarceration, the CA may therefore gain unwarranted strength by fostering the perception of black criminality.

F. Self-Defeat

The CA also fails because of the sense in which it is self-defeating. The aim of the CA is to justify an offset to the rectificatory compensation due to the descendants of American slaves. It attempts to accomplish this aim by showing that compensation is due from the descendants themselves (the "offset") for the crimes they have committed. Putting aside the difficulties concerning individuals and groups raised earlier, since the crimes in question have been committed by blacks, it stands to reason that the offsetting compensation is due to whites. This makes sense because whites possess the overwhelming majority of wealth in this country and so would bear the brunt of any rectificatory compensation rendered to the descendants. In addition, as I have tried to show, white fear of blacks helps to perpetuate the perception of blacks as criminals and whites as the victims of black criminality. Hence the claim that "crimes that victimize others ground a claim to compensation in the victim" means that crimes committed by blacks against whites ground claims to compensation from these black criminals to their white victims, and this compensation offsets the rectificatory compensation due to the slave descendants.

66. Leith Mullings, *Losing Ground: Harlem, the War on Drugs, and the Prison Industrial Complex*, SOULS, Spring 2003, at 1, 14.

67. Lani Guinier, *What We Must Overcome*, AMERICAN PROSPECT, March 12–March 26, 2001, *at* http://www.minerscanary.org/mainart/what_we_must_overcome.shtml.

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The problem with this rationale is that it relies upon whites being the victims of black crime. But in fact, "people of color are most often the victims of crimes committed by minorities."[68] Indeed, Kershnar implicitly grants this fact. In supporting his claim of black criminality, he indirectly cites a magazine article titled "The Black-on-Black Crime Plague."[69] Hence while the CA appeals to the perception of black-on-white crime, it is black-on-black crime that is most often the social reality in America. Since the CA grounds its claim of an offset to rectificatory compensation on crimes committed by blacks that involve white victims, and since whites are least often the victims of such crimes, the CA is self-defeating.

Some might object to this analysis because they think it misinterprets the CA. According to this objection, the offsetting compensation may indeed arise from "others" who are not white, including blacks and other minorities. This being the case, there is no sense in which the CA is self-defeating. The difficulty with this objection is that it leads us right back into the individuals/groups problem discussed above. If blacks who have been the victims of crimes by other blacks have ground for a claim of compensation, then this can begin to make sense only in those cases in which the criminal is a slave descendant and the victim is not. For all we know, black-on-black crimes overwhelming involve slave descendants as both perpetrator and victim. Additionally, the objection remains problematic even in cases involving other minorities. Since none has the economic clout of whites, none will be tasked with bearing the burden of rectificatory compensation. This being the case, there is almost no sense in which their victimization can ground a claim of compensation that would offset the rectificatory compensation due to the slave descendants.

G. The Absurdity of the Criminalization Argument

Another reason for thinking that the CA fails is because, by reductio, we find that its conclusion is absurd. If any change is warranted at all, it makes more sense to think that the rectificatory compensation due to the descendants of American slaves ought to be *increased* from whatever amount they are due by way of inheritance.

Suppose that the CA is correct: the rectificatory compensation owed to the descendants of American slaves may be reduced. Now consider what has been shown: blacks in America live in a society in which their careers and lives can be threatened simply on the basis of their skin color; they must learn almost from birth that there are certain rules of engagement to living while black that must necessarily be followed throughout their lives if they are to survive; they are criminalized to the point that their very existence is identical with criminality; they are subjected to racial injustice at the hands of the

68. Ronald Walters, *Resurgence: White Nationalism and Anti-Black Violence*, SOULS, Fall 2002, at 1, 11.

69. Kershnar, *supra* note 3, at 262 n. 52.

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police, prosecutors, and juries; and their imprisonment is a source of economic and political gain for the dominant society. In short, although their reality is often hidden or obscured, they live in a world of perpetual and overarching racial injustice, the harm of which none of them is likely to escape. Although the dominant historical narrative "has continued to amplify the myths of automatic progress, universal freedom, and the American Dream without the ugly reality of racism seriously challenging the faith,"[70] when that reality is properly understood, a very different history is brought to light.

It is absurd to conclude that, in light of this reality, whatever rectificatory compensation is due to the descendants by way of inheritance may be reduced. Given this reality, it makes more sense to think that if any change is warranted at all, the amount of rectificatory compensation due to the descendants ought to be increased so as to account for the injustices perpetrated against them in their lifetimes.

