



Reparations and State Accountability

Citation

Page, Jennifer Marie. 2015. Reparations and State Accountability. Doctoral dissertation, Harvard University, Graduate School of Arts & Sciences.

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Reparations and State Accountability

A dissertation presented by

Jennifer Marie Page

to

The Department of Government

in partial fulfillment of the requirements

for the degree of

Doctor of Philosophy

in the subject of Political Science

Harvard University
Cambridge, Massachusetts
April 2015

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Reparations and State Accountability

Abstract

In the United States, many associate the idea of reparations with the longstanding African American claim of being owed redress for slavery and Jim Crow. Many defend the black reparations claim based on the exceptional nature of the hardships that African Americans have endured: paying reparations to blacks need not open a Pandora's Box of other grievances, it is argued. My dissertation puts forward a theory of reparations in the domestic liberal democratic context, grounded in a variety of real world cases, that suggests that governments owe reparations in a much wider range of situations than is usually recognized. Though some compelling reparations claims refer to racialized state-sponsored injustices (e.g., Japanese American internment, the illegal annexation of Hawaii, the Tuskegee syphilis study), others have little to do with race (e.g., eugenical sterilization surgeries, LSD experimentation conducted under the CIA's MKULTRA program, harms to "Atomic" veterans). The argument for paying reparations to blacks is grounded in an argument for liberal democratic governments to pay reparations whenever political power is abused.

The core claim of the dissertation is that the government is unaccountable at the very times when it matters the most morally. When an injustice is conducted according to the law, not only are the activities of state personnel and taxpayer resources channeled towards unjust ends, an individual who is harmed does not have a viable means of recourse against the state. Sovereign immunity, the legal principle that the government cannot be sued without its consent, or "the King can do no wrong," precludes redress in the majority of cases. Reparations seekers may appeal to the legislature, but this is an unreliable avenue to redress. I argue that reparations

claims are fundamentally about the government's accountability for injustice, and that reparations claimants are reasonable to call state power to account. On an accountability-based theory of reparations, liberal democratic governments should recognize that the safeguards against the abuse of power are not infallible, and observe a norm of redress. A liberal democracy that willingly takes responsibility for its abuses, apologizes, and pays reparations demonstrates its adherence to its legitimizing commitments.

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Acknowledgements

I have been fortunate to have a wonderful dissertation committee. Dennis Thompson has given me extensive feedback over the years, and his concrete suggestions about what worked and what didn't helped to shift the dissertation's overall argument in a more productive direction. Nancy Rosenblum helped me identify weaknesses in the practical parts of the argument at pivotal moments in the writing process, and has always been supportive of the project's ambitious nature. Michael Frazer has been encouraging and sympathetic to the dissertation ever since I started working on it, and has an excellent eye for the big picture and the miniscule details alike. Having Adrian Vermeule as a committee member has allowed me to go much deeper into the practice of reparations claims, since I knew there would be a safety net for the legal stuff that I would be sure to get wrong as a political theorist without a law degree.

The dissertation has benefited from my test driving many different versions of the chapters in a number of academic settings. These include the Midwest Political Science Association Annual Conference, the Oxford Graduate Conference in Political Theory, the Sciences Po Graduate Political Theory Workshop, the Boston Area History, Institutions, and Politics Workshop, and two Harvard-based workshops, the Graduate Political Theory Workshop and the Ash Center Workshop. I am especially grateful to those who gave formal comments: Jason Anastopoulos, Angela Cummine, Prithvi Datta, John Harpham, Carly Knight, Tanja Pritzlaff, Emma Saunders-Hastings, and Bernardo Zacka; as well as to Adam Lebovitz, Andrei Poama, and Tom Theuns for insightful feedback that might as well have been a prepared set of comments. Special thanks to James Brandt, Jacob Eisler, Jon Gould, and Stan Veuger for reading entire chapters, and to Tim Beaumont, Tae-Yeoun Keum, Erin McCammack, Lindsay Moss, Morten Olsen, and Will Selinger for conversations that helped me form some of my ideas. Steve

Cicala, Brad Johnson, Vanessa Williamson, Evann Smith, and Chiara Superti have all given me valuable empirical reading suggestions.

Of my peers, special recognition of three individuals is in order. Besides my committee, the brilliant and incisive Rita Koganzon has read more of this dissertation than anyone—taking into account not only the chapters that actually made it into the dissertation, but also deleted chapters that I spent months writing in order to respond to certain irksome questions that challenged the foundational assumptions of the project. The surviving chapters owe much to Rita’s substantive suggestions big and small, and to her superior grammatical sense. The estimable Jessica Simes has played a huge role in the interdisciplinarity of parts of the dissertation. I have asked Jess countless sociology questions and badgered her for reading suggestions. I have absorbed sociological insight and lingo by osmosis, and instead of wondering what a sociologist would think of some of my normative claims, I have had a dear friend to listen to practice presentations and to read my words. Finally, Olamide Olatunji wrote her senior thesis on reparations under my supervision. In addition to it being an absolute joy to advise her thesis, conversations with Lami spurred me to rethink some of my own assumptions about reparative justice. When I read the draft of Lami’s thesis all the way through, the discussion of affirmative action was so persuasive that I had to go back to the drawing board.

Peter Hall, Ryan Enos, and Jennifer Hochschild allowed me to write term papers on topics related to the dissertation, and helped me to see issues early on that I would eventually have to tackle. I was moreover fortunate to be able to talk to Eric Beerbohm, Astrid van Busekist, Dan Carpenter, Richard Fallon, Aaron Garrett, Saul Levmore, David Lyons, Charles Mills, and Tommie Shelby about the project when it was in its initial stages. Rhoda Howard-Hassmann was especially generous with her time, meeting with me for an entire morning and

commenting extensively on a more empirically-oriented version of Chapter 5. Professor Howard-Hassmann also exercised a huge influence on the dissertation before we ever met as the creator of the Political Apologies and Reparations website, which features a database that opened my eyes to a broader range of cases than I had been considering in thinking about my dissertation subject. Charles Griswold was a teacher, advisor, and mentor to me throughout my undergraduate years. His two courses on forgiveness were the bookends to my time in a philosophy department, and I cannot help but think that I discovered my eventual doctoral dissertation topic as a college freshman when Professor Griswold assigned hearing transcripts from the Truth and Reconciliation Commission of South Africa in order to demonstrate the practicability of the philosophical understandings of forgiveness that we had been studying.

