ESSAY

REPARATIONS FOR SLAVERY AND OTHER HISTORICAL INJUSTICES

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Victims of historical injustices who have no positive law claim against wrongdoers often seek reparations from governments, and occasionally they obtain them. The best known reparations programs are those for Japanese Americans who were interned by the United States government during World War II, and for victims of the Nazi Holocaust. But there are several other less well known programs both in the United States and abroad, and there are countless proposals for new reparations programs, including a proposal for slave reparations in the United States. The moral and political arguments for and against reparations in diverse contexts have received considerable attention, but problems of legal and institutional design have received almost none. This paper fills the gap in the literature by analyzing the various design options for reparations programs, their legal and constitutional bases, and their relationship to the standard moral and political arguments about reparations.

INTRODUCTION

In this paper we provide an overview of the conceptual, legal, and moral issues surrounding reparations. We aim to provide all participants in these debates with analytic tools that may be used to sort out the good normative arguments from the bad, whatever their political valence. And we argue that a normative recommendation for or against any particular grant of reparations must be highly sensitive to the question of how the reparations scheme is to be designed; the question of whether reparations should be paid turns crucially on choices about the form of payment, the identity of the beneficiaries, the identity of the parties who will bear the costs of payment, and so forth. The prudential and institutional issues surrounding reparations schemes, in other words, are as important as the high-level questions about justice and injustice that are usually the focus of reparations debates.

These claims are intended to fill large gaps in the literature. Despite a cascade of recent writing on reparations, and on associated topics in

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We thank Larry Alexander, Jim Dwyer, Michael Greene, Chris Kutz, Jacob Levy, David Strauss, and participants at workshops at the University of Chicago, Stanford, William & Mary, and George Mason, and thank John Griffin and Eric Truett for valuable research assistance. Posner thanks The Sarah Scaife Foundation Fund and The Lynde and Harry Bradley Foundation Fund for financial support; Vermeule thanks the Russell J. Parsons Research Fund for the same.

transitional justice,[1] the legal and moral analysis of reparations is dramatically undertheorized. The literature is often tendentious and rhetorical (in the pejorative sense) rather than analytical. The analytically sophisticated literature on reparations that does exist tends to have a positive and explanatory orientation,[2] rather than the normative orientation that we adopt here. Within the normative debates, proponents of reparations often focus monomaniacally on the historical injustices inflicted upon victim groups, while minimizing the serious problems of policy design that reparations pose. Opponents of reparations, on the other hand, minimize the relevant injustices and portray reparations proposals as outlandish or even unprecedented, overlooking that federal and state governments have often paid reparations in one form or another. Most generally, commentators on all sides of the issue focus excessively on abstract questions about the justice of reparations while ignoring institutional and prudential questions about how reparations schemes should be designed. As we shall see, answers to the design questions will themselves help to determine whether and when reparations should be paid in the first place.

The structure of the argument is as follows. Part I defines our terms, provides a conceptual map of the problems surrounding reparations, and reviews the most important reparations schemes enacted by federal, state, and foreign governments since World War II. Part II canvasses the major ethical theories that bear on the moral status of reparations. We examine a rigorous position of ethical individualism that would condemn all or most reparations as impermissible group-based government action; a position of modified ethical individualism that permits individuals to be charged with moral obligations based on the acts of institutions, such as corporations, with which the individuals have voluntarily affiliated; and a position of ethical collectivism, which supposes that racial, ethnic, or national groups, in which individuals hold membership involuntarily, may have independent, group-level rights and duties. Part III connects morality to law, examining the constitutional constraints on reparations schemes. We argue that those constraints are generally loose, under both current doctrine and under the Constitution rightly understood. Even where remedial affirmative action schemes are constitutionally suspect, other forms of reparations fare better, in part because they diffuse the costs of payment more widely. Part IV connects morality and law to policy, asking how legislators or other officials should design reparations schemes in light of both the prevailing ethical theory and the important legal, institutional, and empirical issues bearing on the choice among various design alternatives. We examine choices along the various margins

1. Prominent examples are Randall Robinson, The Debt: What Americans Owe to Blacks (2000) and Rudi Teitel, Transitional Justice (2000). Other sources in this voluminous literature are cited throughout.

2. E.g., Saul Levmore, Changes, Anticipations, and Reparations, 99 Colum. L. Rev. 1657, 1686–99 (1999).

that define a reparations scheme, including questions about what form reparations should take (IV.A), who the beneficiaries of the scheme should be (IV.B), who should bear the costs of payment (IV.C), and whether a reparative payment should be a single-shot event or a continuing program (IV.D). A brief conclusion follows.

I. Definitions and Preliminaries

A. *What Are "Reparations"?*

The word "reparations" does not pick out a natural kind; there are no clear conceptual boundaries that demarcate reparations from ordinary legal remedies, on the one hand, and other large-scale governmental transfer programs, on the other. Paradigmatic examples of reparations ordinarily discussed in the relevant literatures in law, politics, and moral theory, such as proposals for slavery reparations, do tend to share certain major features: They typically refer to schemes that (1) provide payment (in cash or in kind) to a large group of claimants, (2) on the basis of wrongs that were substantively permissible under the prevailing law when committed, (3) in which current law bars a compulsory remedy for the past wrong (by virtue of sovereign immunity, statutes of limitations, or similar rules), and (4) in which the payment is justified on backward-looking grounds of corrective justice, rather than forward-looking grounds such as the deterrence of future wrongdoing. However, a wide range of policies, programs, and decisions have been described as reparations, and the various cases are connected only by a series of family resemblances. Any of the typical features we have listed can be quibbled with; we might, without linguistic impropriety, use the word "reparations" to describe a scheme that dispenses with any of them. A payment to a small group rather than a large one, for example, might without absurdity be described as "reparations" if justified as remediation of wrongs committed under a previous legal regime.

Although we make no attempt to offer a set of necessary and sufficient analytic conditions for identifying a "reparations" scheme, it will nonetheless be useful to offer a working definition that indicates the limits of our project and focuses the discussion. We will adhere to the following stipulations. *First*, whereas an ordinary legal remedy typically effects a transfer from an identified individual wrongdoer[3] to an identified individual victim of the wrong, we will say that a reparations scheme typically relaxes one condition or the other, or both. A reparations scheme might, for example, effect a transfer from taxpayers to identified individual victims, as in the case of Japanese American reparations. It might effect a transfer from identified wrongdoers to a group or institution that serves as a stand-in for deceased or unidentifiable victims, as when compensa-

3. Including, of course, multiple individual wrongdoers; the point is that they are identified as individuals, not on the basis of some other status or group membership (such as "taxpayer" or "white person").

tory payments are made to Jewish charities or the State of Israel as representatives of deceased victims of the Holocaust. It might even relax both constraints, as in proposals for living taxpayers to pay money to living African Americans based on harms inflicted by dead people (antebellum whites) on dead people (antebellum blacks).

Second, we will say that reparations schemes are justified on the basis of backward-looking reasons—remediation of, or compensation for, past injustices—rather than on the basis of forward-looking reasons—increasing utility, deterring future wrongdoing, or promoting distributive justice. In dispensing with fully individualized remediation, a reparations scheme resembles large-scale governmental transfers, which frequently take from A to give to B regardless of whether A inflicted harm or B suffered it. Any number of transfer programs are justified or rationalized on the ground that the transfer will increase total or average utility, promote distributive justice, or (more vaguely) make "society" better off. We distinguish reparations schemes from this class of transfers by stipulating that reparations schemes pursue, not welfare maximization or end-state distributive justice, but rather backward-looking justice through rectification of past wrongs.[4] In this regard reparations schemes share the corrective justice focus of many ordinary legal remedies. It is also true, however, that ordinary remedies are sometimes justified strictly on forward-looking, incentive-based grounds, and the second stipulation excludes those as well. An example is the vicarious liability of government for the torts of its employees, which would otherwise be counted as reparations by virtue of the non-identity of wrongdoer and payer.

Third, and finally, we will exclude any cases in which the reparations are paid under legal compulsion, for example a judicial order. A violation of the Takings Clause[5] or Contracts Clause[6] gives rise to a judicially enforceable claim for damages against the government, not a reparations scheme. To include such cases in our subject would collapse the topic of reparations into the larger topic of constitutional remedies for government wrongs. Historically, the paradigm cases in the reparations literature are precisely cases in which sovereign immunity or some other bar to recovery has cast the issue out of the courts and into legislatures. Exam-

4. These distinctions are just for conceptual clarity; in practice there is a range of intermediate cases. Reparations schemes, for example, sometimes add a means test to the definition of the beneficiary class. A reparative payment might be limited to the poorest members of the victim class; a scholarship program might be limited to members of the victim class who cannot otherwise afford to buy education. In such cases the addition of the supervening means test pushes reparations programs closer to a transfer program justified on the grounds of end-state distributive justice. Note, however, that typically, and in these examples, the means test only applies within a beneficiary class that is initially defined solely on compensatory, backward-looking grounds.

5. U.S. Const. amend. V.

6. U.S. Const. art. I, § 10, cl. 1.

ples include the statute compensating Japanese American internees,[7] which was enacted only after, and in part because, the courts had denied compensation suits against the government,[8] and legal claims against the federal government for slavery reparations, which the courts have also flatly denied.[9] In such cases the denial of judicial relief may eliminate a reason or pretext for legislative inaction and encourage compensation proponents to concentrate their resources on the only remaining forum. To be sure, some proponents of compensation for slavery have simply switched targets, pursuing legal remedies against private firms, such as insurance companies, rather than pursuing legislative means of redress.[10] As we will subsequently discuss, however, demands for reparations more typically appeal from courts to the moral norms held in society at large.

The overall picture is that reparations schemes stand poised, uneasily, between ordinary remedies and large-scale transfer programs. They share the backward-looking, corrective justice focus of many ordinary remedies, but share with transfer programs a willingness to do mass or aggregate justice by dispensing with individualized moral justification for the transfer. This unique combination of attributes makes reparations schemes morally intriguing, yet also threatens to render them morally incoherent. At least, it often renders academic discussions of reparations prima facie incoherent. An example is a common combination of views, under which (1) justice permits reparations only where compensation is paid to actual victims of wrongdoing (as opposed to say, nonvictim members of the same racial group), *and* (2) justice permits the payment to be extracted in part from those who did not themselves wrong anyone, through taxes or other mechanisms.[11] The combination of (1) and (2) needs justification, to say the least. If government may extract assets from innocent nonwrongdoers to pay victims, why may not it extract assets from wrongdoers to pay innocent nonvictims? And may it simultaneously relax both constraints? In Part II we take up such questions from the standpoint of moral theory, in Part III from the standpoint of constitu-

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7. Civil Liberties Act, Pub. L. No. 100-383, 102 Stat. 903 (1988) (expired 1998) (committing president to a formal apology and authorizing reparations of $20,000 for each surviving internee who was a U.S. citizen or legal resident alien at time of internment); see Leslie T. Hatamiya, Institutions and Interest Groups: Understanding the Passage of the Japanese American Redress Bill, *in* When Sorry Isn't Enough 190, 190 & n.9 (Roy L. Brooks ed., 1999) [hereinafter When Sorry Isn't Enough].

8. See, e.g., Hohri v. United States, 847 F.2d 779, 779 (Fed. Cir. 1988).

9. See, e.g., Cato v. United States, 70 F.3d 1103, 1111 (9th Cir. 1995) (finding United States protected by sovereign immunity).

10. See Michelle E. Lyons, Note, World Conference Against Racism: New Avenues for Slavery Reparations?, 35 Vand. J. Transnat'l L. 1235, 1266–67 (2002) (stating that recent suits have named corporate defendants).

11. Ellen Frankel Paul, Set-Asides, Reparations, and Compensatory Justice, XXXIII Nomos 97, 103, 124 (1991) (arguing that certain reparations schemes for Japanese Americans and for Holocaust victims are acceptable because they compensate actual identified victims, and the costs to innocent taxpayers are justified).

tional law, and in Part IV from the standpoint of policy formulation and institutional design.

B. *Reparations Schemes: An Overview*

Here we provide a brief overview of reparations schemes, both to orient the reader and to provide some concrete examples that are important to the following discussion. Reparations, in the sense that we use the term, is a recent phenomenon, but the concept itself is quite old. France paid Germany reparations after the Franco-Prussian War of 1872.[12] Germany paid France reparations after World War I and the Soviet zone of Germany paid reparations to the Soviet Union after World War II.[13] Iraq has paid, and continues to pay, reparations on account of the destruction it caused during the Gulf War.[14] We distinguish these cases on the grounds that the reparations were not paid voluntarily—they were extracted by the victors, as spoils, as a condition for peace—and they were paid to states. By contrast, the reparations that concern us are not paid in order to avoid violence or destruction, but to accomplish some other political or moral purpose, and they are usually paid to individuals or groups.

The most famous reparations (in our sense) are the Holocaust reparations paid by West Germany after World War II.[15] Although the United States and other countries did pressure Germany to pay reparations to Holocaust victims, and although the West Germany reparations can be traced to earlier reparations programs imposed from 1947 to 1949 by the occupying powers, the Holocaust case differs from the standard cases of coerced wartime reparations. The Holocaust reparations did not go to the victorious powers, and the program emerged more or less autonomously from the German political system, at a time (the 1950s and 1960s) when Germany was no longer under imminent threat of further physical or economic destruction. German leaders such as Konrad Adenauer believed that Holocaust reparations would persuade the international community that West Germany had shaken off its Nazi past and could be trusted with political autonomy.[16]

The current wave of reparations in Eastern Europe arose with the end of the Cold War. In the newly democratic states, individuals whose property had been confiscated by Communist governments sought the return of that property or compensation. The most notable reparations

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12. Michael Howard, The Franco-Prussian War 446–51 (1961).

13. Bruce Kuklick, American Policy and the Division of Germany 205 (1972); Marc Trachtenberg, Reparation in World Politics: France and European Economic Diplomacy, 1916–1923, 1–10 (1980).

14. John F. Burns, A Cadillac and Other Plunder: Iraq-Kuwait Issue Resurfaces, N.Y. Times, Dec. 30, 2002, at A1.

15. For details, see generally Kurt Schwerin, German Compensation for Victims of Nazi Persecution, 67 Nw. U. L. Rev. 479 (1972).

16. Id. at 492–93, 513.

programs were established in the Czech Republic and Germany (on account of East German expropriations). Also in the 1990s, reparations programs were established in Japan and in Chile.[17]

In the United States, the first reparations program was created by Congress in 1946 in order to redress a wide range of claims pressed by Indian tribes, including violations of treaties for which a judicial remedy was denied, and the loss of lands under treaties signed under duress.[18] More than forty years passed before Congress authorized reparations for Japanese Americans who had been interned during World War II, but then Congress passed three more programs in rapid succession.[19] A movement seeking reparations for black slavery began in the late 1960s but petered out before enjoying a resurgence in the late 1990s.[20]

The table below lists major reparations that have either been authorized or considered seriously at high levels of government. Panel A lists American programs or proposals. Panel B lists examples from other countries.

17. See sources for Table 1.B, infra note 22.

18. Nell Jessup Newton, Compensation, Reparations, & Restitution: Indian Property Claims in the United States, 28 Ga. L. Rev. 453, 468 (1993).

19. In 1975, the U.S. government settled a class action lawsuit brought on behalf of the heirs of the deceased participants in the Tuskegee Syphilis Study, agreeing to contribute approximately $9,000,000 to a settlement fund. While judicial settlements do not usually satisfy our definition of reparations, the Tuskegee case was settled for "unique reasons," namely that "the United States was rightfully and grievously embarrassed" and that "it was in the best interest of the United States Government to close the last chapter of this sordid book as expeditiously and honorably as possible." Pollard v. United States, 69 F.R.D. 646, 647, 649 (M.D. Ala. 1976). Despite the ambiguity of the settlement, President Clinton's subsequent actions fit squarely within our definition. In 1997, Clinton made an official apology to survivors and family members of the 399 victims, announced a $200,000 grant to Tuskegee University to fund the establishment of a bioethics research center, and requested that the Department of Health and Human Services undertake a sustained effort to involve minority communities in health research and health care. See Alison Mitchell, Clinton Regrets "Clearly Racist" U.S. Study, N.Y. Times, May 17, 1997, at A10; Frank Trejo, Tuskegee Apology Part of Effort to Heal Old Wounds, Dallas Morning News, May 11, 1997, at 1J.