H. Quantificational Epistemic Problems

Finally, the CA fails because it amounts to a quantificational epistemic problem employed as an antijustificatory argument against compensation. Since all such problems fail when employed in this way, the CA also fails.

Quantificational epistemic problems in this sense are those problems that arise in compensatory scenarios when the amount of compensation in question is either completely unknown or at best unclear. Since such problems are wholly concerned with the amount of compensation in question, they are wholly unrelated to the *justification* for compensation in any given case. Hence employing a quantificational epistemic problem as an antijustificatory argument against compensation amounts to a red herring—it diverts our attention away from the actual justification for compensation, focuses our attention instead on *how much* compensation is due, then concludes that the justification for compensation is weakened as a result. A typical workplace scenario should suffice to demonstrate this fallacy.

Suppose that Q is a rising star at LMN Corporation. As a mid-level manager, Q has a corporate debit card to facilitate the numerous business trips each year that are required of managers in Q's department. The debit card balance must be paid in full by the end of each month. Q makes several business trips during the month of September. However, on each trip, Q opts to fly first class instead of coach, to order expensive vintage wines with dinner, and to have room service for all meals not taken with clients. Not surprisingly, Q's September travel expenditures exceed the amount budgeted by LMN.

Z, the person to whom Q reports, learns of Q's extravagance through the office grapevine. Z reasons that, given such extravagances, Q's September paycheck may be substantially smaller than usual. Of course, until the actual

70. Nathan Irvin Huggins, *The Deforming Mirror of Truth, in* REVELATIONS: AMERICAN HISTORY, AMERICAN MYTHS 252, 255 (Brenda Smith Huggins ed., 1995).

https://doi.org/10.1017/S1352325205050068 Published online by Cambridge University Press

accounting is complete, Z is unclear as to the exact amount of what seems to be a likely reduction in Q's pay and hence how much Q will actually be owed. Z has a quantificational epistemic problem (although hardly one that Z is likely to lose any sleep over).

At the end of the month, LMN still charges the department to which Q is assigned one-twelfth of Q's annual salary for the month of September, and the payroll department allocates these funds to Q's payroll account. But why is this so? It is so because Q clearly deserves this monthly allocation. The moral (and legal) justification for the allocation of Q's monthly salary is quite clear, especially since Q is a rising star in the company. Further, Z's quantificational epistemic problem is wholly unrelated to the justification for Q's salary allocation. Even though Z has good reason to suspect that Q's compensation will be "offset" by unbudgeted travel expenses, the fact that the net compensation Q will actually be due come October 1st *may* be less than usual does nothing to weaken the justification for allocating the usual monthly salary amount. Any argument advanced by Z to reduce Q's monthly salary allocation that is grounded in this suspicion is moot. For all Z knows, Q sent in a check to the card company to cover the overages and will receive the usual monthly salary amount on October 1.

This example is paradigmatic of a quantificational epistemic problem employed as an antijustificatory argument against compensation. It therefore makes sense to think that all such arguments fail.

The CA claims that criminal acts on the part of some slave descendants may reduce whatever amount of compensation is owed to them. So even if we knew the exact amount of compensation each descendant was justified in receiving, given the CA, that amount would be rendered unclear until such time as we could resolve the question of criminality in each individual case. Hence the CA amounts to a quantificational epistemic problem. Since the CA is advanced as part of a case against compensation for the slave descendants, that is, as part of a rationale for thinking that compensation is not justified in their case, the CA is employed as an antijustificatory argument against compensation. Since all quantificational epistemic problems fail as antijustificatory arguments against compensation, the CA fails.

III. CONCLUSION

The CA commits the fallacy of missing the point; it viciously conflates criminal and moral wrongdoing; it ignores the black experience in America and so is advanced from an impoverished epistemic perspective; it makes an implicit appeal to white fear; it fosters the perception of black criminality; it is self-defeating; its conclusion is absurd; and it is a red herring. Hence the CA fails.[71]

71. I wish to thank Professors Robert F. Card, J. Angelo Corlett, and Falguni Sheth, as well as an anonymous reviewer of this journal for their comments on earlier versions of this article.

https://doi.org/10.1017/S1352325205050068 Published online by Cambridge University Press