The idea of reparations became concrete to me when I was a Teach for America teacher on the Rosebud Reservation in South Dakota, home to the Sicangu Lakota Nation. Many individuals were generous with their time when I returned to Rosebud for projects and visits, and I hope the discussion of He Sapa does some degree of justice to what I have been taught over the years. In 2010, a class project for Nation-Building II allowed me to go to Rosebud on behalf of the Truth and Reconciliation Commission of Canada to report on Lakota concepts of truth, reconciliation, healing, and forgiveness. To Waycee Guerue, Lila Kills in Sight, Lester Kills the Enemy, Charlene LaPointe, Leland Little Dog, Ned Metcalf, Shane Red Hawk, Sherry Red Owl, Ray Sigala, Homer White Lance, and Bernadine Wilson, pilamaya! I also owe my gratitude to Sandra Black Bear, Sylvan White Hat, Philomene White Lance, and (again!) Homer White Lance for their donating their time and storytelling for another project, and for the conversations that were had along the way. I learned a lot from Candace Metcalf and Emily White Hat over the

years, and especially from the late Albert White Hat, who also helped with both projects. Thanks also go to Wzipan Little Elk for meeting with me on my most recent visit.

I am grateful to the staff at Widener Library, particularly during this past year when I made liberal use of the “Request Item” service. Nothing brightens and validates the lonely dissertation writing process quite like being known by name at the library, and I am appreciative!

To my family, my most profound thanks. Caroline and Todd, I was willing to cut it, but I appreciate the special trip downtown to scout out the position of Abraham Lincoln’s engraved words at the Court of Federal Claims. You were both right that “It is as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals,” is a really great quote, and it would have been a shame not to use it. I also thank my grandmother, Mary Gambitta, for her love and for her encouraging emails. Above all, I am so incredibly grateful to my parents, Marian and Robert Page, for their love, their cheer, and their cheerleading throughout this dissertation process, and all the years preceding it.

David Hemous, besides being the love of my life, you are my most loyal interlocutor and friend. Thank you for always being a willing reader in my moments of writerly insecurity, for believing in me, and for our many conversations of Antico Forno-esque gravitas about reparations.

Dedicated to my parents, Marian and Robert Page

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Chapter 1

Introduction

In 1966, Robert F. Kennedy took a trip to South Africa. He was invited by an anti-apartheid group, the National Union of South African Students, to be the keynote speaker for their annual Day of Affirmation. Tension was high. Dr. Martin Luther King Jr. had been invited to speak the previous year, but the South African government had denied King's visa. The college senior who had invited Kennedy had been punished with house arrest. But Kennedy went to Cape Town anyway, and began his address before an audience of 18,000 with the following words:¹

I came here because of my deep interest and affection for a land settled by the Dutch in the mid-seventeenth century, then taken over by the British, and at last independent; a land in which the native inhabitants were at first subdued, but with whom relations remain a problem to this day; a land which defined itself on a hostile frontier; a land which has tamed rich natural resources through the energetic application of modern technology; a land which was once the importer of slaves, and now must struggle to wipe out the last traces of that former bondage. I refer, of course, to the United States of America.²

It was a good joke, and a daring one. When on foreign diplomacy tours, prominent political figures do not make a habit of undermining the image of the country they represent, admitting its moral weakness and historical guilt. Much more common is for diplomatic relations to be characterized by sanctimonious finger-pointing—which of course is the motif that Kennedy was playing with.

¹ Robert F. Kennedy, "Suppose God is Black," *Look Magazine*, August 23, 1966.

² Robert F. Kennedy, "Day of Affirmation Address," June 7, 1966, in *Ripples of Hope: Great American Civil Rights Speeches*, ed. Josh Gottheimer (New York: Basic Books, 2003), 283.

A recent example of American “moral police work” is Congress’s passing legislation concerning Japan’s World War II practice of forcing Korean comfort women into sexual slavery. Congress ordered the Japanese government to “formally acknowledge, apologize, and accept historical responsibility in a clear and unequivocal manner.”³ Yet in many instances, the United States has failed to do precisely this for its own injustices. This does not amount to a flat-out denial of responsibility in all cases. But successfully holding the American government to account is a difficult, often Herculean task.

Why is this the case? In his important recent book on the subject, Jeff Spinner-Halev argues that the injustices to which Kennedy’s Day of Affirmation speech alluded—arrogating Indian land, slavery and segregation—challenge the core of the liberal democratic self-understanding.⁴ The irony of liberal progress, as Spinner-Halev argues, is that it is “triumphant for many, but not for others.”⁵ The story of certain groups, the “persistent minorities” within liberal democracy, is a “tragedy within a larger romantic narrative.”⁶ It is the seductive quality of this narrative—one that involves manifest destiny, the pioneer spirit, and American exceptionalism—that can explain why the United States government is not keen on owning up to its own injustice. In this light, citizens in a post-colonial liberal democracy would do well to take a “chastened” view of their national history.⁷

³ H. Res. 121, 110th Cong. (2007).

⁴ Jeff Spinner-Halev, *Enduring Injustice* (Cambridge: Cambridge University Press, 2012).

⁵ *Ibid.*, 50.

⁶ *Ibid.*, 133.

⁷ *Ibid.*, 187 *et passim*.

These themes came up recently in Ta-Nehisi Coates's widely read (and widely praised) essay in the June 2014 issue of the *Atlantic*, "The Case for Reparations."⁸ Focusing mostly on twentieth century segregation and the federal government's policy of "redlining," Coates asks, why is America so loath to take responsibility for its injustices against African Americans? The lines that seemed to strike a chord with Coates's readers, quoted for weeks in the popular media, were these:

What I'm talking about is more than recompense for past injustices—more than a handout, a payoff, hush money, or a reluctant bribe. What I'm talking about is a national reckoning that would lead to spiritual renewal. Reparations would mean the end of scarfing hot dogs on the Fourth of July while denying the facts of our heritage. Reparations would mean the end of yelling "patriotism" while waving a Confederate flag. Reparations would mean a revolution of the American consciousness, a reconciling of our self-image as the great democratizer with the facts of our history.⁹

Coates eloquently makes the case that the refusal to pay reparations to African Americans is existential. Coming to terms with America's past makes it too hard to maintain a sense of innocence and pride. It puts too much weight upon the psyche of the nation.

As both Coates and Spinner-Halev observe, the effects of past injustice often have a persistent and intractable character. As the past cannot be undone, it seems that there is no satisfactory way of dealing with enduring injustice. And yet, there are examples of liberal democracies defying the image of the unaccountable nation-state by acknowledging injustice, apologizing, and paying reparations to those who are harmed. Some are quite cynical towards the "age of apology," an understandable sentiment when apologies are no more than political theater: "We are here on behalf of the people to express regret for the horrible thing that has happened

⁸ Ta-Nehisi Coates, "The Case for Reparations," *Atlantic*, June 2014, <http://www.theatlantic.com/features/archive/2014/05/the-case-for-reparations/361631>.