20. Tamar Lewin, Calls for Slavery Restitution Getting Louder, N.Y. Times, June 4, 2001, at A15.

TABLE 1: MAJOR REPARATIONS PROGRAMS
PANEL A: UNITED STATES[21]

PROGRAM	YEAR(S)	PAYER	RECIPIENT	PAYMENT	TOTAL COST	CAUSE
Indian Claims	1946	U.S.	Indian tribes	Various	~$800 million	Land taken by force or deception
Japanese Internment	1988	U.S.	Internees	$20,000	~$1.65 billion	Internment of Japanese Americans during World War II
Radiation Exposure	1990	U.S.	People exposed to radiation	$50,000 – $100,000	~$117 million	Exposure to radiation from nuclear tests, or from mining
Hawaiian Annexation	1993	U.S.	Descendants of native Hawaiian groups	(apology)	$0	Loss of lands after annexation in 1897
Rosewood	1994	Florida	Survivors, descendants	$375 – $150,000	$2.1 million	Murder and destruction of black town in 1923
Syphilis Experiments	1997	U.S.	Victims of experiments	$5000 – $37,500	~$9 million	Denied treatment for syphilis without telling victims, 1932–1972
Mexican American Land Titles	1997–1998	U.S.	Descendants of property owners	(investigation of claims)	$0	Failure to recognize Mexican or Spanish land titles under 1848 treaty

21. For Indian Claims reparations, see Final Report of the United States Indian Claims Commission, H.R. Doc. No. 96-383, at 21 (1980); Sandra C. Danforth, Note, Repaying Historical Debts: The Indian Claims Commission, 49 N.D. L. Rev. 359, 388–89 (1973). On the Japanese Internment, see Eric K. Yamamoto, Racial Reparations: Japanese American Redress and African American Claims, 40 B.C. L. Rev. 477, 515 (1998). On Radiation Exposure, see Michael D'Antonio, Scars and Secrets: The Atomic Trail, L.A. Times, Mar. 20, 1994, Magazine Section, at 14; U.S. Dep't of Justice, Radiation Exposure Compensation System, Claims to Date Summary of Claims Received by 10/23/2002 (Oct. 23, 2002), at http://www.usdoj.gov/civil/omp/omi/Tre_SysClaimsToDate Sum.pdf (on file with the *Columbia Law Review*). For Hawaiian Annexation, see S.J. Res. 19, 103d Cong., 1st Sess., 107 Stat. 1510 (1993); Jennifer M.L. Chock, One Hundred Years of Illegitimacy: International Legal Analysis of the Illegal Overthrow of the Hawaiian Monarchy, Hawai'i's Annexation, and Possible Reparations, 17 U. Haw. L. Rev. 463, 512 (1995). For Rosewood, see Richard A. Ryles, The Rosewood Massacre: Reparations for Racial Injustice, Nat'l B. Ass'n Mag., Mar./Apr. 1995, at 15, 24. On Syphilis Experiments, see *Pollard*, 69 F.R.D. at 647; Mitchell, supra note 19. On Mexican Land Titles, see Jon Michael Haynes, What Is It About Saying We're Sorry? New Federal Legislation and the Forgotten Promises of the Treaty of Guadalupe Hidalgo, 3 Scholar 231, 232 (2001).

PANEL B: INTERNATIONAL PROGRAMS[22]

PROGRAM	YEAR(S)	PAYER	RECIPIENT	PAYMENT	TOTAL COST	CAUSE
Holocaust	Various, 1947–1992	West Germany, Germany	Israel; Holocaust victims, descendants; organizations	Various	> DM 100 billion	Holocaust
East Germany	1990, 1993, 1994	Property recipients	Property owners	Restitution of property, or compensation	~$9 billion in cash	Confiscation of property by Communist government, 1949–1990
Czechoslovakia (now Czech Republic)	1991	Property recipients	Property owners	Restitution of property, or compensation	$11 billion, of which ~$2 billion in cash	Confiscation of property by Communist government, 1948–1990
Chile	1992	Chile	Victims of Pinochet, descendants	Monthly pension of 140,000 pesos, plus other benefits		Execution, torture, and exile of at least 200,000 people
Korean Comfort Women	1995–1996	Japan (through printed donations)	"Comfort Women" in Japanese-occupied Asian countries	$19,000 (through "private" funds)	$20 million proposed	200,000 women used as sex slaves by Japanese army during World War II
Canada	1998	Canada	Aboriginals	Various	CA $350 million	Forced assimilation of children

22. For Holocaust related programs, see Schwerin, supra note 15, at 490, 511, 515–18. On East Germany, see Heather M. Stack, Note, The "Colonization" of East Germany?: A Comparative Analysis of German Privatization, 46 Duke L.J. 1211, 1218, 1226 (1997). On Czechoslovakia, see Richard W. Crowder, Comment, Restitution in the Czech Republic: Problems and Prague-nosis, 5 Ind. Int'l & Comp. L. Rev. 237, 240–46 (1994); Prague Votes to Return Nationalized Property, Chi. Trib., Feb. 22, 1991, at C1; Peter S. Green, Czechoslovak Restitution Could Cost $11 Billion, UPI, Feb. 21, 1991; Jan Obrman, Rehabilitating Political Victims, *in* 50 Rep. on E. Eur. 5, 6–7 (Dec. 14, 1990). On Chile, see Alejandro González, Treatment of Victims and of Their Families: Rehabilitation, Reparation and Medical Treatment, *in* Int'l. Comm'n of Jurists, International Meeting on Impunity of Perpetrators of Gross Human Rights Violations 323, 330–34 (1993); Jayni Edelstein, Rights, Reparations and Reconciliation: Some Comparative Notes (July 27, 1994), available at http://www.csvr.org.za/papers/papedel.htm (on file with the *Columbia Law Review*). On Korean Comfort Women, see George Hicks, The Comfort Women Redress Movement, *in* When Sorry Isn't Enough, supra note 7, at 113, 119, 124; Tong Yu, Recent Development, Reparations for Former Comfort Women of World War II, 36 Harv. Int'l L.J. 528, 530 (1995); Andrew Pollack, Japan Pays Some Women from War Brothels, but Many Refuse, N.Y. Times, Aug. 15, 1996, at A11. On Canada, see Pamela O'Connor, Squaring the Circle: How Canada Is Dealing with the Legacy of Its Indian Residential Schools Experiment, 28 Int'l J. Legal Info. 232, 251 (2000); Indian & Northern Affairs Canada, Backgrounder: Gathering Strength—Canada's Aboriginal Action Plan, available at http://www.ainc-inac.gc.ca/nr/prs/j-a1999/98123Bk.html (last visited Jan. 18, 2003) (on file with the *Columbia Law Review*).

The table shows the diversity of the reparations programs. The payer is frequently the government, but the East German and Czech systems also contemplate return of property from the current owner. The recipients of reparations are usually the people who were injured (Japanese Internment, Syphilis), but recipients often include spouses (Chile) and descendants (Rosewood), including quite distant descendants (Hawaii, Mexican American). The German reparations to Israel present the weakest link between recipients and victims; although the reparations were technically paid for the purpose of resettling victims of the Holocaust, the payments were received by the Israeli government to be used as it wished. We observe quite a bit of variation in the size of the payment and the total cost of the program. Note that payments take the form of benefits like educational funds (Rosewood, Chile) or health care (Chile), in addition to cash. Payments are made to organizations, such as Jewish groups in the case of Holocaust reparations, as well as to individuals.

As the table notes, the Hawaiian claims have so far achieved only an apology, and no payments. Apologies can be thought of as a form of in-kind reparations that often precedes, follows, or accompanies cash payments, but sometimes stands alone. We will provide further examples of apologies in Part IV.A.

II. Ethical Theories of Reparations

A theory of reparations explains why the government should require one group of people to pay another group of people even though the latter group, the victims or their descendants or relations, do not have a prior legal right against the first group. Reparations claims thus involve three relationships: (1) the relationship between the original wrongdoer and the original victim; (2) the relationship between the original wrongdoer and the possible payer of reparations; and (3) the relationship between the original victim and the possible claimant or beneficiary of reparations. The claimant must show that each relationship is of the proper type.

The nature of the relationship depends on two separate moral questions. The first concerns the grounds of the moral obligation that gives rise to the reparations claim. Many reparations schemes are based on a claim that one group of people wrongfully harmed another group of people and therefore owe compensation to the extent of the harm. Others are based on a claim that one group of people was unjustly enriched by another group of people and therefore must make restitution of the benefit obtained. The harm and restitution theories have distinctive implications for the generosity and form of reparations and for the validity of the claims of nonwrongdoers and nonvictims.

The second question concerns the nature of the entity that can bear moral obligations. We consider three positions. Under ethical individualism, only individuals can have moral obligations and rights. Under "soft" ethical individualism, a corporate body can also have moral obliga-

tions and rights even arising out of circumstances where the individuals who compose the corporation do not. Thus, an individual who belongs to the corporation could be made to pay on account of a wrongful act committed by the corporation even though the individual was not to blame for the act. Under ethical collectivism, a more loosely defined group such as a nation can have moral obligations and rights. Here, even individuals who, though members of the group, did not voluntarily enter the group or accept the benefits of membership (as in the case of soft ethical individualism) can be made to pay for the wrongful acts of the group. As we will discuss, reparations claims become easier to make as individualistic premises are relaxed, but they also become vaguer and less compelling.

In the following sections, we discuss the grounds of moral obligation, and then the nature of the bearer of obligations. For ease of exposition, we discuss the grounds of moral obligation mainly from the perspective of ethical individualism, but the two dimensions are orthogonal, yielding six distinctive reparation theories.

A. *The Grounds of Moral Obligation*

1. *Compensation for Harm.* — A strong tradition in the United States holds that individuals are not blameworthy for acts over which they have no control. If one person wrongfully harms another, the wrongdoer has a duty to provide a remedy, but a third party has no duty to provide a remedy. The wrongdoer, and no one else, owes a duty to the victim. Similarly, the victim, and no one else, has a claim against the wrongdoer on account of the original wrongful act. Compensatory justice requires a relationship of identity between the wrongdoer and payer and a relationship of identity between the victim and claimant.

If the wrongdoer and victim must be individuals—the premise of ethical individualism—then compensatory justice will rarely justify a reparations scheme. The reason is that as we define reparations either the wrongdoer-payer or the victim-claimant relationship must not be one of identity. But if the wrongdoer and victim can be groups, then payers or claimants will sometimes be individuals who are not the original wrongdoers or victims—rather, they derive their rights or obligations from their membership in the group.

Under the strict standards of ethical individualism, we can see only a few possible exceptions to the requirement of identity. If a victim has a valid tort claim against the wrongdoer, the victim could sell the claim to another party; then the buyer of the claim would have a claim against the wrongdoer. But the problem facing those seeking reparations is that positive law never recognized the initial claim (as in the case of slavery), or that the victim never assigned the claim even if he could, or that the statute of limitations bars legal proceedings. Reparations claims appeal over the head of law to morality, and it would be only under the most unusual circumstances that a third person has a moral claim against a

wrongdoer, who has never harmed this third person, as a result of the latter's purchase of the claim from the victim.

On the victim side, however, more progress can be made. The East German and Czech reparations schemes permit the children of victims of expropriation to seek a return of the property. The Rosewood scheme also made funds available to descendants. These programs might be justified in the following way. When the communist governments (in the first two cases) expropriated land, they knew that they were harming the children of the property owners as well as the owners themselves, assuming that children have a baseline entitlement to inherit property from their parents. The governments are blameworthy because they could have acted otherwise, and they owe a remedy to the descendants because they could have foreseen that the descendants would be injured by the harm to the original property owners.

Even when the claim can be established, valuation problems will often be formidable. Some of these valuation problems are familiar from tort law—the difficulty of valuing pain and suffering, lost employment or social opportunities, harm to reputation, or "wrongful birth"—but that does not make them any less difficult. But many valuation problems in the reparations context are uniquely difficult because of the social and political turmoil from which reparations claims derive. How does one value the loss of an education that was denied because of political activities? Should it matter if the education would not have increased one's income? "Should a Jewish-Hungarian man who was 18 years old in 1939 be compensated for the lack of opportunity to become a lawyer if his overwhelming desire was to become a violinist?"[23] Reparations claims often require one to consider counterfactual worlds much more extreme than those involved in tort cases[24]—what X would have earned if communists had not taken control of the economy, rather than what X would have earned if he had not been hit by a car—and thus are likely to produce more arbitrary valuations.

2. *Restitution.* — There is another view that provides a stronger case for reparations. If a communist government wrongfully harms a property owner, and in the process obtains his land, and the government gives the land to an official or supporter, then the beneficiary is unjustly enriched, and has a duty to return the benefit to the original owner. The wrongdoer and payer do not need to be the same person. In addition, if the original owner would have given or bequeathed the benefit to another person, like a child, then this other person can plausibly argue that he

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23. Jon Elster, Moral Dilemmas of Transitional Justice 25 (2002) (unpublished manuscript, on file with the *Columbia Law Review*) [hereinafter Elster, Moral Dilemmas].

24. See Jeremy Waldron, Redressing Historic Injustice, 52 U. Toronto L.J. 135, 143–46 (2002) (remarking on the difficulty of determining amount of reparation that is necessary to put the damaged party in as good a position as he would have been in before the injustice); Jeremy Waldron, Superseding Historic Injustice, 103 Ethics 4, 7–14 (1992) (same).

has a right to the benefit superior to the beneficiary's. Because the victim and claimant do not need to be the same person, even under ethical individualism, the restitution argument provides a stronger case for reparations than the compensation argument does.[25]

The relationship between wrongdoer and payer must be one in which gift and bequest are likely. Reparations cannot be made solely on the basis of a wrong, like murder or torture, that did not measurably enrich the wrongdoer. In the easiest case, a governmental official seizes the owner's land and gives the land to the official's child. But suppose instead that the official sells the land for cash, and later bequeaths some of the money to his child. It is no longer clear that the child benefited from the wrongdoing: He might have received the same amount of money even if the official had never expropriated the land. But if this is so, then one must ask why the transfer of land is such an easy case: The official might have given the child the cash equivalent of the land, and no more, if the official had never seized the land. If the official had great wealth, and simply gave his child the land rather than an equivalent amount of cash, it is not clear why the child should be obliged to give up the land when he does not have to give up the cash.

One might argue that the child has a moral obligation to pay the original owner or the owner's heirs regardless in either case. But this position would need to be refined. If the child did not know of the wrongful taking, and has relied on the transfer, then requiring him to return the value of the benefit might be unreasonable.[26] Often, the child will have invested in improving land taken from the original owner.[27] And if the child has received a stolen object in lieu of cash or some other legally acquired good, then it is not even clear that the child has gained, or gained to the full extent of the benefit.

With respect to the relationship between victim and claimant, the analysis here is similar to the compensatory justice analysis. In the latter case, the wrongdoer had to foresee, or have reason to foresee, the harm to the nonvictim claimant in order for the claimant to have a valid claim. Under the restitutionary theory, it is not clear that foreseeability is a requirement, but the claimant must still show that he would have received the benefit if the wrongdoing had not occurred, and that he did not receive, from the victim, some offsetting benefit despite the wrong.

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25. Bernard Boxhill, The Morality of Reparation, *in* Reverse Discrimination 270, 275 (Barry R. Gross ed., 1977); Stephen Kershnar, The Inheritance-Based Claim to Reparations, 8 Legal Theory 243, 251–57 (2002).

26. The law protects reliance through statutes of limitations, and also through the good faith purchaser doctrine. This principle is reflected in various reparations schemes, for example, the East German program. See David Southern, Restitution or Compensation: The Property Question, *in* 2 Transitional Justice 640, 641 (Neil J. Kritz ed., 1995).

27. A problem with Eastern European reparations. See Elster, Moral Dilemmas, supra note 23, at 25.

The restitutionary theory is more generous than the compensatory justice theory, but the generosity will be limited by empirical difficulties. Claimants will have difficulty, especially if a generation or two has passed, showing that they would have obtained the value of the benefit taken from the victim and that the payer has obtained the value of the benefit from the wrongdoer.[28] They also must confront troublesome issues regarding the netting out of the benefits and costs of the wrong.[29] Many slaves, for example, might have benefited from their enslavement and transportation if the alternative had been slaughter by an enemy. Should this avoided harm have been subtracted from a calculation of the benefit that the slaves conferred on slave owners? Many wrongdoers passed their unjust profits to descendants who made sacrifices for the sake of slaves. Should these descendants have to pay less to the descendants of slaves as a consequence? And there are related problems concerning the mixture of the classes of descendants of wrongdoer and victim, the immigration of nondescendants, and so forth. Finally and even more difficult are the claims of people who would not exist but for the wrongdoing. These people owe their existence—their unique genetic and cultural identity—to a historical wrong that brought together their ancestors. If slavery had not existed, then there would be no descendants of slaves.[30]

These problems are grist for the mill of reparations critics, but many of them are familiar in law, and the law has developed methods for dealing with (or ignoring) them. Sometimes, property can be traced, and even when it cannot be traced, rules of thumb can be used for untangling the different contributions to a common fund. As for the existence problem, it has already been confronted albeit with mixed results in "wrongful life" cases, where doctors can be held liable for failing to terminate a pregnancy or birth that results in a child with birth defects. The child would not exist if the termination had occurred, yet can obtain a remedy.[31] Still, when the harm and the reparations claims are separated by generations, ordinary standards of proof will often be insurmountable.

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28. These problems are inadequately addressed in the literature. See Martha Minow, Between Vengeance and Forgiveness 107–12 (1999); Robinson, supra note 1; Boxhill, supra note 25. Bittker is clear eyed but despairing. See Boris I. Bittker, The Case for Black Reparations 9–12 (1973).

29. Elster, Moral Dilemmas, supra note 23, at 20–25. See generally Bruce Sacerdote, Slavery and the Intergenerational Transmission of Human Capital (May 21, 2002) (unpublished manuscript, on file with the *Columbia Law Review*) (suggesting that effects of slavery disappear after two generations by comparing well-being, using a variety of measures, of the descendants of free blacks and of slaves). Sacerdote does not show that free blacks or their descendants are unharmed by the existence of slavery and its racial associations. See generally Kershnar, supra note 25 (arguing for this reason that slavery reparations are unjustified).

30. See, e.g., Kershnar, supra note 25, at 246–51.

31. The difficulty of comparing the value of nonexistence and the value of an impaired life being extreme, some courts adopted the pragmatic shortcut of permitting damages for the cost of care. Compare Turpin v. Sortini, 643 P.2d 954, 966 (Cal. 1982) (allowing plaintiffs in wrongful-life suit to recover "special damages for the extraordinary

In sum, the restitutionary theory allows for the payer and wrongdoer to be different people, and for the claimant and victim to be different people, but the relationship in both cases must remain close. The payer's gain must be connected to the wrongdoer's act, and the claimant must show that he depended on the victim or otherwise would likely have obtained the benefit from the victim if the wrong had not occurred.

B. *The Bearer of Moral Obligations*

1. *Ethical Individualism: Hard and Soft.* — Our discussion so far has proceeded mainly on the premises of (hard) ethical individualism, which holds that only individuals have moral rights and duties. But some reparations schemes target corporations, and others make corporate bodies like Indian tribes the beneficiaries of reparations. In both cases, the strictures of ethical individualism are avoided by treating the corporate groups as though they were individuals. To some, this strategy is a subterfuge. A shareholder of a corporation is not blameworthy for the wrongful acts of a manager or employee, and certainly not blameworthy for wrongful acts committed long before the shareholder acquired shares. Members of an Indian tribe living today have not necessarily been deprived of goods taken from distant ancestors. Or, if the truth were otherwise, one could ground the claims in ethical individualism and need not invoke the corporate body in order to create the necessary relationships between wrongdoer and payer, and between victim and claimant. For these critics, ethical individualism rejects the relevance of corporations and disapproves of schemes that use corporate form in order to justify reparations.

This view follows the individualist tradition of rejecting collective guilt.[32] But some philosophers have argued that collective guilt, and in particular, corporate guilt, is justified in limited conditions. To make this argument, they weaken the premises of individualism without altogether abandoning them, and for this reason we classify this approach as soft ethical individualism. Two versions of this approach can be distinguished.

The first version justifies limited collective guilt by weakening the individualist assumption that a person can be blamed only for wrongful acts. A person can be blamed for the wrongful acts of others when he voluntarily enters certain relationships with these others. People enter relationships in order to obtain the benefits of collective action; in the process they become blameworthy for the harms that occur as a result of collective action. They become blameworthy because they could have

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expenses necessary to treat the heredity ailment" of a child), with Kassama v. Magat, 792 A.2d 1102, 1123–24 (Md. 2002) (refusing to recognize a wrongful life claim because it is "beyond . . . the practical ability . . . of the law to make a judgment regarding the value of life, even impaired life, as contrasted with non-life").

32. See generally H.D. Lewis, Collective Responsibility (A Critique) *in* Collective Responsibility: Five Decades of Debate in Theoretical and Applied Ethics 17–34 (Larry May & Stacey Hoffman eds., 1991) [hereinafter Collective Responsibility].

avoided entering the relationship in the first place and lending support to others who later act wrongly. On this view, shareholders can be blameworthy for the wrongful acts of agents of the corporation, but so can a member of any group that consists of volunteers, and has a governance structure, or, on one view, a potential governance structure, where the members of the group could organize for the purpose of combating some evil, even if they do not.[33] On this latter view, a person in a mob might be blamed for the wrongs committed by other members of the mob—or, as the Czech Constitutional Court held, Germans living in the Czechoslovak Republic in the 1930s could not apply for restitution of their property under Czech law because of their failure to "manifest[ ] their fidelity to the Czechoslovak Republic whose citizens they were."[34]

The second version holds that corporations and other corporate bodies can be considered persons for moral purposes. We attribute intentions to corporations in ordinary language, and we also blame them, hold them responsible, and so forth. While the hard moral individualist considers these statements as either convenient modes of expression, which do not say anything about the moral reality, or else as anthropomorphizing confusions, it is also possible to think that corporations are moral agents.[35] Once we take this step, we can demand that corporations pay when they commit wrongs, and allow them to receive reparations on account of wrongs committed against them. Shareholders, employees, and other members are benefited or harmed as a consequence, but their claims are incidental and derivative.

These ideas are usually discussed in the context of compensatory justice. A corporation injures someone through the actions of its agents, but none of these agents is morally culpable.[36] The victim seeks compensation from the "corporation," but this means that shareholders would have to pay. And this is true even if the current shareholders—the ones who must pay through devaluation of their shares—are different from the shareholders at the time that the wrong was committed.

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33. Larry May, Sharing Responsibility 116–17 (1992); cf. Brent Fisse & John Braithwaite, Corporations, Crime and Accountability 50 (1993) (arguing that shareholders can be responsible for corporate wrongdoing by virtue of their voluntary participation through the purchase of shares, but can be blamed only if they could have prevented the wrongdoing); Christopher Kutz, Complicity: Ethics and Law for a Collective Age 166–253 (2000) (same). But see David Copp, Responsibility for Collective Inaction, J. Soc. Phil., Fall 1991, at 71, 71 ("In certain circumstances . . . a person may properly be blamed for failing to do what she could to bring about the cooperative action required to deal with a problem, even if she did not create the problem and could not solve it on her own.").

34. Istvan Pogany, Righting Wrongs in Eastern Europe 153 (1997) (citing Mark Gillis, Facing up to the Past: The Czech Constitutional Court's Decision on the Confiscation of Sudeten German Property, 2 Parker Sch. J. E. Eur. L. 709 (1995)).

35. Peter A. French, Collective and Corporate Responsibility 31–48 (1984).

36. See Kutz, supra note 33, at 196–200 (citing example of Union Carbide and lack of individual accountability for individual Bhopal plant agents).

If these arguments are accepted, they can be applied to the restitutionary theory as well. If Ford benefited from its German plants' use of slave labor, then "it" should pay restitution, even though the people who pay the reparations through the corporation are different from the people who committed the wrong through the corporation. Again, this result holds even though current shareholders did not receive any gain from the wrongdoing. They had to pay more for their shares as a result—and in this respect they are like good faith purchasers who are excused under the law of restitution—or, more likely, the original benefit was dissipated as consumers' surplus. To the hard ethical individualist, reliance on the corporate fiction to make blameless people pay for the collective wrongs of earlier shareholders is a doubtful ploy. However, not all corporations are the same, and some who object to attributing blame to business corporations might find more sympathetic a claim against an Indian tribe for lands that it wrongfully took. Because the Indian tribe does not sell anything, and people do not buy membership in it, one can argue that descendants of the original wrongdoers continue to enjoy gains to which they are not entitled.

As noted, the corporate relationship also links the victim and the claimant. If the injured party is a corporation, or a corporate body such as an Indian tribe, municipality, or religious organization, then it retains its original claim, even if all the members of the corporation have been replaced by new people. This means that a person removed from the wrongdoing by generations, and who cannot be said to have been injured by the wrongdoing, will benefit from the corporation's claim.

All of these arguments presuppose criteria for distinguishing corporations and non-corporations, and this is true both under the more individualistic theory of corporate liability that stresses the voluntary participation of members, and the less individualistic theory that stresses the bare fact that corporations play a role in moral language. The criterion that is suggested is usually one of coherence, stressing formal decision-making procedures.[37]

Soft ethical individualism urges us not to worry too much about the gains or losses of members of the corporation, as long as we are persuaded that there is a sufficient relationship. Take the case of an Indian tribe that claims that a private corporation wrongfully deprived it of property many generations ago. It might be impossible for the members of the tribe to show that they are worse off than they would have been if the deprivation had not occurred: They might not have been born. And the shareholders of the corporation are unlikely to be better off: They paid more for their shares if any surplus was generated and not paid as divi-

37. See French, supra note 35, at 54–55 (emphasizing corporate decisionmaking procedures); May, supra note 33, at 82 (emphasizing relationships of solidarity); see also Kutz, supra note 33, at 218–19 (emphasizing participating intent). For criticisms of French, see Manuel G. Velasquez, Why Corporations Are Not Morally Responsible for Anything They Do, *in* Collective Responsibility, supra note 32, at 111, 111–32.

dends to prior shareholders. Still, there is some sense—the soft individualists argue—in which the tribe as a whole is less prosperous or flourishing than it would otherwise have been. And the shareholders purchased the shares knowing that the corporation might be burdened with moral as well as legal claims against it. A claim against the U.S. government is weaker in the sense that current U.S. citizenship is usually not a matter of choice, but stronger in the sense that all citizens benefit, however minutely, from an earlier seizure of land. And a claim against white Americans is still weaker, because white Americans do not all belong to a coherent group that adopts policies on the basis of the race of the members.

2. *Ethical Collectivism.* — A more extreme type of argument assumes that the individual is not the object, or not the sole object, of moral concern, and that the group can be blameworthy and responsible in the same sense as individuals, and their obligations are not reducible to those of their members. The claim for reparations would be based on an assertion of the type: At Time 1 Group P wrongfully injured Group Q; therefore, at Time 2 Group P must pay reparations to Group Q. As long as each group can be said to persist from Time 1 to Time 2, it does not matter whether the identities of the people in each group stay the same, or are linked by some factor other than group membership. Although Group P's payment of reparations must come from the pockets of group members, the members have no moral basis for complaint.

Soft ethical individualism and ethical collectivism are overlapping and might seem indistinguishable. But although individualists differ about the degree of causation and blameworthiness necessary for an individual to be liable for a wrong, some positions just cannot be made consistent with individualism. A hard individualist might think that adult Germans living in the 1930s share guilt for Nazi crimes only if they participated in them, while a soft individualist might blame those who failed to vote against the Nazis, or those who successfully objected to euthanasia of "genetically diseased" non-Jewish German citizens but kept silent about the Jews[38]—but the view that their children are guilty of crimes from which they did not benefit surely is based on a non-individualistic ethic,[39] as is the view that all Germans living in the 1930s are equally guilty of Nazi crimes, regardless of their degree of participation. The methodologies differ over whether the group has instrumental or intrinsic significance. For the soft ethical individualist, the group matters because it gives value to individuals who derive their identity from membership; the individual remains the moral atom.[40] For the ethical collectivist, the

38. See Alan Davies, The German Third Reich and Its Victims: Nazi Ideology, *in* When Sorry Isn't Enough, supra note 7, at 23, 24.

39. If the children did benefit, an individualist might argue that they have a duty to perform restitution.

40. This is the standard position of those who defend nationalism. See, e.g., David Miller, On Nationality 10–11 (1995).

group itself is the moral atom. Individuals are agents of the group and are obliged to suppress their interests for the sake of the group.[41]

Although ethical collectivism has enjoyed few philosophically sophisticated defenses, it does reflect powerful intuitions held by many people. The propensity to attribute moral qualities to nations and races is deeply ingrained and difficult to shake. Nazi ideology treated the purity of the Aryan race as an intrinsic good, and thus the threat of Jewish miscegenation as a bad. Although Nazi ideology is extreme, nationalistic movements, including the various American forms going back to the nineteenth century, have always attributed moral value to a group of people. Many people appear to believe that Germans living today share guilt for the crimes of the Nazis, and indeed such a theory appears to be the basis, in part, of the scheme of continuing German reparations to victims of the Holocaust.[42] Some Jews oppose intermarriage on the ground that the disintegration of a distinctive Jewish cultural or ethnic group is a bad in itself. This ethical collectivist view should be contrasted with the soft individualist view that the disintegration of a culture is bad only to the extent that individuals lose a source of value that cannot be replaced, and to the extent that use of coercion to protect the culture in the face of individual self-assertion causes more good than harm.

Ethical collectivism must overcome two difficulties. First, it is always difficult to determine what the relevant groups are, and what to do when groups overlap. Americans could be seen as a single group, as a nation, but also divided by religion, class, race, ethnicity, language, and region.[43] The nation, to take just one case, is a notoriously protean and ill-defined concept, and the national affiliations of individuals are blurred by intermarriage and immigration.[44]

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41. One might believe that a group can be collectively guilty but that individuals do not have obligations arising from the group's guilt—perhaps, the group's guilt might cause some members to try to change the group's practices, but they have no such obligation. Cf. Margaret Gilbert, Sociality and Responsibility: New Essays in Plural Subject Theory 151 (2000). Since reparations must come from someone's pocket, we interpret this position as a kind of ethical individualism: The reparations program cannot be justified unless the individuals are blameworthy.

42. Ronald Dworkin, Law's Empire 173 (1986) ("[I]t would be absurd to blame contemporary Germans for what the Nazis did; but . . . it is not absurd to suppose that contemporary Germans have special responsibilities because the Nazis were Germans too."). Perhaps Dworkin is making a point about creating incentives for future war criminals, but more likely he is unable to shake off the feeling that Germans are still blameworthy.

43. Rorty would claim that historical contingency determines the group with which we (as an empirical matter) feel solidarity, and therefore to which we owe obligations. Richard Rorty, Contingency, Irony, and Solidarity 195 (1989).

44. Benedict Anderson, Imagined Communities: Reflections on the Origin and Spread of Nationalism 12–13 (1983) (arguing that nations are constructed from often arbitrary and false beliefs); Eric Hobsbawm & Terence Ranger, The Invention of Tradition 4–14 (1983). For a recent defense of the claim that a nation can have moral rights (including the right to self-determination) and obligations, see Miller, supra note 40, at 11. Others see the nation as an important source of identity for individuals, which justifies

Second, even if the groups could be identified, it is difficult to know what obligations they owe to each other. The natural lawyers based international law on customary practices and the intentions of governments, concepts that cannot be easily transferred to a group like "Moslems" or "Anglo-Saxons." Nationalist rhetoric is rarely content with the international status quo. The Nazi policy of *Lebensraum* was premised on the claim that Germany was overcrowded and that the Germans, by virtue of the superiority of their race, had a right to the land owned by Slavs; the American policy of manifest destiny was based on the presumed superiority of American civilization.

Both difficulties play a role in the debate about slave reparations. We might start by thinking that "whites" harmed "blacks" by enslaving them. One of the responses to this claim is that many whites are the descendants of slaves and many blacks are descendants of slaveowners. The Nazis dealt with the similar problem of miscegenation by, in effect, asserting a German "essence"—the Aryan—that survives as an ideal type, embodied only in those Germans with no Jewish, Slav, or other non-German blood.[45] Today, no one in the reparations debates makes claims about racial essences. The best argument for overlooking the problem of racial mixing is that the stigma of slavery attaches only to people who are perceived to be black and not to nonblacks.[46]

Next, to calculate the harm that whites did to blacks, we must answer extremely difficult questions.[47] Is the guilt of whites affected by the participation of Arabs and Africans in the slave trade? Is the relevant comparison the standard of living of Africans and African Americans (and which ones?) prior to slavery and during slavery, or prior to slavery and today? And what is the relevant measure—mortality rates, population size, satisfaction of basic needs, wage differentials, or something else? Are the sacrifices by (Northern) whites during the Civil War to be taken into consideration? If so, should this sacrifice count as reparations, partial or full? Those who are skeptical about reparations for slavery worry that the logic of ethical collectivism implies endless, intractable conflicts about what one group owes another: Germans and French, English and Indian, Christians and Jews, Romans and North Africans.

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different treatment of co-nationals, and an important condition for political unity. See, e.g., Margaret Canovan, Nationhood and Political Theory 71–74 (1996); Margaret Moore, The Ethics of Nationalism 87 (2001); Will Kymlicka, Misunderstanding Nationalism, *in* Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship 242, 242–53 (2000).

45. George L. Mosse, The Crisis of German Ideology: Intellectual Origins of the Third Reich 303–04 (1964).

46. We return to this argument under the rubric of "moral taint" below. See infra Part II.B.3.

47. See generally The Wealth of Races: The Present Value of Benefits from Past Injustices (Richard F. America ed., 1990) (noting difficulty in quantifying effects of past and present racial discrimination on society's current distribution of resources among racial groups).

3. *Moral Taint.* — The intuitions behind ethical collectivism can be approached in another way, one that seems less foreign to the tradition of individualism. It is commonly observed that people feel a "moral taint" as a result of an association with wrongful behavior over which they had no control and therefore for which, under traditional individualistic premises, they carry no blame. Anthony Appiah gives the example of a sales clerk who considers selling a knife to a murderer knowing that the murderer will use it to kill someone, but also knowing that if he does not sell the knife to the murderer, the latter will buy a knife from someone else.[48] The seller might refuse to sell the knife—even though selling the knife is not morally wrong—in order to avoid a feeling of moral taint. The point can be made with less exotic hypotheticals: A person who sells a knife *without* knowing that the buyer will use it for a murder might feel a moral taint when he finds out about the murder, and we know that illegitimate children have often felt a moral taint from the association with the illicit union of which they are the product, even though they can in no way be blamed. Appiah's example, however, makes clear that moral taint can have behavioral consequences: People will take certain actions to avoid it even if they do not think they are morally obliged to avoid it.

People suffering from moral taint are not blamed for the conduct that produced it. They are not blamed because they had no control over the conduct, and, because they are not blamed, they have no moral obligations as a result of the taint. But people often feel shame, and are stigmatized by others, as a result of their association with the wrongful conduct. Though the shame and stigma seem irrational from a moral point of view, they are psychological and social facts, which have behavioral consequences.[49] To avoid moral taint, and the associated shame and stigma, people will change their conduct. As Appiah's example shows, the knife seller might avoid selling the knife even though he cannot be held morally responsible for the sale. More importantly for our purposes, people might try to wipe away the feeling of moral taint after it occurs. A natural way to remove the stain of moral taint is to make an

48. Anthony Appiah, Racism and Moral Pollution, *in* Collective Responsibility, supra note 32, at 219, 219–26. A helpful discussion and development of Appiah's view is found in Gregory F. Mellema, Collective Responsibility 71–82 (1997).