⁹ *Ibid.*

and the lives that were needlessly lost, etc.” in the passive voice.¹⁰ But the apology ritual can be more or less sincere, and more or less satisfying to the apology recipients. A meaningful commitment to not repeat past abuses, and paying reparations if there is a valid claim to them, are among the few things that a government can do for those who suffer the effects of state-sponsored injustice.

Numerous volumes have been written on the subject of political apologies, providing historical contexts for various real world examples thereof, analyzing the craft, and critiquing or making recommendations to improve it.¹¹ My subject, however, is reparations, a comparably underexplored and undertheorized political practice. Reparations can take many forms; a monetary transfer from the government to claimants is not the only way of satisfying the demands of reparative justice. But monetary payments are significant. Consider what it means for a domestic government to pay redress. In his *Second Treatise of Civil Government*, John Locke outlines a social contract theory that contrasts a pre-political state of nature to political society.¹² For Locke, the greatest inconvenience of the state of nature is the lack of an impartial judge when there has been wrongdoing between private parties.¹³ When the state engages in egregious wrongdoing, however, there is no common judge on earth.¹⁴ The state cannot

¹⁰ *The Age of Apology: Facing Up to the Past*, eds. Mark Gibney, Rhoda E. Howard-Hassmann, Jean-Marc Coicaud, and Niklaus Steiner (Philadelphia: University of Pennsylvania Press, 2008).

¹¹ *Ibid.*; Melissa Nobles, *The Politics of Official Apologies* (Cambridge: Cambridge University Press, 2008); Danielle Celermajer, *The Sins of the Nation and the Ritual of Apologies* (Cambridge: Cambridge University Press, 2009); *On the Uses and Abuses of Political Apologies*, ed. Mihaela Mihai and Mathias Thaler (Basingstoke, GB: Palgrave Macmillan, 2014).

¹² John Locke, “Second Treatise,” in *Two Treatises of Civil Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988).

¹³ *Ibid.*, §19, 88-89, 125.

¹⁴ *Ibid.*, §20-21, 168.

impartially judge itself, since no one is a good judge in his own case.¹⁵ There can only be an appeal to heaven—the right of rebellion is reserved to the people in cases where the abuse of political power has made life under the present government unlivable.¹⁶ Abstracting from Locke, few would dispute that many of the acts of state-sponsored injustice for which reparations are claimed amount to outlandish abuses of power in which inviolable rights are violated. Yet reparations claimants do not make the case that life under the government is unlivable; no right of rebellion is invoked. They demonstrate trust and a belief in the fundamental legitimacy of the government by asking for accountability: essentially, the claimants’ request is for the state to be both the defendant and judge, to judge fairly, and to find itself at fault for the injury. The claimants’ motivation is not, moreover, for the state to undergo punishment. Though many injuries would fall under the auspices of criminal law if a private party were the wrongdoer, reparations claimants ask for civil justice only. As plaintiffs seek damages from a malefactor, claimants seek monetary redress. The wrongdoer-government that allows itself to be held to account by those with a valid reparations claim satisfies the demands of reparative justice.¹⁷

I use the term “reparative justice,” as opposed to compensatory, corrective, or rectificatory justice, because it does reasonably well at communicating what going through this process—calling power to account, having the government take responsibility and pay reparations to the claimants—can and cannot accomplish. Many important aspects of the convention of dealing with wrongdoing, at least in the Western world, are invoked in the reparative justice process, and going through it can give the claimants the sense that justice was

¹⁵ *Ibid.*, §13, 91.

¹⁶ *Ibid.*, §222-223, 240-242.

¹⁷ I am indebted to Rita Koganzon and Will Selinger for pressing me on Locke, rebellion, and reparations.

done. It can make for a liberal democratic enterprise that is more in line with its legitimizing ideals. Reparative justice does not, however, mean that individuals are made “whole” in any way that is more than metaphorical, that there has been a return to the *status quo ex ante*, or that the wrong has been nullified. The moral universe does not equip us humans with an undo button, just customs and rituals to patch things up, and help people move on. These are meanings that are better captured by the verb “repair” than the verbs “correct” or “rectify.”

What sorts of injustices are at issue in reparations claims? Consider the following examples of reparations programs that have taken place in the United States:

- *The annexation of tribal lands from the colonial era into the twentieth century* – Congress set up the U.S. Indian Claims Commission in 1946 to settle Indian land claims; over half of the cases that were heard resulted in payments for tribes.¹⁸
- *A 1932-1972 federal study conducted on syphilitic black men living in Tuskegee, Alabama, presented as a treatment program while denying penicillin to the participants* – in 1974, an out-of-court settlement provided monetary redress and free health care to survivors of the study and redress to the heirs of the deceased; participants’ spouses and children were later added in as beneficiaries of the health care program. The federal government also contributed funds to create the National Center for Bioethics in Research and Health Care at Tuskegee University.¹⁹
- *The World War II internment of Japanese Americans and the removal of the residents of the Aleut villages of the Aleutian and Pribilof Islands* – the federal government

¹⁸ David E. Wilkins, *Hollow Justice: A History of the Indigenous Claims in the United States* (New Haven: Yale University Press, 2013); Michael Lieder and Jake Page, *Wild Justice: The People of Geronimo vs. the United States* (Norman: University of Oklahoma Press, 1997).

¹⁹ Susan Reverby, *Examining Tuskegee: The Infamous Syphilis Study and Its Legacy* (Chapel Hill: University of North Carolina Press, 2009).

- paid \$20,000 to each living former internee, authorized by Congress with the 1988 Civil Liberties Act; Japanese Peruvians brought to the U.S. to be interned during the war were eventually paid \$5,000 each.²⁰ Congress also paid \$12,000 to each living Aleut relocatee, and set up a trust fund for scholarships, cultural preservation, and other community-level Aleut projects.²¹
- *The Rosewood Race Riot of 1923, in which an African American community was destroyed and all residents displaced* – in 1994, the Florida state legislature allotted \$150,000 to each living survivor of the riot and additional funds for descendants’ property claims; it also established the Rosewood Family Scholarship Fund.²²
 - *“Allotment” policy under the 1887 Dawes Act; the policy reduced already diminished tribal land holdings by two-thirds, and most individuals never saw funds put into a trust in their name* – a multiphase, thirteen year class action lawsuit (ultimately *Cobell v. Salazar*) was settled and approved by Congress in 2010 for \$3.4 billion, used for individual payments, the purchase of fractionated lands for tribes, and a college scholarship fund for Native students.²³

At the same time, there are many reparations claims that have not been resolved through a legislative or judicial process. There remain outstanding Indian land claims, claims pertaining

²⁰ Leslie T. Hatamiya, *Righting a Wrong: Japanese Americans and the Passage of the Civil Liberties Act of 1988* (Stanford: Stanford University Press, 1993); Mitchell T. Maki, Harry H. L. Kitano, and S. Megan Berthold, *Achieving The Impossible Dream: How Japanese Americans Obtained Redress* (Urbana, IL: University of Illinois Press, 1999).

²¹ Hatamiya, *Righting a Wrong*, 120-128.

²² C. Jeanne Bassett, “Comments: House Bill 591: Florida Compensates Rosewood Victims and Their Families for a Seventy-One-Year-Old Injury,” *Florida State University Law Review* 22 (1994): 503-523; Charles Flowers, “The Rosewood Massacre: From Rumor to Fact,” *Seminole Tribune*, March 4, 1994. ProQuest.

²³ Armen H. Merjian, “An Unbroken Chain of Injustice: The Dawes Act, Native American Trusts, and *Cobell v. Salazar*,” *Gonzaga Law Review* 46 (2011): 609-658.

to the Indian boarding school system, and a claim to memorialize the Wounded Knee Massacre site.²⁴ For over a century, Native Hawaiians have sought various forms of redress for the 1893 overthrow of Queen Lili‘uokalani and the illegal annexation of Hawaii.²⁵ The survivors of the Tulsa Race Riot of 1921 have unsuccessfully sought reparations from the Oklahoma legislature and in federal courts.²⁶ A bill to study and make a reparations recommendation on the Mexican “repatriation” campaign of the 1930s was passed by the California legislature but vetoed by the governor.²⁷ Individuals sterilized against their will in Virginia and California have been unable thus far to obtain reparations, though their counterparts in North Carolina have been successful.²⁸

During the Cold War era, the CIA’s Project MKULTRA used prisoners, armed services members, and random civilians as LSD and mescaline test subjects, and only a handful of

²⁴ Unresolved Indian land claims include the Lakota’s claim for the repatriation of the Black Hills and claims pertaining to Western Shoshone lands. Many authors discuss these claims: see, e.g., Nell Jessup Newton, “Indian Claims in the Court of the Conqueror,” *American University Law Review* 41 (1992): 753-854. For the Indian boarding school claim, see Andrea A. Curcio, “Civil Claims for Uncivilized Acts: Filing Suit against the Government for American Indian Boarding School Abuses,” *Hastings Race and Poverty Law Journal* 4 (2006): 45-130; *Zepher v. United States*, No. 03-768L (Fed. Cl., Oct. 29, 2004). S. 278, 103rd Cong. (1993) is an unsuccessful bill to memorialize the site of the Wounded Knee Massacre, with a proposal for entrance fees to be used to fund college scholarships for Native youth.

²⁵ 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,” *University of Hawai’i Law Review* 17 (1995): 463-512; Haunani-Kay Trask, *From a Native Daughter: Colonialism and Sovereignty in Hawaii* (Honolulu: University of Hawaii Press, 1999).

²⁶ The unsuccessful Tulsa reparations case is *Alexander v. State of Oklahoma*, 382 F.3d 1206 (10th Cir. 2004); H. Res. 98, 113th Cong. (2013) is a bill that has been introduced multiple times to allow the lawsuit. See also Charles J. Ogletree Jr., “Tulsa Reparations: The Survivors’ Story,” *Boston College Third World Law Journal* 24 (2004): 13-30.

²⁷ Francisco E. Balderrama and Raymond Rodríguez, *Decade of Betrayal: Mexican Repatriation in the 1930s* (Albuquerque: University of New Mexico Press, 2006); Eric L. Ray, “Mexican Repatriation and the Possibility for a Federal Cause of Action: A Comparative Analysis on Reparations,” *University of Miami Inter-American Law Review* 37 (2005): 171-196.

²⁸ Fredrick Kunkle, “Virginia under Renewed Pressure to Give Reparations for those Sterilized under State Law,” *Washington Post*, December 8, 2013, http://www.washingtonpost.com/local/virginia-politics/people-sterilized-under-infamous-virginia-law-renew-effort-to-obtain-reparations/2013/12/08/10f0bc30-5c8a-11e3-bc56-c6ca94801fac_story.html; Elizabeth Cohen and John Bonifield, “California’s Dark Legacy of Forced Sterilizations,” *CNN*, March 15, 2012, <http://www.cnn.com/2012/03/15/health/california-forced-sterilizations>.

claimants have been paid redress.²⁹ African Americans have sought reparations for slavery since Reconstruction; nowadays, the “black reparations claim” often refers to slavery, segregation, and racialized abuses by the federal government during the Civil Rights era and beyond.³⁰

Reparations claims are not recent political phenomena. Many uncritically consider the payment of reparations to Japanese American internees as the event that brought reparations claims into American politics. However, though this may have been when academics began taking an interest, reparations claims date back over a century earlier. Indeed, given the character of the American Constitution and the protections declared in the Bill of Rights, it should not come as a great surprise that individuals would try to hold the government accountable for acts felt to be in violation of basic moral and legal rights, and that this practice would have originated well before the year 1988. The reparations claim from freedmen and women in the post-Emancipation era was organized by the National Ex-Slave Mutual Relief, Bounty and Pension Association, whose members exercised (or more accurately, tried to exercise) their First Amendment right to “petition the government for a redress of grievances.”³¹ The group was banned from using the postal service for its activities, and its leaders served jail time for defying the order. Also unsuccessful was the Ex-Slaves’ lawsuit for a lien on \$68,073,388.99 that the

²⁹ “Project MKULTRA, The CIA’s Program of Research in Behavioral Modification,” *Joint Hearing before the Select Committee on Intelligence and the Subcommittee on Health and Scientific Research of the Committee on Human Resources*, 95th Cong., 1st sess., August 3, 1977 (Washington, D.C.: U.S. Government Printing Office, 1977); John Marks, *The Search For the “Manchurian Candidate”: The CIA and Mind Control* (New York: Times Books, 1979); Jonathan D. Moreno, *Undue Risk: Secret State Experiments on Humans* (New York: Routledge, 2001), esp. 189-200; and Moreno, *Mind Wars: Brain Science and the Military in the 21st Century* (New York: Bellevue Literary Press, 2012). A note in Chapter 5 discusses the problem of source reliability for MKULTRA.