49. Indeed, for Appiah, moral taint is a form of magical thinking. Kutz argues that an allied notion, the sense of "counterfactual guilt," arises because the wrongdoing of the group member gives rise to "guilt [by the agent] at the suspicion that one might oneself have acted wrongly." Kutz, supra note 33, at 45. Williams's "agent-regret" is similar, although this term encompasses regret for a bad outcome that was not the result of wrongdoing. Bernard Williams, Moral Luck 28 (1981). All of these accounts are psychological, although Kutz also defends the view that guilt by complicity can be warranted as long as the agent intentionally participated, even if his participation made no difference to the outcome. Kutz, supra note 33, at 113–45. This is more restricted, however, than moral taint, as we use it. May goes furthest by arguing that people are responsible for failing to act collectively to eliminate moral taint, and might be morally guilty for failing to become "consciously aware of their situations." May, supra note 33, at 151. For a discussion of May's view, see Mellema, supra note 48, at 76–79.

apology, do good works, or pay reparations—depending on the nature of the associated conduct.

Moral taint makes sense of the psychology of collective guilt. If an illegitimate child can feel moral taint because of the behavior of his parents, then members of a group can feel moral taint as a result of the behavior of other members. Ethnic shame—the other side of ethnic pride—is another example of the phenomenon. Blacks, Jews, and members of other ethnic or racial groups often feel shame when a co-ethnic commits a crime. Most people reject the core ethical collectivist argument that a Jew, for example, is guilty of the wrongful act of other Jews, and must make amends, but the idea of moral taint helps explain why some Jews do feel ashamed by the wrongful acts of other Jews, and do make (supererogatory) amends, and also why others' views of innocent members of a group can be influenced by the behavior of guilty members of the group.

Some reparations programs might be explained as efforts to remove a moral taint. Few Americans alive in 1988 can be blamed for the internment of Japanese Americans during World War II: The main decisionmakers were dead, and those who voted for these decisionmakers (or the people who appointed them) cannot be assigned much blame for these decisions. Yet many Americans feel a moral taint. Most Americans derive a sense of pride and well-being from their association with American institutions, and these feelings are diminished to the extent these institutions have produced injustice. Apologies, reparations, and similar remedial acts are natural devices for reasserting the value of these institutions, and thus for reinflating American self-esteem. Apologies show that the internment is recognized as a failure of the institutions, not as their proper outcome.[50] To the extent that they return to the victims some of what was taken away, reparations retroactively lessen the harm caused by American institutions, and, even if reparations can do no good for the victims, they reinforce the message of the apology.

Moral taint connects wrongdoers and payers who otherwise have nothing in common. If the payer is tainted by the conduct of the wrongdoer, then the payer might believe that it is appropriate to pay reparations to the victim. If the victim no longer exists, the payer might believe that it is appropriate to pay reparations to people who are associated with the victims, including descendants. This belief could be strengthened by a further factor: Nonvictims might be tainted by the fate of the victims. This is one way of understanding the claims of blacks about slavery, and Jews about the Holocaust. A black person who is not descended from a slave is tainted by black slavery, and a white person who is descended from a black slave is not so tainted. One hears similar claims about the

50. Jacob T. Levy, The Multiculturalism of Fear 242–43 (2000). Levy argues that anyone who feels pride about national institutions or accomplishments relies on ethical collectivism, and therefore should feel shame about national failures.

lack of reparations for non-Jews descended from Holocaust victims and for Israeli Jews (and other citizens) not descended from Holocaust victims. Moral taint works by the metonymic logic of psychological association—picking out individuals with distinctive traits shared by the salient victims of a historical injustice—and not by the logic of ethical individualism.

C. *Summary: Remedial Implications*

A theory of reparations asserts that one group of individuals bears an obligation to remedy a historical injustice that it, or some prior group, inflicted on another group of individuals. The compensatory theory justifies reparations when the wrongdoer is the payer and the victim, or a foreseeable relation, is the claimant. The restitutionary theory justifies reparations when the wrongdoer benefits the payer and the victim, or a relation who is deprived of a gift or bequest from the victim, is the claimant.

Under ethical individualism, an individual can be a payer only if he committed, or benefited from, or could have benefited from, a wrongful act. An individual can be a beneficiary only if he was the victim of the wrongful act. Under soft ethical individualism and ethical collectivism, a group—if it meets the appropriate criteria—can play the role of payer or beneficiary. Members of the group derivatively pay or receive reparations, by virtue of their membership, even though they did not commit the wrongful act or were not the victims of the act. In the moral taint version of collectivism, individuals pay reparations in order to erase the moral taint that results from their (non-blameworthy) association with the wrongful act.

Existing reparations systems can be justified (or not) on the basis of one (or more) of these theories, and when legislatures design new reparations systems, their choices will reflect these theories. But none of the theories is determinative: Many possible schemes might be consistent with any particular theory. The choice among these schemes will reflect constitutional, prudential, and political considerations—the topic of the remaining sections of this paper.

III. Constitutional Constraints

What constraints does the Constitution place upon reparations schemes? We must consider three types of challenges: (1) challenges brought by objecting payers—using "payers," for lack of a better term, to denote those required by law to bear the costs of the reparations scheme, such as taxpayers or nonpreferred job applicants; (2) challenges by would-be beneficiaries of the scheme—those who have been excluded from its scope while other similarly situated individuals or groups have been included; and (3) challenges by objecting beneficiaries—members of the beneficiary class who object to the government's offer of reparations, perhaps because they find it stigmatizing or expressively demean-

ing. (The remaining possibility, a challenge by a would-be payer who protests her exclusion from the payer group, is strictly hypothetical; it corresponds to no real world cases or arguments of which we are aware.)

A. *Objecting Payers*

Here the easiest cases, or at least the most familiar cases, involve affirmative action. A racial preference scheme may be justified on backward-looking or remedial grounds,[51] as a compensatory measure, or on forward-looking grounds such as promoting the diversity of student bodies or the government workforce. Such schemes are typically challenged by marginal applicants or candidates from nonpreferred races who claim either that they would obtain the relevant benefit in the absence of the preference,[52] or, less ambitiously, that the absence of the preference would allow them to compete for the benefit on race-neutral terms.[53] Those marginal nonpreferred candidates are, in this special sense, the payers who bear the costs of the scheme, and theirs are the most important constitutional objections.

Remedial affirmative action transfers an entitlement, in the form of a preference, from groups whose members benefited from prior illegality or injustice to groups whose members were harmed. When justified on such grounds, affirmative action is just a reparations scheme, albeit one with a few special features: (1) The reparations are awarded in kind, rather than in cash, and (2) the proximate costs of the scheme are borne not by general taxpayers, as with cash reparations, but by marginal candidates from nonpreferred groups. The backward-looking justification is, as usual, essential to describing this as a reparations scheme. An otherwise identical program justified on forward-looking grounds—say, that admitting black A rather than white B to a public university's class will promote an educationally beneficial diversity of perspectives among the student body—is simply an in-kind transfer program.

The group-based character of the transfer is also definitional of affirmative action. Suppose that Individual A suffers discrimination on the basis of race in a manner that benefits Individual B (perhaps the two are competing for places in a public university class), and a court later orders that A's injury be redressed by putting A and B into the positions they would have occupied but for the discrimination (say, with A rather than B admitted to the class). This is an ordinary case of individualized remediation; neither affirmative action nor any other form of reparations has yet entered the picture. Suppose, however, that many years ago blacks (such

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51. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 478–80 (1989) (describing plan designed to remedy past discrimination in awarding government construction contracts).

52. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 277–78 (1978) (opinion of Powell, J.).

53. Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville, 508 U.S. 656, 662 (1993).

as A) suffered discrimination in the public university's admissions program, whites (such as B) benefited by gaining the admissions slot that would otherwise have gone to A, there were many people in the same position as A and many in the same position as B, and at some point in the past the university stopped discriminating against the As in favor of the Bs. Here the university might adopt, or a later court might require, some preference to be granted to current As over current Bs, justifying its decision by pointing to "continuing effects" on current As of the prior discrimination.[54] Absent the prior illegal discrimination, the argument runs, current As would be better off than they currently are; the affirmative action program is remedial or compensatory in the sense that it attempts, roughly, to put the As in the position they would have occupied in the counterfactual world in which the discrimination never occurred. Although the program attempts to compensate As for the continuing harms they have suffered, it is nonetheless group-based in the sense that current As were never themselves subjected to discriminatory treatment—as current Bs are sure to point out.

Under current law, the constitutionality of this sort of program is unsettled. The Supreme Court has recently granted certiorari in a pair of cases that will define the permissible limits of affirmative action in higher education.[55] At least with respect to the typical challenge by a marginal white candidate, it is not even clear whether nonremedial justifications are permissible at all; partisans and lower courts have been able to mine Supreme Court opinions for ambiguous indicators in either direction.[56] Even if justified remedially, the program will receive strict scrutiny, no matter which level of government mandates it;[57] the court will require that the program rest upon judicial, legislative, or administrative findings of prior constitutional or statutory violations, and the enacting jurisdiction will have to show that it is aimed at redressing discrimination by or within the enacting jurisdiction itself, rather than "general" or "society-wide" discrimination. For expository purposes, we will assume that affirmative action is not per se unconstitutional—assuming away the view, held by Justices Scalia and Thomas but to date invariably rejected by the

54. See, e.g., Fullilove v. Klutznick, 448 U.S. 448, 496 (1980) (Powell, J., concurring) ("I believe that § 103(f)(2) is justified as a remedy that serves the compelling governmental interest in eradicating the continuing effects of past discrimination identified by Congress.").

55. See Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002), cert. granted, 123 S. Ct. 617 (2002); Gratz v. Bollinger, 277 F.3d 803 (6th Cir. 2001), cert. granted, 123 S. Ct. 602 (2002).

56. Compare Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996) ("[S]ubsequent Supreme Court decisions regarding education state that non-remedial state interests will never justify racial classifications."), with *Grutter*, 288 F.3d at 742 ("Because this court is bound by Justice Powell's *Bakke* opinion, we find that the Law School has a compelling state interest in achieving a diverse student body.").

57. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

Court, that equal protection requires colorblindness in all circumstances.[58]

Less familiar questions involve the constitutionality of cash reparations schemes financed by the government out of tax revenues. Fortunately, however, the relevant questions are easier, or so we will argue. Imposing the costs of the scheme on (some class of) taxpayers, rather than on applicants for jobs or places in educational institutions, enables reparations schemes to sidestep the most serious constitutional objections that lie against remedial affirmative action schemes. Consider the following cases:

(1) A federal statute providing cash reparations payments, funded out of general revenues, for persons illegally (unconstitutionally) subject to federal internment during World War II under specified government programs.

This is an easy case. The statute counts as a reparations scheme because it relaxes individualized remediation on the payer side. Most of the taxpayers who fund the scheme out of general revenues are not the very people who unconstitutionally discriminated against, or authorized government officials to discriminate against, the beneficiary class over fifty years ago. But a challenge by the taxpayers, qua taxpayers, will never get off the ground. Taxpayers lack standing to challenge the legality of federal expenditures, unless the objection is based upon the Establishment Clause.[59] Even if the merits could be reached, the statute would be subject to mere rational-basis review, not strict scrutiny, because it is not formally race-based in the sense that current law finds constitutionally suspect. The beneficiaries are identified by a facially neutral or race-blind criterion, as individuals who suffered prior illegal treatment under specified government programs. The beneficiary class encompasses only those persons who were, as individuals, victims of illegal treatment.[60]

It is true that people who were, or claim to have been, victims of *other* illegal internment programs are not included in the beneficiary class; in that sense, the class might be said to treat similarly situated people differently, without justification. Below we will discuss a challenge brought by

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58. See id. at 239 (Scalia, J., concurring); id. at 240 (Thomas, J., concurring). Even on this view, colorblindness might not apply to cases arising in emergency circumstances, such as race riots in prisons. There even proponents of a colorblindness rule seem to think that temporary segregation of prisoners by race is permissible. See Lee v. Washington, 390 U.S. 333, 334 (1968) (Black, Harlan, & Stewart, JJ., concurring) ("[P]rison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails.").

59. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 479 (1982); Flast v. Cohen, 392 U.S. 83, 102–03 (1968).

60. Although the statute in (1) is adapted from the Civil Liberties Act of 1988, the statute that provided reparations to Japanese American internees, we should be clear that the real Act itself is not facially neutral. It explicitly defines the individuals eligible for payment as "individual[s] of Japanese ancestry" subject to internment under specified government programs. 50 U.S.C. appx. § 1989b-7 (2000); see infra text accompanying notes 83–84.

German American World War II internees on a similar ground. But that challenge, even if successful, would not help the *taxpayers*. The challenge would establish, at most, that the statute is unconstitutionally underinclusive. The taxpayers, however, want to argue not that the statute should be expanded to include other groups, but that it should be declared entirely invalid.[61] The taxpayers cannot assert the rights of the third parties who wish to expand the program, and even if they could, the expansion of the program would not redress the taxpayers' injuries; to the contrary, it would exacerbate them. So the taxpayers will lack standing, under any possible theory.

Harder cases arise if the reparations scheme is formally race-based on either the payer side or the beneficiary side, or both. Consider the following example:

(2) A federal statute providing cash reparations payments, funded out of general revenues, to every black American (justified as recompense for slavery and its continuing effects).

This, of course, is the sort of broad race-based reparations scheme that some members of the movement for slavery reparations have advocated. In other versions, such as Randall Robinson's proposed reparations scheme, the payments would be used for educational scholarships for black youth or other in-kind benefits;[62] those benefits can also be means-tested, as by specifying that only poor black youth will be eligible. Although these variants are important to the design questions addressed in Part III, they are constitutionally on the same footing as (2). The principal feature that makes them constitutionally problematic is the feature they share with (2), namely that the beneficiary class is defined by race rather than by status as victims of government illegality. Adding means-testing or some other feature (thereby defining the beneficiary class as "poor blacks" rather than as "blacks") does not make the definition race-neutral. It just adds a supervening distinction within the racially defined beneficiary class.

It is not clear how (2) fares under current constitutional law; the relevant questions are complicated and little explored. Start with the standing issues. Here too taxpayers will lack standing, for the same reasons we discussed with reference to (1): Apart from Establishment Clause challenges, taxpayers lack standing to litigate, qua taxpayers, the constitutionality of government expenditures. The relevant grievances are taken

61. The taxpayers might get what they wanted if the German Americans won and the court or legislature cured the national origin discrimination by repealing benefits for Japanese Americans, rather than by adding benefits for German Americans. But the severability presumption in such cases is the opposite: Courts will, absent express legislative instruction to the contrary, expand the beneficiary class. See Heckler v. Mathews, 465 U.S. 728, 738–39 & n.5 (1984).

62. Robinson, supra note 1, at 244–45.

to be "generalized" or "abstract," and thus remediable by political processes alone.[63]

Here, however, unlike in (1), there is a potentially successful plaintiff class in the picture. Nonblacks may sue to enjoin the program on the straightforward claim that they suffer both economic and stigmatic injuries by virtue of the government's provision of a race-based benefit.[64] (Note that the only plausible remedy the court could provide in this suit would be to cure the unconstitutional inequality of treatment by voiding the program, rather than by extending it to include nonblacks. The latter course would simply convert the statute into a general distribution to all persons, and financed by all taxpayers.) It is hard to see what possible basis there would be for rejecting this standing claim. The injury is widely shared across the plaintiff class, but that alone does not suffice to make it a nonlitigable "generalized grievance."[65] As the Court recently emphasized, a grievance or injury may be both widely shared and also individuated, and thus not "generalized" in the sense relevant to standing law.[66]

Assuming that nonblacks have standing to protest the government's provision of this racially defined benefit, will their challenge succeed on the merits? The statutory definition of the beneficiary class, because race-based, is constitutionally suspect under the affirmative action decisions, and will be subject to strict scrutiny. But (2) may be a rare example of a race-based program that survives strict scrutiny. As the Court was at pains to emphasize in its most recent pronouncement on affirmative action, strict in theory need not mean fatal in fact,[67] at least when race-based schemes that favor minority interests are at issue.[68] And (2) is constitutionally less objectionable than a standard affirmative action scheme.

The strict scrutiny analysis asks whether the statute in (2) rests upon a compelling governmental interest and is narrowly tailored to achieve that end.[69] Start with the question whether the government's remedial interest in a reparations scheme is compelling. Probably it is: The remedial or compensatory interest in a reparations scheme is the same interest that underpins remedial affirmative action, and that interest has been repeatedly blessed by the Court. If there are differences, they cut in favor of reparations. Common sense suggests that the governmental interest in remedying massive, society-wide structural injustices such as slavery

63. The same applies to citizens suing qua citizens, without alleging any particularized injury. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220–21 (1974); United States v. Richardson, 418 U.S. 166, 177 (1974).

64. See, e.g., Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville, 508 U.S. 656, 666 (1993).

65. Flast v. Cohen, 392 U.S. 89, 106 (1968).

66. See FEC v. Akins, 524 U.S. 11, 23–25 (1998).

67. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995).

68. See David A. Strauss, Affirmative Action and the Public Interest, 1995 Sup. Ct. Rev. 1, 22–25.

69. See *Adarand*, 515 U.S. at 235.

should surpass the governmental interest in remedying small-scale discrimination in particular schools, offices, or government programs.

Under current doctrine, however, this commonsensical distinction is turned on its head. The Court has indicated in several decisions, although never squarely held, that governmental institutions may act only to remedy "identified" discrimination within their jurisdictions.[70] A governmental unit such as a city council, for example, cannot pretend to provide a remedy for society-wide discrimination, based upon a general finding that blacks or other minorities have suffered at the hands of the white majority; it can only proceed on the basis of a concrete legislative, administrative, or judicial finding of identified acts of discrimination by the governmental unit itself or by private actors within its jurisdiction.[71] Perhaps reparations schemes are uniquely vulnerable to this restriction. Reparations schemes on the scale contemplated in (2) are, after all, a paradigmatically society-wide remedy based on general facts about large-scale historical practices and structures, such as slavery, rather than small-scale facts about specific discriminatory acts.

Yet there are two reasons to doubt the force of this objection, even taking current law as given. A doctrinal reason is that the Court has never invoked the disfavored status of society-wide remediation to invalidate an affirmative action scheme enacted by Congress, as opposed to a state or local institution.[72] In the latter setting the distinction is at least coherent, whether or not it is attractive. A local governmental institution's jurisdiction encompasses less than all acts of discrimination committed in society. The federal government's jurisdiction, by contrast, is itself society-wide in a sense that no merely regional government can claim, so that the distinction might become blurry or even collapse as applied to a national reparations scheme like (2). It is true that the Court has indicated, in the abstract, that the same legal standards apply to both federal and state programs.[73] Yet the twisting course of the Court's jurisprudence in this area suggests that any abstract pronouncement should be eyed skeptically until the Court cashes it out in an actual holding.

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70. See, e.g., Shaw v. Hunt, 517 U.S. 899, 909 (1996) ("A generalized assertion of past discrimination in a particular industry or region is not adequate because it 'provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy.'" (citation omitted)); City of Richmond v. J. A. Croson Co., 488 U.S. 469, 499–500 (1989) (holding evidence of discrimination in construction industry nationally is "of little probative value in establishing identified discrimination in the Richmond construction industry"); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986) ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.").

71. See *Croson*, 488 U.S. at 504.

72. Justice Powell's concurrence in Fullilove invoked the distinction, but the Court upheld the federal program of contracting set-asides at issue. Fullilove v. Klutznick, 448 U.S. 448, 499–503 (1980).

73. See *Adarand*, 515 U.S. at 216–17.

There is a second, more important reason for doubting that the Court's distinction between identified and societal discrimination threatens the constitutionality of (2): The rationale for the distinction does not apply to a national reparations scheme financed out of general revenues. David Strauss argues, convincingly, that the distinction's purpose is to help the courts flush out race-based preference schemes that represent socially harmful interest group transfers rather than public-regarding remedial programs.[74] But the critical feature that distinguishes (2) from a standard affirmative action scheme is that (2) has a different cost structure, and that difference alleviates any concerns that (2) represents a welfare-reducing transfer among racial interest groups. In affirmative action schemes, the costs of remediation are typically concentrated on a small group of identified or identifiable individuals: the nonblack applicants who would have obtained a job, admissions slot, or contract in the absence of the governmental affirmative action scheme. In (2), by contrast, there is no targeted infliction of costs on a small group of individuals. The scheme is funded by contributions from all taxpayers. We can even tie this distinction to a standard *Carolene Products* account of political process checks on government action,[75] suggesting that a national reparations scheme financed by taxpayers must overcome daunting political obstacles.

To be sure, the standard process account is simplistic. It overlooks public choice insights about the ability of discrete minorities to organize to secure government benefits at the expense of dispersed majorities, like taxpayers, who are subject to free-rider problems.[76] Conversely, transfer programs that concentrate costs may arouse fierce opposition from the small groups targeted for exaction;[77] those groups have sufficient incentives to overcome the free-rider problem through mutual monitoring. On this view, the standard process account may even get the calculus of political forces exactly backwards.[78] Affirmative action should receive less scrutiny, not more, precisely because it concentrates costs, while the taxpayer-funded reparations statute is suspect precisely because it diffuses

74. Strauss, supra note 68, at 27–31.

75. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (calling for greater judicial scrutiny when political processes relied upon to protect minorities are curtailed).

76. See generally Mancur Olson, The Logic of Collective Action: Public Goods and the Theory of Groups (8th ed. 1980). On the political process that generated reparations for Japanese American internees, see Hatamiya, supra note 7, at 190, 190–96. Instead of a predictably crude interest group account, in which lower costs of organization allowed Japanese American groups to foist a minoritarian transfer on disorganized taxpayers, Hatamiya offers an institutionally nuanced account, emphasizing not only interest group dynamics but also the ideological motivations of key legislators and the importance of public education about the injustice of the internment program. Id.

77. See Saul Levmore, The Case for Retroactive Taxation, 22 J. Legal Stud. 265, 280 (1993).

78. See generally Bruce A. Ackerman, Beyond Carolene Products, 98 Harv. L. Rev. 713 (1985).

them. Yet both halves of this objection seem implausible. On the affirmative action side, it seems unlikely that strictly notional or conceptual "groups" like marginal white applicants can organize, as such, to oppose the transfer. On the reparations side, the high public visibility and sheer scale of any society-wide reparations scheme like (2) make it an extremely unpromising vehicle for minoritarian transfers of the sort predicted by the simplest versions of interest group theory. The upshot is that courts should have confidence that any nationally enacted reparations scheme represents a product of successful public deliberation, or at least of a well functioning pluralist market in legislation, rather than a socially suspect interest group transfer.

The best argument that (2) should fail strict scrutiny is based not on the strength of the government's interest, but rather on the principle of narrow tailoring: There are various alternative, race-neutral schemes for promoting the government's remedial interest (or so the argument would run). The statute might, for example, provide cash payments to "descendants of former slaves." But the narrow tailoring argument will probably fail, for two reasons. First, the imaginable alternatives are almost certainly infeasible. Attempts to tailor the beneficiary class will quickly encounter insuperable difficulties, for the alternatives will be either conceptually indeterminate or excessively information-demanding. It is by no means simple to identify the "descendants of former slaves" even at the conceptual level; we need to specify what degree of consanguinity counts. Empirically, the government will be unable to identify the relevant individuals to even a minimal level of precision. The descendants of slaves are a population that is hardly well documented in genealogical records.

Second, even if these practical difficulties could be overcome, the narrow tailoring argument is inconsistent with judicial practice in the affirmative action cases. Affirmative action schemes by definition lack narrow tailoring in the usual sense. Rather than providing remedies to individual victims of discrimination who might, by incurring sufficient process costs, be identified as such, affirmative action schemes provide a crude group-based remedy whose inevitable overinclusiveness and underinclusiveness alleviates the costs of providing the remedy. Despite arguments to the contrary by some Justices,[79] the Court has not to date embraced the view that affirmative action schemes are inherently constitutionally defective for this reason. No more should be demanded of society-wide reparations schemes, which share the pragmatic scope of

79. See, e.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239–40 (1995) (Scalia, J., dissenting) ("To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred."); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 520 (1989) (Scalia, J., dissenting) ("The benign purpose of compensating for social disadvantages . . . acquired by reason of prior discrimination . . . can no[t] . . . be pursued by the illegitimate means of racial discrimination . . . .").

affirmative action programs but display a politically less suspicious cost structure.

If there are relevant differences between reparations statutes and affirmative action, they cut in favor of (2)'s constitutionality. Affirmative action schemes systematically compensate the best performers within the preferred class or group. The minority contractor with the lowest bid gets the set-aside contract; the minority student with the best scores gets into an elite university, while the minority student with the worst scores gets in nowhere, with or without a preference. This might be thought perverse from the standpoint of the remedial aims advanced to justify the scheme in the first place. If the best performers in the preferred group are typically those who suffer least from the original wrong or its continuing effects, then affirmative action schemes systematically undercompensate the most severely injured and overcompensate the least severely injured.[80] By contrast, (2) provides a flat rate of compensation to all members of the group. This is hardly perfectly tailored compensation, but at least it lacks the systematically perverse skew that affirmative action displays. If affirmative action can ever survive the narrow-tailoring inquiry, reparations should survive a fortiori.

So far we have discussed only cases like (1), in which the reparations scheme is race-neutral, and cases like (2), in which the scheme is race-based, but solely on the payee or beneficiary side. We should mention, for completeness, the possibility that the payer class might be defined racially, as well as the payee class. Defining the payer class to include all taxpayers is in principle unjustly overinclusive. In (1), Japanese American internees who are also current taxpayers are being made to contribute a fractional share, in their taxpaying capacity, to the reparations payment they receive in their capacity as victims of historical injustice. In (2), black Americans who are also taxpayers are being made to contribute a fractional share to their reparations payments as well.

In principle the government might solve this problem by narrowing the definition of the payer class. In (2), for example, the government might levy a special surcharge on nonblack Americans, earmarked to pay for the reparations program. That course of action would face serious constitutional objections, however. Note that the racially defined taxpayer class in (2) would have standing to challenge the tax. The challenge would run against the very imposition of the race-based tax on the plaintiffs, not against its subsequent expenditure, so this would not be an example of "taxpayer standing" in the sense rejected by current standing law; instead it would be a core example of government imposition of a race-based harm. And, in practice, there is no consequentialist or outcome-based justification for narrowing the class in this way. The beneficiaries in either (1) or (2) can be placed in exactly the same economic position they would occupy if they were not contributors to the govern-

80. See Strauss, supra note 68, at 21.

ment's general revenues, by the simple expedient of raising the reparations payment by the amount of their fractional contributions. So the constitutional problems of racially defined payer classes, although conceptually intriguing, have little relevance to real world policy.

B. *Would-Be Beneficiaries*

Here an affirmative action scheme, or a cash reparations scheme, is challenged by a member of a group not included within the beneficiary class, yet alleged to be similarly situated to that class. In affirmative action settings we might imagine a Hispanic or Asian American challenging a federal or state program of contracting that gives preferences to blacks alone; the challengers will claim that they, too, have suffered identifiable discrimination that the state should remedy with racial or ethnic preferences. But real world examples are interestingly rare. Affirmative action programs tend to err on the side of inclusiveness, to such an extent that they provoke charges of overinclusiveness by whites or other nonpreferred groups seeking to invalidate, rather than extend, the scheme. Consider the affirmative action scheme in local contracting invalidated in *Croson*, which afforded preferences to "Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts."[81] The Court seized upon the total absence of most of these groups from the jurisdiction to portray the list as a bizarrely overinclusive scheme of racial spoils.[82] A plausible alternative explanation, however, is just that the City mechanically copied a similar list from a federal contracting statute previously upheld by the Court.

As for cash reparations schemes, the leading example of alleged underinclusiveness is the D.C. Circuit's decision in *Jacobs v. Barr*.[83] A German American, interned by the federal government during World War II, challenged the statute providing reparations to Japanese American internees, claiming that the government's failure to provide reparations to German Americans discriminated against him, invidiously, on the basis of national origin. The statute on its face described the beneficiary class in ethnicity-regarding terms, as "individuals of Japanese ancestry" subject to illegal internment under specified programs.[84] But the court disposed of the claim on the simple ground that German Americans had not been victims of *illegal* internment—German Americans had typically received individualized hearings sufficient to satisfy due process, and had been interned only on an individualized showing of disloyalty—so that the statute did not actually treat similarly situated ethnic groups differently. It

81. 488 U.S. at 478.

82. See id. at 506 ("The random inclusion of racial groups that . . . may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination.").

83. 959 F.2d 313 (D.C. Cir. 1992), cert. denied, 506 U.S. 831 (1992).

84. Id. at 320.

merely distinguished those who were subjected to illegal internment from those who were not.

For a more interesting variant of *Jacobs*, let us suppose that German Americans had indeed been subject to illegal mass internment, amounting to invidious group-based discrimination, but had nonetheless been excluded from the beneficiary class defined in the reparations statute. (For an arguably parallel case under our hypothetical statute providing nationwide slavery reparations to black Americans, imagine a suit by Chinese Americans complaining that their exclusion from the beneficiary class is unconstitutional.) Would this sort of underinclusiveness discriminate on grounds of race or national origin, and thus violate equal protection?

One straightforward answer is no. On this view, the core concern of the equal protection norm is invidious governmental discrimination by racial, ethnic or national majorities against minorities, where that discrimination favors the majorities themselves. Underinclusive remedial schemes, even ones that classify explicitly by race or ethnicity, merely embody governmental distinctions between or among different minority groups, distinctions that favor some minorities over others but do not directly benefit the racial majority. A cash reparations scheme, or remedial affirmative action program, that provides redress to some but not all similarly situated victim groups would not, on this view, be seen as arbitrarily different treatment of similarly situated claimants. Rather it would be seen as just another instance of the government's prerogative, familiar from the domain of economic legislation, to proceed "one step at a time,"[85] prioritizing its remedial programs in light of budget constraints and other policy considerations.

The Supreme Court once said something like this, in *Katzenbach v. Morgan*,[86] although it is not clear whether the Court saw the relevant distinction (between students educated in American-flag schools and other students) as creating a suspect classification or impinging on a fundamental right. If a distinction does neither of those things, of course, the underinclusive definition of the remedial class is subject only to rational basis review in any event, and is almost certain to survive. What makes our hypothetical variant of *Jacobs* difficult is the claim that the underinclusive remedial class is defined along lines (national origin) that are independently suspect.

The *Jacobs* opinion implicitly suggested the opposite answer: that a failure to extend a reparations scheme to all similarly situated victim groups would itself violate equal protection. On this view, to provide reparations to Japanese Americans but not German Americans (stipulating, counterfactually, that the latter group had previously been subject to unconstitutionally discriminatory treatment) itself discriminates on grounds

85. Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955).

86. 384 U.S. 641, 657 (1966).

of ethnicity or national origin—and thus discriminates in exactly the same way, on the same grounds, that the original internment program did. This position holds, in effect, that the government must provide reparations (or, for that matter, any benefit) to all victim groups simultaneously or to none at all; it may not pick and choose. And this position would expose many affirmative action schemes to invalidation as underinclusive.

But it seems excessively rigid to establish an all-or-nothing requirement, forcing government to choose between compensating every racial or ethnic group, all at once, or compensating no group, ever. Perhaps the intuition is that the selectivity of government policy suggests an implicit hierarchy of worthiness among the disadvantaged, thus stigmatizing the excluded groups. As we will subsequently discuss, however, considerations of stigma may well cut in unpredictable directions; perhaps the excluded groups will escape a stigma that attaches solely to groups that have received reparative payments. A more sensible rationale for the all-or-nothing requirement is the fear that a government dominated by the white majority might, by favoring certain ethnic minority groups over others, pursue a strategy of "divide and conquer." This might make sense if buying off the political opposition of some minorities, through either reparative programs or simple transfers, would enable the government to oppress others. Yet there is an independent equal protection constraint against any government infliction of harm based on race or national origin. Given that harms or penalties must be imposed in a generalized form, rather than targeted against particular minority groups, the government's ability to divide potential recipients when providing reparations or other benefits gives it no extra leverage to conquer other minorities when inflicting harms. There is no particular reason, in this setting, to treat governmental provision of benefits and harms symmetrically. We conclude that reparations schemes that proceed one step or group at a time should be subject only to rational basis review. If so, *Jacobs* correctly rejected the German Americans' claim, whether or not the plaintiffs were subjected to unconstitutional internment.

C. *Objecting Beneficiaries*

For completeness we should mention possible challenges to reparations schemes by objecting beneficiaries: members of the beneficiary class who challenge a reparations scheme on the ground that the government's offer of reparations itself inflicts some sort of injury. We might imagine, for example, that some members of the beneficiary class find the expressive dimension or social meaning of the government's offer of reparations demeaning or offensive. Perhaps they take the scheme to suggest that members of the beneficiary class are chronic underperformers who have been unable to shake off the lingering effects of political discrimination centuries in the past—unlike other groups with similar histories who have flourished without special benefits. (Note that

the objecting beneficiary cannot simply refuse the benefit; the claimed stigmatic injury arises from the government's offer, not from the beneficiaries' acceptance.) Justice Thomas finds affirmative action programs demeaning, even racist, on similar grounds;[87] and there is a possible analogy to cases of gender discrimination, in which statutes or programs providing differential benefits to women have been challenged and invalidated on the ground that the benefit reflects or reinforces paternalistic and stigmatizing assumptions about women's capacities.[88]

This sort of challenge, however, possesses more conceptual interest than empirical significance. Note first that there are few, if any, equivalent examples of challenges to race-based affirmative action programs by beneficiaries claiming that the program is stigmatizing or demeaning. The stigma critique of affirmative action remains mostly a rhetorical trope of its opponents rather than a litigated issue for the courts. Many causal explanations, all plausible but speculative, suggest themselves. In university admissions cases the pool of blacks who would obtain admission under race-neutral criteria may be too small to generate a noticeable number of plaintiffs, although it is hardly clear that the same problem of small numbers obtains in contracting cases or other areas where governments have instituted affirmative action programs. A sociological speculation might be that minority plaintiffs in such cases might encounter heavy social sanctions from other members of the beneficiary class. And a psychological speculation might be that the universal propensity for self-serving bias, which causes perceptions of fairness systematically to correlate with interests, prevents most members of the beneficiary class from developing the indignation or moral outrage about affirmative action programs sufficient to sustain non-remunerative litigation of this sort.

Whichever explanation is best, we might extend it to challenges to cash reparations schemes as well. Descriptively, proponents of reparations schemes who fall within the beneficiary class depict the government's failure to provide reparations as unjust, opponents who fall outside of the beneficiary class depict the proposals for reparations as themselves unjust, and opponents who fall within the beneficiary class depict them as unnecessary or counterproductive, but it is rare for opponents who fall within the beneficiary class to depict them as unjust. Whatever the causes of this phenomenon, the absence of litigated chal-

87. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240–41 (1995) (Thomas, J., concurring).