³⁰ See, e.g., the essays collected in *Redress for Historical Injustices in the United States: On Reparations for Slavery, Jim Crow, and Their Legacies*, ed. Michael T. Martin and Marilyn Yaquinto (Durham, NC: Duke University Press, 2007).

³¹ Generally, see Mary Frances Berry, *My Face is Black is True: Callie House and the Struggle for Ex-Slave Reparations* (New York: Alfred A. Knopf, 2005).

federal government had collected in taxes on cotton: “United States cannot be made a party to this suit without its consent,” as the appeals court held, and the Supreme Court affirmed the ruling.³² The Sand Creek Massacre of 1864 was a brutal affair in which, as Special Indian Agent and eyewitness John S. Smith testified before Congress, U.S. troops killed women and children “indiscriminately”; Smith described seeing “bodies of those lying there cut all to pieces, worse mutilated than any I ever saw before; the women cut all to pieces... with knives; scalped; their brains knocked out; children two or three months old; all ages lying there, from sucking infants up to warriors.”³³ In 1865, the Cheyenne and Arapaho signed the Little Arkansas River Treaty. In it, the U.S. government, “being desirous to make some suitable reparation for the injuries then done,” promised land to the surviving chiefs and to the families of those slain in the massacre.³⁴ The U.S. Indian Claims Commission was set up in the mid-twentieth century because of the sheer number of jurisdictional bills that were being pursued in Congress for unresolved Indian claims—including the government’s noncompliance with the reparations provision of the Little Arkansas River Treaty.³⁵

Reparations claims concern a wide range of circumstances. A common misconception is that the defining feature of reparations claims is their referring to ancient wrongs experienced by claimants’ ancestors, and not by claimants in a first-order sense. However, as the inventory

³² *Ibid.*, 178; *Johnson v. McAdoo*, 45 App. D.C. 440, 441 (1916); 244 U.S. 643 (1917). *Johnson* was technically against Treasury Secretary William McAdoo; the Ex-Slaves knew sovereign immunity would be an obstacle. But the court held that the United States was the “real defendant” and was immune from suit, thus the quoted passage.

³³ “Massacre of Cheyenne Indians,” *Joint Committee on the Conduct of the War*, 38th Cong., 2nd sess. (Washington, D.C.: U.S. Government Printing Office, 1865), 56-59.

³⁴ “Treaty with the Cheyenne and Arapaho, 1865,” in *Indian Affairs: Laws and Treaties*, Vol. II, Treaties, ed. Charles J. Kappler (Washington, D.C.: Government Printing Office, 1905), available on the website of the Oklahoma State University Library, <http://digital.library.okstate.edu/kappler/index.htm>.

³⁵ For more on Sand Creek, see Ari Kelman, *A Misplaced Massacre: Struggling over the Memory of Sand Creek* (Cambridge, MA: Harvard University Press, 2013).

shows, it is extremely common for claimants to seek reparations for injuries to which they themselves were subject. Another misconception is that reparations are sought from the state for societal injustice, something that is no doubt due to the prominence of the black reparations claim, wherein the role of the United States government as the leading perpetrator tends to be ignored by reparations proponents and critics alike. But the majority of reparations claims refer to injustices that are deeply political, including those against African Americans—or so I argue in this dissertation.

1.1 Reparations and State Accountability: The Central Argument

To my knowledge, there are no examples of reparations being paid in the domestic liberal democratic context without there first being a lawsuit or popular mobilization on the part of reparations claimants. Invariably, the government’s reaction is to put up a fight. (In the transitional context, by contrast, the leaders of a new democracy are much more willing to undertake the work of reparative justice as a way to distance themselves from the defunct authoritarian regime and lay the foundation for a smooth transition.³⁶) In the lawsuit regarding the federal government’s Indian allotment policy, as lead plaintiff Elaine Cobell observed, “the government had assigned more than 100 lawyers to fight the plaintiffs in this case, through four trials, seven appeals, 2,500 different court filings, and six attempts at mediation.”³⁷ Spinner-Halev and Coates may be right that there is something existential in all this. My thesis, however, is that the challenge of reparations largely lies in liberal democracy’s institutional design. Liberal democracies are characterized by a commitment to individual rights, and a wide range of

³⁶ See, e.g., Paige Arthur, “How ‘Transitions’ Reshaped Human Rights: A Conceptual History of Transitional Justice,” *Human Rights Quarterly* 31 (2009): 321-367, esp. 325, 331.

³⁷ Merjian, “Unbroken Chain of Injustice,” 656.

safeguards against the abuse of political power. And yet, the common law notion of sovereign immunity, the principle that the government cannot be sued without its consent, or “the King can do no wrong,” has been inherited by most modern states that subscribe to liberal democratic ideals. When an injustice is committed through law as an official government policy, or else is a practice that is considered within the realm of the state’s discretionary power, the government is not liable because it is acting in its capacity as the government. Reparations seekers may still appeal to the legislature, but it is an unreliable avenue to redress. Success usually requires a campaign and political connections. Moreover, the American Framers favored an independent judiciary in part to avoid a situation in which those injured by state policies would only be able to appeal to the branch of government that made the policies in the first place.³⁸

The overall aim of the dissertation is to lay out a theory in which reparations claims are fundamentally about the government’s accountability for injustice, and make the case that reparations claimants are reasonable to call state power to account.³⁹ On the accountability-based theory of reparations, liberal democratic governments should recognize that the safeguards against the abuse of power are not infallible, and adhere to a political norm of redress. A liberal democracy that willingly takes responsibility for its abuses, apologizes, and pays reparations demonstrates its adherence to its legitimizing commitments. Such an understanding of reparations may, of course, be less than satisfying to the person who wishes that there were some principle, or some political tool, to level all inequalities that we have inherited from the past. But it does help to make realistic sense of what reparations signify when they are paid by real world

³⁸ Alexander Hamilton, “Federalist, No. 78,” in *The Federalist Papers*, ed. Clinton Rossiter (New York: Signet Classic, 2003), 469.

³⁹ I have seen this formulation used in one other place in the context of reparations claims: *Calling Power to Account: Law, Reparations, and the Chinese Canadian Head Tax Case*, ed. David Dyzenhaus and Mayo Moran (Toronto: University of Toronto Press, 2005).

liberal democratic governments to real world claimants. At its loftiest, reparative justice is a powerful antidote to the idea that the King can do no wrong.