88. See Miss. Univ. for Women v. Hogan, 458 U.S. 718, 729 (1982) ("MUW's policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job."); Orr v. Orr, 440 U.S. 268, 283 (1979) ("[T]he State's compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes . . . .").

lenges to race-based preference schemes by beneficiaries also means that the relevant legal questions are largely *terra incognita.*

IV. Design Alternatives

We have argued that the constitutional constraints on reparations are loose; governments have a wide choice of means by which to pursue their reparative aims. In this Part we examine reparations from the standpoint of policy design. We will ask how reparations schemes should be structured along four margins: (1) what form reparations should take, where the principal choice is between cash or an in-kind payment (including in the latter category not only affirmative action but also less common forms such as apologies, land, and special voting rights); (2) the identity of the payer or payers (whether taxpayers, marginal nonpreferred applicants, or other groups); (3) the identity of the beneficiaries (whether individual victims, descendants of victims, representative groups, tribes or institutions, etc.); and (4) whether the payment should be a single-shot event or be continued over several periods.

Evidently, choices along these design margins will affect each other, and will be partially sensitive to the underlying ethical theory that justifies reparations in the first instance. But we will also emphasize the extent to which design choices have independent significance. First, some design choices may be either attractive or unattractive on an overlapping consensus of, or an incompletely theorized agreement among, underlying ethical theories. In such cases policymakers can select in or select out the relevant policy while remaining officially agnostic about the underlying ethical theory. Second, even where the underlying theory makes a difference, ethical positions can rarely be translated directly into policy. Officials will have to make additional judgments about critical institutional questions, such as the cost of administering competing proposals. In sum, the design of reparations schemes involves considerations not only of substantive justice, according to the prevailing first-best ethical theory, but also second-best considerations of prudence, including economic cost and anticipated benefits.

A. *The Form of Reparations*

Most contemporary debates over the form of reparations involve choices among three modes of payment: cash, affirmative action, and apologies. These three modes may be combined in various respects, and the resulting hybrids may share either the best or worst features of the pure forms. The relevant questions are thus complex, and we will focus the discussion on these modes and their combinations. For completeness, however, we will also touch on more exotic forms of in-kind payment, including land and extraordinary voting rights.

1. *Cash vs. In-Kind Payment.* — An important threshold question concerns the choice between cash, on the one hand, and in-kind payment, on the other—where in-kind payment can take the form not only

of affirmative action and apologies, but also of land, (extra) votes, or other transfers. One general dimension of this choice is the question whether policymakers wish to restrict the uses to which the reparations payment may be put. Any in-kind payment that is not convertible to cash, through resale, is analogous to a use-restricted and inalienable voucher, such as a food stamp. So the beneficiaries of an affirmative action scheme, if they lack any way to alienate their entitlement, are equivalent to food stamp recipients, as are recipients of compensatory votes, if the legal regime bars vote selling.

Most of the advantages and disadvantages of restricting use are familiar from the literature on transfer programs generally.[89] On one standard view, in-kind payments reduce recipients' welfare relative to a scheme of cash payment, whenever the recipient would have preferred to use the cash equivalent of the restricted payment in some other fashion. On a contrary view, policymakers might legitimately choose in-kind payments and restrictions on alienation in order to steer recipients' behavior into preferred channels. Food stamp programs, for example, may reflect a distrust of recipients' cognition or motivations, if policymakers fear that recipients will squander cash grants on "luxuries" rather than "necessities," or will appropriate funds intended to promote children's welfare and convert them to solely parental uses. In the former case, where the welfare of children or other third parties is not involved, the imposition of constraints is paternalistic, in the sense that the policymaker overrides the recipient's judgment of the recipient's welfare. In the latter case, by contrast, the conditions address a conflict of interest between the recipient and third parties in the recipient's charge, whom the policymaker is attempting to benefit indirectly.

Against the background of this general debate about the relative merits of cash and inalienable vouchers, the particular setting of a reparations scheme adds arguments cutting in both directions. On the one hand, the backward-looking character of justifications for reparative payments knocks out some available justifications for use restrictions and inalienability. Cash is the standard or presumptive form of remedy in ordinary civil cases of corrective justice; an in-kind remedy, such as specific performance, is traditionally thought to require some special justification. And courts never ask whether a civil tort plaintiff, for example, can be trusted to spend her damages award wisely—if only for the philosophically disreputable reason that the court sees the award as a "right" rather than a "privilege." On the other hand, the very historical injustice that produced the demand for reparations may also affect the recipients in ways that make use restrictions pragmatically attractive. Consider, for example, a scheme of cash reparations to members of a Native American tribe that is afflicted with high rates of alcoholism, due to the cultural and

89. For an overview of the standard debate, with references, see Richard A. Posner, Economic Analysis of Law 511–14 (5th ed. 1998).

economic disruption arising from an original act of territorial dispossession. Here it would be foolish to ignore, on antipaternalist grounds, the possibility that cash payments to individual members may exacerbate the public health problem that the original injustice itself produced.

Note that, in many such cases, the aims that spur policymakers to restrict the form of payment may also be accomplished by altering the reparations scheme on other margins. Reparations proponents concerned that victim-recipients will use cash grants for consumption rather than investment may argue, not that payments should take the form of inalienable vouchers, but that payments should go to a different recipient altogether.[90] The recipient might be a scholarship fund, a tribal government, a civil rights organization, or some other institution that acts as a representative or fiduciary for the intended beneficiaries, investing the funds in "productive" uses. We touch on these possibilities in Part IV.C. below.

Another, related set of considerations involves the social meaning or expressive effect of the choice between cash and in-kind payment. An extreme view might hold that reparations should never be paid in cash, in whole or in part, because money demeans the recipient and dilutes the payer's expression of moral repentance or purging of moral taint. We canvass these problems below, in connection with the expressive dimension of apologies, where they arise in their purest form.

2. *Affirmative Action.* — The leading mode of in-kind reparative payment, at least in the United States, is remedial affirmative action. In Parts II and III we examined the distinctive moral and constitutional features of remedial affirmative action, so our discussion here will be brief. From the design perspective, the decision to make reparations through an affirmative action scheme entails important choices about the form of reparations (in-kind rather than cash), the identity of the payers (marginal nonpreferred candidates for jobs or places, rather than taxpayers), the identity of the beneficiaries (members of the preferred groups who are also applicants for jobs or places), and the temporal extension of the program. In Parts IV.B and IV.C we discuss the identity of payers and beneficiaries; in Part IV.D we discuss the temporal extension of affirmative action programs and cash reparations schemes.

As far as the form of reparations is concerned, affirmative action is one variety of an in-kind payment scheme, albeit one with special features. Suppose that a government committed to paying reparations may choose cash payments or affirmative action. Which should it choose, holding constant the identity of payers and beneficiaries, and the temporal extension of the reparations program?

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90. See, e.g., Bittker, supra note 28, at 71–86 (weighing the relative merits of group and individual reparations); Darrell L. Pugh, Collective Rehabilitation, *in* When Sorry Isn't Enough, supra note 7, at 373, 373 (suggesting the "[c]reation of a national trust fund" for reparations).

One answer might emphasize that affirmative action preferences may provide better compensation than cash. Just as the landowner whose property was illegally confiscated might insist that full compensation will be made only if he receives the very land that was taken, rather than a cash substitute, so too a member of a victim group who was denied access to labor markets (on equal terms) might be fully compensated only by legally mandated access to employment, or at least an employment preference. In ordinary employment discrimination cases, of course, available remedies include not only back pay and damages, but also reinstatement. The point might also be put in expressive rather than compensatory terms: Perhaps the moral message imparted to society at large is particularly fitting when discrimination in labor markets is redressed by employment preferences, discrimination in education is redressed by educational preferences, and so forth. Against these points, however, is the observation that cash is the standard civil remedy in American law, and is not disfavored on expressive grounds. In practice, outside of settings involving land and other unique goods or goods with idiosyncratic private value, cash payment is the norm, while specific performance and other in-kind remedies typically require special legal justification.

A second, more complex answer might emphasize that affirmative action, relative to cash, tends to obscure the amount of reparations and tends to ambiguate the benefit to its recipients. The member of a victim group who gets a government check in the mail is not in the same position as the member who receives a preference in employment, contracting, or college admissions. In the case of preferences, there is often uncertainty among competitors about whether the preferred candidate would have obtained the benefit in any event. Where the relevant institutions use precise formulae, such as admissions grids, to determine the weight of the preference, the uncertainty can be dispelled by publication. More common, however, is for the preference to be described as a "one factor," or a "thumb on the scale," of unspecified weight—in effect a delegation to low visibility employees, such as admissions officers, to implement the preference with indeterminate and unverifiable weight. Indeed, some of the Justices have suggested that any more precise version of preferences may be unconstitutional, at least in the university setting,[91] although as usual the Court has attained no clear consensus on the point. Blurring the weight of preferences increases the costs to third parties of determining whether preferences have been outcome determinative, and thus of identifying either the beneficiaries of the reparations scheme or the amount of the benefit.

The government might desire these effects on either strategic or moral grounds. Strategically, ambiguating the benefit reduces the salience of the reparations program itself, thus dampening political opposi-

91. See, e.g., Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 317–20 (1978).

tion. The same effect may hold on the payer side as well. As we have seen, the costs of affirmative action fall upon a largely notional group—marginal nonpreferred candidates, who may often not know whether the preference was dispositive in denying them relevant goods or opportunities, and who are unlikely to be able to organize for effective political action. Under a cash reparations scheme, by contrast, the recipients of the benefit are easy to identify, and opponents of the scheme can trumpet a dollar figure that purports to represent each taxpayer's fractional contribution. That figure will of course be rhetorical, given that taxes are funneled through the government's general treasury, but its salience will have undeniable political effect.

Morally, the ambiguating effect of affirmative action might be seen as a means to preempt or diffuse unjustified resentment of the beneficiary group among payers, the marginal nonpreferred candidates, or among the public generally. The empirical prediction here is that ambiguating the benefit will dispel a social stigma that would otherwise attach to the beneficiaries. If justice demands that the beneficiary class be compensated for prior harms, then the public stigma is unjustified, so dispelling it is a moral good. But this empirical prediction may go badly awry. Payers will be given an unfalsifiable excuse for every failure to obtain a job, contract, or admission slot, while third parties may stigmatize all potential members of the beneficiary class precisely because the identity of actual beneficiaries is uncertain. Rather than preventing stigma from attaching to any, ambiguating the benefit may produce a spillover effect, ensuring that stigma attaches to all.

3. *Apologies.* — Another important form of in-kind reparation is the official apology, understanding "official" in a broad sense that includes artfully phrased admissions of "personal" repentance or regret by government leaders. Recent examples are Queen Elizabeth's official apology to the dispossessed Maori of New Zealand; President Clinton's official apology to the victims of the Tuskegee experiments; and the "personal" apology of Japanese Prime Minister Koizumi to the Korean comfort women of World War II.[92] We can assimilate to the category of apologies other forms of political symbolism that serve similar social functions, such as monuments, rites, or national days of remembrance intended to commemorate the injustice and the oppressors' repentance. An example is Australia's annual "Sorry Day," May 26, which commemorates the "lost generation" of aboriginal children confiscated from their families by the Australian government and raised by white families and in orphanages.[93]

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92. See Queen Puts Signature to Historic Land Deal, Dominion (Wellington), Nov. 4, 1995, at 1; The Tuskegee Apology, St. Louis Post-Dispatch, May 21, 1997, at 6C; Japanese Premier Lectured and Yelled At in South Korea, L.A. Times, Oct. 16, 2001, at 14A (reporting that South Korean President Kim Dae Jong lectured Prime Minister Koizumi that his apology may not have been sufficient).

93. See A Day to Honour the Stolen Generations, Canberra Times, Apr. 7, 1998, at 12A.

To classify apologies as a form of in-kind reparations is metaphorical, in that apologies usually do not effect a direct transfer of tangible goods or privileges, like cash or employment preferences, to the recipients of the apology. Yet apologies may sometimes bond the speaker to legal liability in the future, if the background legal rules in the jurisdiction take the apology as an admission of justiciable wrongdoing, as will be discussed below. And even where the apology is not legally operative of its own force, apologies do transfer to recipients a valuable intangible benefit, that of moral acknowledgement of historical injustice. Apologies, on this view, represent a moral convention by which the official speaker purges the moral taint of the group he represents. The convention allows purgation and atonement by allowing the speaker to establish that the group tendering the apology owes a moral debt to the recipient. That moral benefit has a concrete (albeit intangible) future value, for it provides the apology's recipients with a moral claim that may often be converted into other reparative forms through political action. The recipient group, for example, may point to the apology in pressing for affirmative action programs in other settings. The apology thus represents something of an official promissory note on future reparative payments.

As this picture suggests, the usual questions about the identity of the payer, the identity of beneficiaries, and the temporal extension of the reparations program all have analogues in the realm of apologies. Apologies require a speaker, an addressee, and an audience. The speaker, usually a high government official or body, can apologize in either an official capacity or in a "personal" capacity. Although the latter course is of dubious moral coherence in cases where the official did not personally commit the injustice, it displays a sort of artful ambiguity, obvious to all concerned. It thus allows the speaker simultaneously to appease two conflicting audiences, giving the wronged group something more than obstinate silence while assuring opponents of reparations that no formal admission of wrongdoing has been tendered.

Where the speaker purports to represent or speak on behalf of a group, there is a standard issue about the identity of the wrongdoers: Often some of the "represented" group will not themselves be wrongdoers or even descendants or direct beneficiaries of the original wrongdoers. Consider a presidential apology for American slavery on behalf of the "American people"; this is hypothetical but only barely so.[94] In this example, not only is the identification of the wrongdoers morally contestable, but also whether there remains any moral debt to discharge. Consider the Lincolnian argument that the American people, in some collective or corporate capacity, have already atoned for slavery on the fields of Antietam and Gettysburg.[95] And, finally, the apology may take the form

94. See Eric Zorn, Editorial, Slavery in U.S. a Sorry Chapter, Apologies Aside, Chi. Trib., Mar. 26, 1998, at 1N.

95. See Thomas Geoghegan, Lincoln Apologizes, *in* When Sorry Isn't Enough, supra note 7, at 360, 360–61.

of a single-shot proclamation or a temporally extended performance. Monuments necessarily fall into the latter category, as do permanent national days of repentance like Sorry Day.

Insofar as the form of reparations is concerned, a key question involves the relationship between apologies or symbolism, on the one hand, and cash or more tangible forms of in-kind payment, on the other. Consider three cases:

(1) An official apology (or monument or holiday) accompanied by a tangible transfer, such as a cash payment or an affirmative action program.
(2) An official apology not accompanied by a tangible transfer.
(3) A tangible transfer unaccompanied by an apology.

Each of these possibilities is interestingly problematic, on both moral and prudential grounds. Governments may often prefer (3) if an apology will be taken as a justiciable admission of wrongdoing, under either domestic or international law.[96] Even where sovereign immunity ensures the government's de jure immunity from subsequent legal proceedings, the apology may create irresistible de facto pressure to waive the immunity, either in judicial proceedings or by the creation of an administrative claims mechanism. On the other hand, governments that have determined upon an apology may prefer (1) to (2), precisely because an apology without transfer may be criticized as "cheap talk" for which the government will gain no moral or legal credit. Domestic or international legal rules that make an apology legal grounds for liability may thus serve as a bonding mechanism that makes an apology credible, transforming (2) into (1) even if the government does not issue a cash payment or other tangible benefit simultaneously with the apology. The constituencies that desire an apology may, however, see payment under compulsion of legal liability as morally insincere, even though costly, in which case (2) will not serve as an adequate substitute for (1) even if the background legal rules do attach liability to the apology.

Which of these possibilities will recipient groups prefer? It is tempting to suppose that recipient groups will prefer (1) to either (2) or (3), on the ground that immediate benefits plus an apology is the best of all possible worlds, but this is not obvious. The recipient group may feel, high-mindedly, that the tangible benefit actually detracts from the apology by ambiguating its social meaning, suggesting that the recipients' claims of justice can be bought off if the price is right. Note that, on this view, the recipients' ability to turn down the benefit is irrelevant. It is the offer, not simply the acceptance, that has unwelcome expressive effects. Less high-mindedly, the recipient group or its leaders may calculate that the inchoate or unliquidated moral debt represented by an apology may bring greater long-term benefits, as a rhetorical trump card in debates

96. Washington Whispers, Jesse Jackson to the Rescue, U.S. News & World Rep., Apr. 6, 1998, at 7 (reporting that Clinton opposes slavery apology).

over affirmative action and social transfer programs, than will the immediate payment of reparations. Consider by analogy the argument advanced by some black opponents of slavery reparations that a cash payment will inflict net harm on recipients by taking the government or the white majority "off the hook."[97] On this view, the recipient group would prefer (2) to either (1) or (3). To make this argument plausible, however, requires some reason to think that the current or immediate payment cannot simply be adjusted upwards to capture fully the future benefit of possessing the moral high ground.