In a famous work, Edward Corwin traces the history of the American Constitution's "higher law" background.⁴⁰ A constitution based on higher law does several things. It enshrines the supremacy of a sovereign people. It formalizes a set of principles that are to govern the relationship between the government and the people: the rights of the people are a constraint on the exercise of political power, the people cannot be governed by "extemporaneous, arbitrary decrees," laws must be "general" and "afford equal protection to all," and so on.⁴¹ As Corwin argues, the American Founders took their inspiration for a limited government grounded in popular sovereignty and a commitment to the higher law from Edward Coke and John Locke. However, an opposing tradition is found in the writings of William Blackstone, who maintained that the legislature could "do everything that is not naturally impossible.... True it is, that what the Parliament doth *no authority upon earth can undo.*"⁴² With Blackstone, as Corwin sees it:

Thus was the notion of legislative sovereignty added to the stock of American political ideas. Its essential contradiction of the elements of theory which had been contributed by earlier thinkers is manifest. What Coke and Locke give us is, for the most part, cautions and safeguards against power; in Blackstone, on the other hand, we find the claims of power exalted.⁴³

However, as Corwin triumphantly reports, limited government won out against legislative sovereignty. It did so in two ways. First, "in the American written Constitution, higher law at last attained a form which made possible the attribution to it of an entirely new sort of validity, the

⁴⁰ Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law* (Indianapolis: Liberty Fund, 1955).

⁴¹ *Ibid.*, 64-65.

⁴² *Ibid.*, 82-83. My italics.

⁴³ *Ibid.*, 83.

validity of a statute emanating from the sovereign people.”⁴⁴ However, as Corwin argues, it was not enough for the higher law to be validated by the Constitution. A way for individuals to use the Constitution as a basis for challenging the violation of their rights had to be developed. And so, secondly, “even statutory form could hardly have saved the higher law as a recourse for individuals had it not been backed up by judicial review.”⁴⁵ For Corwin, the ability of the judicial branch to assess a law’s constitutionality, and invalidate it if need be, is the ultimate safeguard against the excesses of political power.⁴⁶

The unanimously decided *Marbury v. Madison*, the Supreme Court case that set the precedent for judicial review in the United States, contains a bold promise: “The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested right.”⁴⁷ And yet, reparations claims against the government often refer to laws whose constitutionality *was* challenged and upheld by the Supreme Court as the outcome of a process of judicial review. *Plessy v. Ferguson* upheld segregation.⁴⁸ *Buck v. Bell* upheld eugenical sterilization.⁴⁹ *Korematsu v. United States* upheld Japanese American internment.⁵⁰ Judicial review, then, does not always provide individuals with a way to hold the state accountable to the

⁴⁴ *Ibid.*, 84. Corwin’s italics removed.

⁴⁵ *Ibid.* Corwin’s italics removed.

⁴⁶ Corwin’s view is not universally accepted. See, e.g., Jeremy Waldron, “The Core of the Case against Judicial Review,” *Yale Law Journal* 115 (2006): 1346-1406.

⁴⁷ *Marbury v. Madison*, 5 U.S. 137 (1803).

⁴⁸ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁴⁹ *Buck v. Bell*, 274 U.S. 200 (1927).

⁵⁰ *Korematsu v. United States*, 323 U.S. 214 (1944).

higher law. Even when it does—after all, the Supreme Court overturned the *Plessy* decision in *Brown v. Board*—in the interim period, there is ample time for legislation that is deeply at odds with the higher law to cause lasting harm.⁵¹

The injustices for which reparations are claimed demand our attention. They expose a deep problem within liberal democracy: namely, that the government is unaccountable at the very times when it matters the most morally. For a government to open its doors to reparations claims, this may not ever prevent a legislature from enacting laws that violate individual rights. But it does create an additional layer of accountability beyond judicial review, providing justice to claimants and helping liberal democracy keep faith with its own higher law.

1.2 Historical vs. State-Sponsored Injustice

In the United States, much of the philosophical literature on the subject of reparations is motivated by the idea that two groups have fared less well in the United States than most others: African Americans and American Indians.⁵² Whereas those belonging to new immigrant groups are upwardly mobile within a few generations, blacks and Natives remain worse off on average than any other racial or ethnic group.⁵³ What is unique about these two groups is the level of

⁵¹ *Brown v. Board of Education*, 347 U.S. 483 (1954).

⁵² See, e.g., Janna Thompson, *Taking Responsibility for the Past: Reparation and Historical Injustice* (Malden, MA: Polity Press, 2002); J. Angelo Corlett, *Race, Racism, and Reparations* (Ithaca: Cornell University Press, 2003), and Corlett, *Heirs of Oppression* (Lanham, MD: Rowman & Littlefield, 2010). In his discussion of affirmative, Owen Fiss identifies blacks and American Indians as having a singular status. Fiss, “Groups and the Equal Protection Clause,” *Philosophy & Public Affairs* 5 (1976): 107-177, 150.

⁵³ Numerous studies have been devoted to the trajectory of blacks versus that of immigrant groups. See Stanley Lieberson, *A Piece of the Pie: Blacks and White Immigrants Since 1880* (Berkeley: University of California Press, 1980); Noel Ignatiev, *How the Irish Became White* (New York: Routledge, 1995); and Jennifer Lee and Frank D. Bean, *The Diversity Paradox: Immigration and the Color Line in Twenty-First Century America* (New York: Russell Sage Foundation, 2010). See Suzanne Macartney, Alemayehu Bishaw, and Kayla Fontenot, *Poverty Rates for Selected Detailed Race and Hispanic Groups by State and Place: 2007–2011*, U.S. Census Publication ACSBR/11-17, February 2013, <http://www.census.gov/prod/2013pubs/acsbr11-17.pdf>, for data showing American Indians and Alaskan Natives as having a 27 percent poverty rate, the highest of all groups.

injustice that each has historically faced; intractable present-day disadvantages correlate with slavery and Indian land removal. A whole field of scholarship within political philosophy has thus arisen around the question: *What is to be done about “historical” injustice?* Scholars of historical injustice tend to defend reparations based on the idea that present-day citizens owe a material debt to groups that are disadvantaged today for reason of historical wrongdoing.

A philosophical inquiry that takes historical injustice as its basis is, however, misguided. To see how easily the foundation of historical injustice breaks down, consider Spinner-Halev’s book, *Enduring Justice*, which is typical in uncritically starting out with a definition of historical injustice wherein “all the original wrongdoers, and all the original victims, have passed away.”⁵⁴ On the basis of this definition, Spinner-Halev immediately excludes from his account two of the most prominent examples of injustice for which reparations were paid, the Holocaust and the internment of Japanese Americans during the Second World War.⁵⁵ However, it is a telling weakness that later on in his book, Spinner-Halev includes the ongoing persecution of Tibetans by the Chinese government as one of his cases of historical injustice—the original wrongdoers and original victims are hardly deceased, as the injustice is ongoing.⁵⁶ Spinner-Halev moreover discusses the case of an infamous attack in which Hindu nationalists tore down the Babri Masjid mosque while Indian police stood watching, an event resulting in at least 2,000 Muslim deaths.⁵⁷ Since this injustice took place in 1992, many survivors and family members of victims are also

⁵⁴ Spinner-Halev, *Enduring Injustice*, 10. See also Thompson, *Taking Responsibility for the Past*, x: historical injustice is “a wrong done either to or by past people.”

⁵⁵ Spinner-Halev, *Enduring Injustice*, 10. Note that Spinner-Halev argues against reparations for historical injustice. *Ibid.*, 28-31.

⁵⁶ *Ibid.*, 178-179.

⁵⁷ *Ibid.*, 3.

still alive. Given the underlying themes of exile and violence, presumably Tibet and the Babri Masjid mosque fit in too perfectly with other cases that interest Spinner-Halev for them to be excluded. But then why not also include the Holocaust and Japanese American internment? Perhaps the fact that Holocaust and internment reparations programs have already taken place suggests that these injustices are not “enduring” in the sense that Spinner-Halev uses the term. But would this not then mean that what justified monetary reparations in these two cases may also provide the normative rationale for repairing other injustices that remain unredressed? In short, an inquiry into the nature of historical injustice that draws a line between living victims and their descendants ends up arbitrarily excluding injustices that “feel” like they belong in the relevant set of cases. Rather than omitting Babri Masjid and Tibet, a framework is needed that is able to make sense of why injustices experienced by living individuals ought to be grouped in with more obviously historical injustices like the annexation of Native land and slavery. On my account, what Babri Masjid and Tibet have in common with the Holocaust, internment, and the injustices against African Americans and American Indians is the role played by governments across all the cases. Whether the actions of government officials are acts of omission—as in the Babri Masjid case, with Indian police failing to stop the fatal riot—or the injustice is organized and conducted through legal mechanisms, in each example, there are arguments for the government’s culpability. Instead of asking, “What should we do about historical injustice?” someone interested in understanding the situation of present-day African Americans and American Indians might ask, “What should we do about state-sponsored injustice?”

These two approaches lead us in quite different directions. A 1987 article by Mari Matsuda—which one commentator considers “the origin of modern slavery reparations talk in the legal academy”—uses the following formulation to show that the African American

reparations claim must traverse uncharted legal waters: “Plaintiff Class A (victim group members) v. Defendant Class B (perpetrators’ descendants and current beneficiaries of past injustice).”⁵⁸ That the defendant is “perpetrators’ descendants and current beneficiaries of past injustice” is revealing: accounts based on historical injustice tend to assume that the government had no special role in past injustice. The passive voice that is often used in these accounts evokes the grammar of so many political apologies. “History is a tale of unrequited injustice,” as Janna Thompson begins her book on reparations. “Treaties have been broken, communities wiped out, cultures plundered or destroyed, innocent people betrayed, slaughtered, enslaved, robbed, and exploited, and no recompense has ever been made to the victims or their descendants.”⁵⁹ That Thompson thinks in terms of the same Class A’s and B’s as Matsuda is evident; she goes on to describe how the effects of historical injustice “can linger long after the perpetrators and their victims are dead.”⁶⁰ Indeed, both Iris Marion Young and Catherine Lu make it a point to formally argue that a state-centered account would be wrongheaded, and that members of society should not be given a free pass by shifting blame to the government.⁶¹ Reparations claims for historical injustice, then, refer to past *societal* injustice, pitting members of society who have inherited illicit gains against members of society who have inherited unjust disadvantages.

⁵⁸ Alfred Brophy, “Some Conceptual and Legal Problems in Reparations for Slavery,” *NYU Annual Survey of American Law* 58 (2003): 497-556, 502; Mari J. Matsuda, “Looking to the Bottom: Critical Legal Studies and Reparations,” *Harvard Civil Rights-Civil Liberties Law Review* 22 (1987): 323-399, 375. Boris Bittker’s influential work, *The Case for Black Reparations* (Boston: Beacon Hill Press, 2003), first published in 1973, also hails from the legal academy, but caters to a broader audience.

⁵⁹ Thompson, *Taking Responsibility for the Past*, vii.

⁶⁰ *Ibid.*

⁶¹ Iris Marion Young, *Responsibility For Justice* (Oxford: Oxford University Press, 2011), esp. Chs. 3 and 6; Catherine Lu, “Colonialism as Structural Injustice: Historical Responsibility and Contemporary Redress,” *Journal of Political Philosophy* 19 (2011): 261-281.

When it comes to analyzing historical injustice, questions surrounding the passage of time take center stage. Janna Thompson is joined by George Sher, Renée Hill, Bernard Boxill, and Andrew Cohen in basing the philosophical analysis of historical injustice on the duties of justice between generations, or “intergenerational justice.”⁶² Here, the most pressing questions are metaphysical and epistemological: How does historical injustice affect the distribution of resources in contemporary society, and how can we be sure? Morally, would it be fair to take from the descendants of past perpetrators in order to give to descendants of past victims? How can someone be harmed by a historical injustice if she would not have been born in a counterfactual world in which it did not take place (the classic “non-identity” problem)? How can we ever judge the outcome of grand historical counterfactuals, like a world without colonialism?

The same events that concern intergenerational justice theorists, however, might elicit a different line of questioning, with a particular interest in the government’s role in perpetrating historical injustice, and in more recent injustices as well. From this angle, both historical and recent injustices of interest were enabled by the state’s legal and political authority. How does a government commit injustice? Is there a difference between the government’s maltreating a group through formal political policies, and its failing to protect a group from majority prejudices and actions? How can the government be on the hook for historical policies and

⁶² Thompson, *Taking Responsibility for the Past*; George Sher, “Compensation and Transworld Personal Identity,” *Monist* 62 (1979): 378-91; Sher, “Ancient Wrongs and Modern Rights,” *Philosophy & Public Affairs* 10 (1981): 3-17; Sher, “Transgenerational Compensation,” *Philosophy & Public Affairs* 33 (2005): 181-200; Renée Hill, “Compensatory Justice: Over Time and Between Groups,” *Journal of Political Philosophy* 10 (2002): 392-415; Bernard R. Boxill, “A Lockean Argument for Black Reparations,” *Journal of Ethics* 7 (2003): 63-91; Andrew I. Cohen, “Compensation for Historic Injustices: Completing the Boxill and Sher Argument,” *Philosophy & Public Affairs* 37 (2009): 82-102.

practices that used to be legal? Should it matter that laws and majoritarian moral belief systems change over time? Why should the government be accountable for injustice at all?