Note also that if the only choices are (2) or (3), the recipient group may prefer (3) for any number of good reasons even if the total future value of the apology and the accompanying moral indebtedness of the government or society would be greater than the value of the immediate payout. Although the optimum might be to defer gratification to the future, the recipient group may lack the current resources needed to endure the transitional or interim period. Consider the case of newly freed slaves of the Reconstruction period, to whom the expected future benefits of the political enfranchisement effected by the Fourteenth and Fifteenth Amendments were arguably far less valuable than current grants of land or consumable goods would have been (even ignoring that those benefits failed to materialize until the federal government began to enforce black voting rights). Some Reconstruction-era Republicans *opposed* enfranchising the new freedmen on precisely this ground, fearing that they would in effect sell their votes to the economically dominant former slaveowners in return for immediate subsistence. Even Thaddeus Stevens at one point attempted to delay the introduction of black suffrage, warning that former slaveowners "will give the suffrage to their menials, their house servants, those that they can control, and elect whom they please to make our laws."[98]

This is an extreme example, but it illustrates the more general point that the injustice for which reparations are sought or paid may itself have placed the victims of injustice in a condition of destitution, forcing them to bargain away future benefits or symbolic compensation, such as an apology, in return for immediate and tangible gains (subject, of course, to the possibility of reopening the justice of the settlement at a later point—the commitment problem that we address in Part IV.D). The former slaves might be forced to sell their votes, not simply to the very people who had formerly exploited them, but also because of the exploitation. For this reason, the recipient group may both accept a current payout and complain of the injustice of the settlement, just as in ordinary litigation an injured plaintiff may complain that the need to finance immediate treatment for the injuries has forced her to accept a cash settle-

97. See, e.g., Leonard Pitts, Jr., Cold Cash Can't Repay This Debt, Balt. Sun, Apr. 17, 2001, at 11A.

98. Eric Foner, Politics and Ideology in the Age of the Civil War 133 (1980) (citation omitted).

ment without an admission of wrongdoing. In both the ordinary civil case and the case of reparations, however, the parties on the other side of the bargaining table are sure to allege an inconsistency between the claim of injustice and the acceptance of benefits.

4. *Other In-Kind Benefits.* — Affirmative action, apologies, and symbolism do not exhaust the possible modes of in-kind reparations, although the other forms tend to be less frequently observed in history; some are downright exotic or even hypothetical. We shall touch upon two important cases: grants of land or territory, and the creation of (special) voting rights for beneficiary groups.

a. *Land, Political Autonomy, and Repatriation.* — In transitional justice situations, a new government may simply return land to the individuals from whom it was expropriated at some previous time, or to their direct descendants. There are economically important cases of this sort in the eastern European transitions,[99] but they are of limited interest for the theory and policy surrounding reparations. In cases where the beneficiary was the original owner, the re-transfer is just an example of ordinary corrective justice or civil remediation with a performance remedy rather than damages. The extension to descendants presents more interesting complications. Here the well-known cases tend to be, not voluntary reparations, but lawsuits to compel governments to cede lands confiscated in violation of some binding law. In America the famous examples are Indian land claims against state governments for the return of lands taken in violation of earlier, paramount federal treaties.[100] Such cases fall outside our stipulative definition of reparations.

Less familiar, because less common, are cases in the which government, acting without legal compulsion, grants land to beneficiaries or beneficiary groups to compensate them for prior injustices. An actual example often invoked in the literature regarding slavery reparation is General Sherman's field order granting freed slaves "forty acres and a mule," acres abandoned by or confiscated from former slaveowners.[101] During Reconstruction such grants, and broader proposals for land redistribution, were sometimes justified on compensatory grounds. The abolitionist Wendell Phillips described land transfers as "naked justice to the former slave" who was entitled to "a share of his inheritance."[102] But there is the common problem that seemingly reparative proposals may rest on multiple justifications, rendering their precedential effect ambiguous. Among the radical Republicans of the period, the more common justification for land grants was the forward-looking idea, grounded in

99. Jon Elster, Preference Formation in Transitional Justice 31–32 (Apr. 2002) (unpublished manuscript, on file with the *Columbia Law Review*).

100. See, e.g., County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 240 (1985); Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 678 (1974).

101. W.M. Sherman, Special Field Order No. 15: "Forty Acres and a Mule," reprinted in When Sorry Isn't Enough, supra note 7, at 365, 365–66.

102. Foner, supra note 98, at 135.

republican principles of "free soil and free labor," that the development of a politically independent class of small, civically engaged stakeholders required that former slaves be given sufficient land for farming.[103] In any event, radical proposals for the confiscation and redistribution of Southern land were uniformly defeated, whatever their stated justification.

Proposals for reparations are often accompanied by programs or proposals for some form of group-based political autonomy. In the least radical form, such programs amount to dispensations from otherwise applicable taxes or laws restricting monopolies; the dispensation allows its holder to enjoy preferential tax treatment or to reap supercompetitive profits. Federal law in effect allocates to certain Indian tribes a preferential license or entitlement to operate gambling casinos.[104] This might be seen as a special form of reparations program—a compensatory dispensation from anti-gambling prohibitions, or the compensatory grant of a gambling license under specially lenient standards.

Naomi Mezey criticizes this justification for Indian gaming, on the ground that

> [A] group [reparations] claim based on past cultural wrongs raises the question of whether the form of the reparation—entitlement to reservation gaming—is not in fact an opportunity for further infliction of cultural harm.
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> . . . [T]o the extent a successful gambling operation invites an influx of outsiders, effects dramatic changes in the tribal economy, and brings about increased governmental scrutiny, it may entail cultural sacrifices that do not support a reparations claim based on harm to cultural vitality.[105]

But this is hardly a well-focused objection, either to gambling or to reparations effected through any other compensatory dispensations from generally applicable legal rules. It applies with as great or as little force to affirmative action, which is sometimes said to damage its beneficiaries by lifting them into an unfamiliar and culturally disorienting socioeconomic sphere. The better criticism is just that it is especially hard to see any policy justification for granting reparations in the indirect form of preferential business licenses, rather than in cash. Note that the standard paternalistic arguments against cash reparations do not apply here. The preferential license, like cash, presupposes an optimistic assessment of the recipient's capacities for choosing between consumption and investment. The business savvy needed to exploit a preferential entitlement to oper-

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103. See Akhil Reed Amar, Forty Acres and a Mule: A Republican Theory of Minimal Entitlements, 13 Harv J.L. & Pub. Pol'y 37, 37–43 (1990) (suggesting that the structure requirements of a "R/republican" government rely on minimal entitlements); see also Foner, supra note 98, at 135 (explaining that the American ideal of success through thrift and hard work could not apply without such a system).

104. See Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–2721 (1988).

105. Naomi Mezey, The Distribution of Wealth, Sovereignty, and Culture Through Indian Gaming, 48 Stan. L. Rev. 711, 715 (1996).

ate a casino might just as well be used to invest a cash payment for maximum return.

More radical are proposals, pioneered by black nationalists, for reparations in the form of large-scale political autonomy—the dispensation from political control generally, not merely from particular laws.[106] In one proposal, African Americans would be given an autonomous state or territory within the United States. In a second proposal, the government would finance the voluntary repatriation to Africa of descendants of former slaves.[107] The premise of these proposals is that the change in political arrangements would make African Americans better off, either because there is an intrinsic psychic benefit to living under laws promulgated by members of one's own race, or because African Americans would be released from the exploitative economic dominion of the white majority. To make these proposals reparative, there must in addition to this explicit premise be an implicit premise that the arrangements, or their indirect benefits, represent compensation for historical injustices, rather than simply a justice-based command to afford African Americans a right to racial self-determination.

Despite their fanciful quality, these proposals have important historical antecedents. As for quasi-autonomous territories, we might analogize the African American state or territory to sovereign Indian lands. Another analogy is to Utah, which (on one narrative) the federal government de facto ceded to Mormons, who were expected to dominate after statehood was granted, in return for the Mormons' tacit agreement to abandon or suppress polygamous practices.[108] Both analogies, however, suppose that African Americans share cohesive political, social, and cultural bonds comparable to those of Indian tribes or a persecuted religion—an empirical assumption of black nationalism that is not widely shared.[109]

b. *Voting Rights.* — In a more speculative vein, a reparations scheme could be implemented by granting members of the beneficiary group increased voting power. The scheme would rest on a prediction that the beneficiaries would use the ordinary processes of electoral and legislative pluralism to convert their newly enhanced voting power directly into political benefits and indirectly into economic ones. In principle this increase of voting power could be accomplished in either of two ways. Express the voting power of a beneficiary group as N/(N+X), where N is the

106. Lee A. Harris, Political Autonomy as a Form of Reparations to African-Americans, 29 S.U. L. Rev. 25, 33–36 (2001).

107. Robert Johnson, Jr., Repatriation as Reparations for Slavery and Jim-Crowism, *in* When Sorry Isn't Enough, supra note 7, at 427, 427–34.

108. See Jill Elaine Hasday, Federalism and the Family Reconstructed, 45 UCLA L. Rev. 1297, 1364 (1998).

109. See Bittker, supra note 28, at 74–85 (distinguishing the situation of American blacks from that of American Indians and discussing the significance as it bears on the desirability of a politically autonomous black community).

number of eligible voters who belong to the group and N+X is the total number of eligible voters in the jurisdiction. The beneficiary group's voting power may be changed either by increasing N, by decreasing X, or by doing both.

The relevant techniques are familiar. For examples, consider the government's attempts, under the Voting Rights Act, to encourage covered states to enhance black voting power by creating majority-minority districts; such districts simultaneously decrease X and increase N.[110] Motor voter laws, by contrast, aim to increase N while leaving X unchanged.[111] (Conversely, an unintended effect of school integration in many urban political districts was to decrease X through white flight, giving blacks greater voting power even where N remained unchanged.) More generally, arrangements that grant beneficiary groups political autonomy typically produce similar results. Granting an Indian tribe political autonomy from the state in which it resides dramatically increases the effective voting power of each of the tribe's members. To be sure, these arrangements are not typically justified as reparations schemes, yet the relevant techniques could easily be harnessed to reparative ends.

There is something of a puzzle about why, as far as we know, governments never increase the voting power of a beneficiary group by simply awarding each eligible voter in that group extra votes in a formal sense, as opposed to extra de facto voting power. Even where we might see majority-minority districts, we will not see schemes that award blacks five votes while whites possess only one. Perhaps "one person, one vote" is an easily administrable description of equal voting rights or even a psychologically compelling focal point. Yet people may be stripped of their (one) vote for committing felonies, so the operative principle is actually more nuanced: "one person, no more than one vote." If votes may be subtracted, why may they not be added? This puzzle, however, is equally present whether the increase in voting power is justified on compensatory or forward-looking grounds; it is a puzzle about voting rather than reparations per se.

B. *Payers*

Reparations are rarely paid by the original wrongdoers, that is, the individuals who performed the wrongful acts, whether or not on behalf of a state or corporate body. Substantive moral considerations must explain why nonwrongdoers—usually taxpayers or shareholders—should pay reparations; when these considerations fail, prudential considerations must be invoked.

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110. Thomas C. Goldstein, Note, Unpacking and Applying *Shaw v. Reno*, 43 Am. U. L. Rev. 1135, 1149 (1994).

111. Dan T. Coenen & Edward J. Larson, Congressional Power over Presidential Elections: Lessons from the Past and Reforms for the Future, 43 Wm. & Mary L. Rev. 851, 895 (2002).

Let us consider two examples. Suppose that Ford benefited from slave labor during World War II. No one doubts that slave labor is an injustice; the problem posed by this case is determining who should pay. Ethical individualism would include in the class of payers only those people who chose and executed this policy, or who directly benefited from the slave labor. No one living today fits in the first category; the second category includes, perhaps, people living today who held shares of Ford stock at the time[112] or purchased cars from Ford at a depressed price. Both groups of people would be hard to identify, and the size of the benefit—spread as it was across millions of interested parties—would be minimal. As a practical matter, reparations would be zero. Soft ethical individualism might allow for Ford, the corporation, to pay reparations today, even though this payment would come out of the pockets of blameless shareholders—people who bought the stock and subsequently never had any control over Ford's actions. Ethical collectivism would make a similar case. The moral taint idea would explain why Ford might voluntarily pay reparations: to erase the stigma, if that is possible, that has resulted from its association with slave labor.

The United States government authorized medical experiments conducted on a group of African Americans without informing them and without obtaining their consent.[113] Ethical individualism would include in the class of payers those who adopted and executed the policy—again, a numerically insignificant group—and those who benefited from the policy. Although many people might have benefited from the medical knowledge gained, tracing and calculating that benefit would be difficult, and any one person's share of the benefit is probably small. In addition, most of the beneficiaries are probably dead, and it would be impossible to trace an already fleeting and insubstantial benefit to heirs and donees. Reparations would be zero or minimal. Soft ethical individualism and ethical collectivism might treat the U.S. government as the payer, as it was the institution that both caused the wrongdoing and benefited from it.

The convenient way in which an institution can be made to stand in for individuals should not obscure the fact that morally blameless individuals must bear the costs of reparations: current shareholders in the case of Ford, taxpayers in the case of the United States. People who are not strict individualists might not care, or they might distinguish cases in which most members of the group participated in (or benefited from) the wrongdoing, or could have prevented it, and those cases in which they had no such opportunities. Even the collectivist might think that U.S. citizens who lived in the nineteenth century were more to blame for the mistreatment of American Indians than Americans living in 2002; a similar claim can be made about Holocaust reparations. However, qualms about collective responsibility, whether held by individualists or

112. And shareholders gained only if Ford had market power; otherwise, its cost savings would have been passed on to consumers.

113. See supra note 19.

others, are sometimes alleviated by prudential considerations. When the cost of tracing unjust benefits is high enough, it might not be worth doing, but this only means that the injustice is not addressed. Broadening the class of payers increases the probability that victims will receive reparations while spreading the cost widely. If the probability of payment increases enough, and the cost is spread widely enough, so that non-beneficiaries are not seriously burdened, a rough justice will be done.[114]

These prudential considerations take center stage in the debate about slave reparations. Here, the scale of the injustice dwarfs the Ford and medical experiment examples, but its remoteness in time makes the identification of the payer class even more difficult. Ethical individualism cannot justify a broad system of reparations because one cannot generally trace the benefits and harms of slavery down to particular individuals living today. Reparations would be paid by taxpayers, and current taxpayers cannot be blamed for slavery or be said, in any normal sense, to have benefited from slavery. Soft ethical individualism also runs into problems. It is hard to assign blame to the U.S. government, which is the institution that destroyed slavery at great cost; it is hard to assign blame to the Southern states because their historical continuity was broken by the Civil War. These problems of ambivalence and discontinuity do not apply to corporations that have existed continuously since the antebellum era, when they profited from the slave economy. For this reason, recent efforts to target corporations that issued insurance policies to slaveowners might be more successful.

Ethical collectivism and the moral taint theory might justify the assignment of responsibility to whites for paying reparations to blacks. This is one interpretation of affirmative action—a form of in-kind reparations, as we have discussed. The problem with affirmative action is that the payers compose a marginal and often sympathetic class; assigning them the burden cannot be justified on substantive grounds, and can be justified on prudential grounds only with great difficulty if at all. Ethical collectivism and the moral taint theory assign responsibility to whites as a class, not just to marginal white workers. Prudential considerations suggest that the cost should be borne generally, not just by marginal workers. The prudential argument on the other side—that it is politically, and possibly administratively, easier to assign the costs to marginal workers—is morally unattractive.

By contrast, under a monetary reparations scheme, white descendants of slaves would bear some of the costs but would not, presumably, obtain the benefits of reparations. But this fact can be given a substantive or prudential justification. The substantive justification comes from the moral taint theory: Whites do not bear the stigma of slavery. The prudential justification is the difficulty of tracing lines of ancestry. There is

114. Reflected in workers' compensation and similar no fault schemes, where judgments of fault are avoided in order to minimize administrative costs.

also the difficult and amorphous question of whether reparations are based only on slavery, or on the continuing discrimination that postdates slavery.[115] If the latter is the case, then perhaps white descendants of slaves should be included in the class of payers. But one could conceive of alternatives such as not making them pay and not giving them reparations.

C. *Beneficiaries*

Considerations of substantive justice and prudence also determine the class of beneficiaries. As before, the simple case is that of ethical individualism. Only actual victims, or those with the proper relationship with the victims, belong to the class of beneficiaries.[116] Proper relationships might include that between a victim and a person who can show that confiscated property would have been given or bequeathed to him by the victim if the wrongdoing had not occurred. Soft ethical individualism enlarges the class of beneficiaries by expanding the notion of relationship to include common membership in groups with sufficient corporate form.

Ethical collectivism is, as we have seen, less concerned with the identity of individual victims, and so it might seem natural under this theory for reparations to be paid to groups. Here it is useful to make a distinction between paying reparations to all individuals who belong to a group regardless of whether they have a claim under an individualistic theory, and paying reparations to institutions that might represent the group in some way, or be devoted to rendering aid to that group.

As an illustration, consider Randall Robinson's proposal that slavery reparations be paid to private institutions whose mission is to provide educational and other benefits to impoverished blacks.[117] The proposal excludes not only white descendants of slaves—which, at least on the moral taint theory, might seem reasonable—but also black descendants who do not normally receive benefits from the institutions he has in mind, namely, wealthier blacks. The proposal also benefits blacks who are immigrants or the children of immigrants, and thus not the descendants of slaves owned by U.S. citizens.

These apparent problems of overinclusion and underinclusion can be made to disappear by redefining the substantive claims of the group under ethical collectivism. If slavery harms all blacks through moral taint or a similar mechanism, then white descendants of slaves may be excluded from, and black non-descendants of slaves may be included in, the

115. See, e.g., Lynn C. Burbridge, What Was Lost: The Cost of Slavery and Discrimination for Blacks, *in* The Wealth of Races, supra note 47, at 191, 196.

116. These problems are discussed extensively in the literature on affirmative action. See, e.g., Thomas Nagel, Introduction to Equality and Preferential Treatment vii (Marshall Cohen et al. eds., 1977) (discussing various considerations regarding preferential treatment for groups and individuals in the employment context).

117. See Robinson, supra note 1, at 244–46.

reparations program. If wealthy blacks are less vulnerable to continuing discrimination traceable to slavery, then they might be properly excluded from the reparations program. The problem is just that these arguments might not seem right to people, and if they seem like ploys for rationalizing a transfer of wealth to an interest group, the reparations program will exacerbate the tensions it is designed to resolve.

For this reason, a frank acknowledgment of administrative costs and other prudential factors might seem attractive. When ancestry is difficult to sort out, the use of proxies is justified, and there does not seem any reason in principle to prevent valid distributive concerns, and other pragmatic concerns external to the historical injustice, from influencing the program. The problem is that as the identity of the beneficiaries diverges more and more from the identity of the victims, the moral basis of the program becomes attenuated, political support will wane, and new resentments will be stoked. One need only think of the German Holocaust reparations, which denied claims to Gypsies and to homosexuals victimized by the Nazis.[118]

The identification of beneficiaries becomes increasingly difficult with the passage of time. The problem is not just that of excavating the historical record and tracing genealogies. This problem can, in principle, be solved simply by insisting that claimants carry a burden of proof or, alternatively, relying on rough proxies such as race for slavery. The more difficult problem exists when the wrongdoing occurs on a large scale, and the wrongdoers and victims miscegenate, or their descendants miscegenate. A descendant of a victim might therefore also be the descendant of a wrongdoer.

With sufficient mixing, reparations become pointless. It makes no sense for a person to pay reparations from one pocket to the other. Even with more limited mixing, one must grapple with the question whether to treat people differently on the basis of how many ancestors belong to the class of victims and how many belong to the class of wrongdoers. Ethical individualism provides an answer to the question in principle: People can be allocated claims on the basis of how much they lost as a result of the wrongdoing. The child of two slaves might, for example, make a claim based on the value of the parents' labor; the child of one slave and one non-slave would have a more limited claim based on the losses incurred by the one parent, possibly with an offset if the other parent was a slaveowner. But after a few generations of mixing, the problem of identifying beneficiaries will become intractable.

Soft ethical individualism and ethical collectivism solve this problem as long as the identity of the relevant groups can be ascertained. The

118. Christian Pross, Paying for the Past: The Struggle over Reparations for Surviving Victims of the Nazi Terror 52–55 (1998) (describing the political maneuverings around German reparations, the lack of support among the vast majority of Germans, and the exclusion of many groups for political, social, administrative reasons); see also Pogany, supra note 34, at 150–54 (discussing Czech reparations).

Maoris in New Zealand, aborigines in Australia, and some of the Indian tribes in the United States have retained their identity over time. The existence problem—the fact that the beneficiaries of reparations would not exist today but for the historical injustice—just does not seem as compelling when the group retains its tribal identity and the impoverishment of the tribe can be traced back to a deprivation of lands. Soft ethical individualism and ethical collectivism therefore exert some force. But these theories stop providing guidance when the identity of the group becomes controversial.

The moral taint theory also provides some guidance, as we noted before. It may be that moral taint is a discrete variable: One is either tainted or not. Moral taint is also an empirical phenomenon that can, in principle, be identified. One might argue that white people bear the moral taint for slavery, and that black people bear the stigma resulting from it, and this is true regardless of the degree of ancestral guilt or victimhood. If all this is true, then the reparations program can be a transfer or apology from whites to blacks.

D. *Temporal Issues in the Design of Reparations*

Reparation claims raise complex problems about time: what to do when the harm or the wrongdoing continues up to, and even beyond, the creation of the reparations program; whether to pay in a lump sum or periodically; and how to establish finality. We discuss each of these problems below.

1. *Discrete and Continuing Harms.* — The simplest reparation claims arise from a discrete wrongdoing and a discrete harm. Examples include the various reparation programs designed to remedy the confiscation of property in Eastern Europe after World War II. Once it is determined that a person has a claim, identifying the injury and calculating the level of compensation is straightforward.

A more difficult case involves a discrete wrongdoing and a continuing harm, such as the harms produced by the nuclear testing in Nevada.[119] In these cases, people do not learn that they are victims until long after the wrongdoing, complicating efforts to determine the extent of liability, and their injuries might not become identifiable until after the reparations program is put into effect. But this problem is not new to the law. In tort and bankruptcy law, courts have increasingly resorted to the use of trust funds when an insolvent corporation is liable for injuries, such as those associated with asbestos, that do not become identifiable until after the bankruptcy is over.[120] The private defendant pays the trust an amount equal to the expected liability or a pro rata share, the trust

119. See U.S. Dep't of Justice, supra note 21.

120. E.g., Jeffrey Davis, Cramming Down Future Claims in Bankruptcy: Fairness, Bankruptcy Policy, Due Process, and the Lessons of the Piper Reorganization, 70 Am. Bankr. L.J. 329, 331–47 (1996).

establishes a claim procedure, and then victims apply for payments as they learn their identity as victims. Private payers of reparations can in a similar way create trust funds with claim procedures—and such has been the case with Nazi-era reparations paid by corporations.[121] Governments do not need to worry about bankruptcy, and they can simply make appropriations as necessary.

2. *Discrete and Continuing Wrongs.* — The most difficult problem involves the continuing wrong. Proponents of slavery reparations argue that the wrong done to blacks did not end with slavery, but has continued to this day.[122] This argument could be understood in a number of ways. Slavery disrupted family relationships and social conventions among blacks, and these ruptures continue in the form of various family pathologies—illegitimacy and so forth. Slavery, by depriving blacks of education, placed them at a competitive disadvantage after the Civil War, pushing blacks into economic relationships with peonage-like elements. Slavery promoted negative stereotypes about blacks which have been passed down from generation to generation. If these arguments are correct, calculating reparations is not a matter of determining, say, the difference between the market wage and the actual implicit wage paid to slaves, but must include some assessment of the harm incurred by blacks, and the benefits (if any) obtained by whites, since the Civil War.[123]

3. *Lump Sum Versus Continuing Payments.* — Even when the wrong and the harm end at a definite point, there remains a question whether the reparations should be paid in a lump sum or over a stretch of time. The United States made a lump sum payment to the victims of the syphilis experiment.[124] Chile's reparations to the victims of the Pinochet government took the form of a continuing pension.[125] In many cases, victims are entitled to a lump sum but the reparations are paid out over time. The Japanese American victims of internment had to wait for periodic congressional appropriations;[126] the Holocaust reparations to Israel have been paid in installments over many years.[127]

At first sight, one might think that the choice between discrete and continuous payments turns on the magnitude of the aggregate payments. Devastated by the war, Germany could not pay significant reparations im-

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121. Roger Cohen, German Companies Adopt Fund for Slave Laborers Under Nazis, N.Y. Times, Feb. 17, 1999, at A1.

122. See, e.g., Robinson, supra note 1, 61–63 (discussing higher infant mortality rates and unemployment and lower income and education among African Americans and suggesting they are caused by contemporary discrimination as well as the legacy of slavery).

123. Sheldon Danziger & Peter Gottschalk, Income Transfers: Are They Compensation for Past Discrimination? *in* The Wealth of Races, supra note 47, at 169, 170.

124. See Mitchell, supra note 19, at A10 ("Since 1973 the Government, in an out-of-court settlement to a class action suit, has paid $10 million in compensation to the Tuskegee experiment's victims and heirs . . . .").

125. See González, supra note 22, at 330.

126. Congress Passes a Bill to Pay U.S. Internees, N.Y. Times, Nov. 9, 1989, at A32.

127. Schwerin, supra note 15, at 517.

mediately, and payments occurred over many decades. If the foreign credit market was closed to Germany after the war, and German citizens could not be forced to pay sufficient taxes or to accept a sufficient reduction in services, then Germany could at best make a small initial payment and promise to pay more in the future. However, these conditions do not prevail in all the other reparations cases, and might not have been met even in Germany's case. The more interesting theoretical problem, then, is the appropriateness of burdening future generations on account of the wrongdoing of the current generation (or members thereof).

To understand this problem, imagine a hypothetical reparations system where the expected value of the amount to be paid out is fixed at $X, and then the question is whether the $X should be paid immediately or as a perpetual stream of transfers with the present value of $X. If capital markets function properly, victims should be indifferent between the choice. Those who expect to receive payments in the future can borrow against them or save less than they would otherwise. Those who would rather receive payments over time can take their lump sum distribution and purchase an annuity.

From the perpetrator's perspective, however, the choice is significant. When reparations must be paid immediately, the initial generation bears their full cost. When reparations are paid out over time, the initial generation shares the cost with future generations. Ethical individualists might therefore object to continuous payments: Because later generations are not blameworthy, they should not bear the costs of the reparations. Ethical collectivists might object less, but even they might believe that the earlier generation should bear more of the cost than the later generation. One might think that the moral taint would fade over time.

A response to these points is that future generations are always in the power of the current generation. If the international community had demanded that the World War II generation of Germans bear the full cost of reparations, then this generation might have tried to borrow money from banks, with payments and interest due from future generations. They might have failed to obtain credit, of course, but in other cases, it is important to understand that a single generation bears the full costs of reparations only if it both pays the reparations itself and holds its consumption to the level it would be at if it did not adjust savings or investment. If the generation spreads reparation payments over time, borrows from the future, or reduces investment, then the cost of reparations will be spread across generations. It will often be impossible to determine which generation is bearing the cost of reparations, and to what extent, because the cost can be offset by distortions in otherwise unrelated policy instruments such as the amount of debt that the government issues and its level of expenditure.

Sometimes it will be appropriate for a single generation to bear the cost of reparations—the Holocaust is possibly a case in point—but not always. When the original wrongdoers do not pay the reparations, and

when those who are unjustly enriched do not pay, governments will sometimes for moral or prudential reasons decide to make the taxpayer pay. But then no particular generation ought to bear the costs of reparations. The current generation of Americans is no more to blame for slavery than the next generation is; therefore, these two generations, and all others, should share the expense. In this case, we do not need to worry about whether the current generation suppresses its consumption; reparations can be paid today, with the cost borne over time.

If all this is true, we might criticize the Germany-Israel reparations system. Israel was complicit in the effort of the post-World War II German government to burden future generations of Germans with the cost of reparations appropriately attributed only to the World War II generation. Israel presumably agreed to the deal for the reason that it could obtain more money from a deal that committed future Germans (if they would feel committed, as they have so far), and Germany agreed because some of the cost was put off to future generations. But it is not clear, except under the broadest version of ethical collectivism, that the later generations of Germans ought to feel compelled to continue paying reparations.

4. *The Problem of Finality.* — Charles Krauthammer supports slavery reparations on the condition that racial preferences be abolished.[128] To some, such an exchange might seem attractive, since a monetary transfer does not cause as much economic distortion as affirmative action appears to, and would seem to end a source of continuing political friction. Krauthammer's argument depends on the premise that this "deal" can be made binding, but he does not explain how that could be the case. If the reparations program is not extremely generous—and there will be much political opposition to generosity—then beneficiaries can always claim that they were sold out by those who negotiated the program.[129] Future generations of blacks, whether or not the reparations program extends to them, will argue that they should not be bound to a deal to which they were not parties (either directly or through representatives to which they consented). And because valuation problems are so severe, and the baseline valuation of harms through the tort system changes over time, claims such as these will often seem plausible.

Krauthammer confuses two different design issues. One is the form and generosity of the program—whether the benefit takes the form of cash (and how much) or an employment preference (and how strong). The other is the finality of the system. Reparations are usually imagined

128. See Charles Krauthammer, Reparations for Black Americans, Time, Dec. 31, 1990, at 18.

129. See Levmore, supra note 2, at 1689–90 (suggesting that reparations would decrease the moral pressure for "introspection, apology, lawsuits, and affirmative action," and predicting from coalition theory that reparations legislation would be drafted with an eye on securing the votes of 50% plus one of Congress rather than on writing ideal legislation).

to be discrete, and affirmative action to be continuing—but both programs could be designed differently, with reparations being paid on a periodic basis (as in the case of the Germany-Israel Holocaust reparations), and affirmative action being implemented just once, for a first job, or for one's education.

Similar confusion surrounded the reparations program for Japanese American internees. In order to receive reparations the claimant had to agree not to pursue legal remedies against the U.S. government.[130] Some victims and politicians argued that this requirement forced victims to "sell out."[131] It is true that the victims would lose their ability to make legal and constitutional claims, and possibly to obtain a more generous remedy through the court system. But nothing in the program prevented victims from seeking further political remedies. A victim could, for example, accept the reparations but then demand further payments from Congress on the ground that the reparations program was negotiated without his consent and was insufficiently generous.

Krauthammer and the critics of the reparations for internees implicitly assume that a political deal can be binding. But a political deal—unlike the settlement of a legal claim—can be reopened unless a commitment device is used. Holocaust reparations have been renegotiated many times since their inception in 1947.[132] An example of an effort to achieve finality comes from the 1946 Indian Claims program, which provided that no claim made later than 1951 could be "submitted to any court or administrative agency for consideration, *nor will such claim thereafter be entertained by the Congress.*"[133] But this law was not properly entrenched against subsequent legislative action, and one might doubt whether it would have prevented congressional action if the decisions of the Indian Claims Commission had been widely seen as unjust, as they indeed were seen.[134]

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130. William Darity, Jr., Forty Acres and a Mule: Placing a Price Tag on Oppression, *in* The Wealth of Races, supra note 47, at 3, 4–5.

131. See id.

132. The most recent renegotiation concluded in 2001, with the German government and German businesses agreeing to pay $4.5 billion to victims of slave labor. Alastair Macdonald, Germany Hopes Cash Will Ease Nazi History Burden, Jerusalem Post, May 24, 2001, at 7.

133. Indian Claims Commission Act, Ch. 959, 60 Stat. 1049 (1946) (expired 1978) (emphasis added).

134. Congress apparently designed the law quite broadly, Indian Claims Commission Act § 2 ("claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity") in the hope of achieving finality:

> [I]f the class of cases omitted [from the law] is one which the Congress has in the past declared to be worthy of a hearing, . . . it is probable that future Congresses will likewise grant a hearing to such claims, and the chief purpose of the present bill, to dispose of the Indian claims problem with finality, will have been defeated.

James Michael Kelly, Recent Development, Indians—Extent of the "Fair and Honorable Dealings" Section of the Indian Claims Commission Act, 15 St. Louis U. L.J. 491, 503–04 (1971) (quoting legislative history). This purpose was defeated by narrow interpretation of the law. Id.; Nell Jessup Newton, Indian Claims for Reparations, Compensation, and

In many cases only a constitutional amendment, or proper legislative entrenchment,[135] can bind the parties to a political settlement.

Design of a reparations program must take account not only of the finality of that program, but also the program's possible influence on other reparations claims. Critics of reparations have often opposed particular programs on the ground that they would provoke non-benefited groups to demand their own reparations as well. Such claims may lead political life to be poisoned by resentments and an unhealthy fixation with the past. Elster makes this argument about the post-communist transitional justice systems in Eastern Europe,[136] but the argument could just as easily have been made about Holocaust reparations or reparations for American Indians. This argument raises an interesting question about the equilibrium level of reparations.

On the demand side, a group's sense of historical grievance might be enhanced when reparations are paid to other groups with similar or lesser grievances, for the discrimination implies that the first group's grievance is not worthy of respect. A flat refusal to pay reparations to all groups does not necessarily carry this message. The spate of proposed and authorized reparations programs in the United States since 1988 provides evidence for this theory.

On the supply side, however, the effect is more complex, and probably runs in the other direction. Each reparations program might increase the willingness of taxpayers and governments to authorize new programs because of the norm of equality of treatment. Once group X obtains reparations, it is hard to deny them to group Y on the ground that Y's injury was less severe. For even if this is the case, the argument does not defeat Y's claim for reparations so much as establish that Y's reparations should be less generous than X's. But by the same token, taxpayers and governments might be reluctant to authorize reparations, or might insist on hedging them with all kinds of restrictions, precisely because they understand the force of the equal treatment norm. The nominal cost of every reparations program must be multiplied by a factor reflecting the increased probability of more reparations in the future.

CONCLUSION

In this Essay we have been less concerned with attacking or defending particular reparations proposals than with illuminating the relevant ethical, legal, and institutional problems. In this way we hope both to lower the temperature of the reparations debate and to lower the level of abstraction at which the discussion occurs. Many participants in the de-

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Restitution in the United States Legal System, *in* When Sorry Isn't Enough, supra note 7, at 261, 266.

135. Eric A. Posner & Adrian Vermeule, Legislative Entrenchment: A Reappraisal, 111 Yale L.J. 1665, 1705 (2002).

136. See Jon Elster, On Doing What One Can, E. Eur. Const. Rev., Summer 1992, at 15.

bate vehemently support or oppose particular proposals; we simply seek to provide an accurate map of the intellectual terrain, one that will prove useful to all concerned. Moreover, too many reparations arguments proceed on the basis of large-scale abstractions about justice and injustice. We want to emphasize that a great deal turns on institutional details and policy design: A reasoned normative view for or against any particular reparations scheme should be at least partially sensitive to constitutional constraints and to the design of the scheme, along the margins we have discussed. In this way, we hope to rework the reparations debate in colors that are, perhaps, less vivid, but also more nuanced, and more useful.