Many points of contrast can be outlined between the historical injustice and state-sponsored injustice approaches. Consider the following groupings:

Table 1. Two Bases of Domestic Reparative Justice

	Historical Injustice	State-Sponsored Injustice
Chapter 2	Intergenerational justice approach to reparative justice: What are the duties of justice between generations? “Transitional” nonideal theory The liberal egalitarian project Reparations as compensation → <i>restitutio in integrum</i>	State-centered approach to reparative justice: What are the duties of a state to its subjects? Partial compliance nonideal theory The liberal democratic project Reparations as accountability → <i>ubi jus ibi remedium</i>
Chapter 3	Members of society are responsible for and/or are the beneficiaries of injustice; there is nothing particularly special about the state’s involvement	The state is the responsible party; the abuse of political power has caused and/or enabled injustice
Chapter 4	A focus on injustices that have resulted in present-day harms The question arises, how long before an injustice is “historical”?	A focus on injustices that have resulted in present-day harms for which the state is actually responsible Historical and more recent injustices fit into a single framework

The chart is imperfect. Not all “compensatory” understandings of reparations are related to what is sometimes called “the liberal egalitarian project”; in his influential libertarian treatise, Robert Nozick endorses compensatory reparations for historical injustice as part of his argument *against* egalitarian distributive justice.⁶³ Moreover, there is another school of thought on historical injustice that is not necessarily related to theories of intergenerational justice: namely, memory- and moral psychology-centered accounts that focus on relations between groups and advocate some form of restorative justice.⁶⁴ Nevertheless, there is a certain logical coherence among each

⁶³ Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 152.

⁶⁴ See, e.g., Lawrie Balfour, “Unreconstructed Democracy: W. E. B. Du Bois and the Case for Reparations,” *American Political Science Review* 97 (2003): 33-44; Roy L. Brooks, *Atonement and Forgiveness: A New Model for*

set of ideas, and the chart is useful for showing the present account's contribution. Most political theorists working on the topic of reparative justice assume that their main challenge is to work out the conceptual difficulties concerning the passage of time, and proceed on this basis. The state-centered understanding of reparations rejects many of the major assumptions of this approach, beginning with the idea that all the injustices of interest are historical. (In the following chapters, the language of "historical injustice" is only ever used to emphasize the temporal dimension of past state-sponsored wrongdoing when this is relevant, or when I am discussing the views of those who are principally interested in the historical dimension of injustice.) Accounts of reparations, particularly in law, do sometimes take a state-centered approach. Boris Bittker and Randall Robinson have defended black reparations on the basis of the U.S. government's culpability; Saul Levmore assumes that governments commit acts of wrongdoing in his more general account analyzing the relationship between reparations and legal change.⁶⁵ However, the state-centered approach is rarely spelled out and made the basis of a theory of domestic reparative justice that aspires to be comprehensive.

In the table above, I have linked a concern with historical injustice to "transitional" nonideal theory, as opposed to "partial compliance" nonideal theory. It is worth dwelling on this difference for a bit. A prominent line of inquiry in contemporary political theory asks about the principles of a just society. On what basis should goods be distributed? When is it fair for some to have more, and others to have less? A variety of accounts have tried to respond to questions

Black Reparations (Berkeley: University of California Press, 2004); Margaret Urban Walker, "Restorative Justice and Reparations," *Journal of Social Philosophy* 37 (2006): 377-395; Leif Wenar, "Reparations for the Future," *Journal of Social Philosophy* 37 (2006): 396-405.

⁶⁵ Bittker, *Case for Black Reparations*; Randall Robinson, *The Debt: What America Owes to Blacks* (New York: Plume, 2001); and Saul Levmore, "Changes, Anticipations, and Reparations," *Columbia Law Review* 99 (1999): 1657-1700.

such as these, working out theories concerning the morality of the distribution of desirable societal goods. According to John Rawls, the author of the most important of these accounts, such a mode of theorizing does not tell us about how a society in which the distribution of goods is perfectly just can be brought about.⁶⁶ It is formulated in the “ideal mode,” presenting “a conception of a just society that we are to achieve if we can.”⁶⁷ Its counterpart is “nonideal theory.”⁶⁸ For Rawls, nonideal theory has two parts. Partial compliance theory deals with the fact that people and laws might not always be just.⁶⁹ Rawls’ definition of the other part is much vaguer; he simply states that there is a second part of nonideal theory that derives from “the natural limitations and accidents of human life, or from historical and social contingencies.”⁷⁰

Many see this second part of nonideal theory, which does not even have a formal label in a work rife with new terminology, as prior to any theory that produces principles about how goods and offices are to be fairly distributed in the ideal, perfectly just society. It can be understood with a ladder metaphor: it is a mode of theorizing that helps us climb to the ideal theory plane that the just society occupies. It is “transitional,” to use the label that Laura Valentini gives it.⁷¹ Some, like Tommie Shelby, have argued that Rawlsian principles are useful

⁶⁶ John Rawls, *A Theory of Justice*, Revised Edition (Cambridge, MA: Harvard University Press, 1999).

⁶⁷ *Ibid.*, 216.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*, 309.

⁷⁰ *Ibid.*, 215. A. John Simmons pulls apart “the natural limitations and accidents of human life” and “historical and social contingencies.” For Simmons, the former category refers to children and the mentally ill. See Simmons, “Ideal and Nonideal Theory,” *Philosophy & Public Affairs* 38 (2010): 5-36, 13-16.

⁷¹ Laura Valentini, “Ideal vs. Nonideal Theory: A Conceptual Map,” *Philosophy Compass* 7 (2012): 654-664.

in a world that is far from ideal for transitioning to one that is.⁷² But others, like Charles Mills, have argued that there are certain conditions in a nonideal society that would have to be eliminated through a special set of efforts in order for the principles of the just society to apply.⁷³ The history-blind distribution of goods may be appropriate in a just society, but in a nonideal setting, such a distribution may replicate patterns of historical disadvantage. Something is needed to equalize the effects of history that have been transmitted through the generations, as the “root cause of many existing inequities,” as Janna Thompson puts it.⁷⁴ Reparations—whether monetary or taking another form, like that of affirmative action—have the potential to literally correct past injustice, bringing us closer to the ideal of the just society, and making it fairer to have an institutional order based on history-blind distributive justice.⁷⁵

By contrast, the accountability-based theory of reparations pays much greater attention to the fact that reparations claims refer to the injustice of the state. Once our attention shifts from the group that is unequal for reason of historical contingencies to the government as the wrongdoer, this should cause us to shift our attention from transitional nonideal theory to the

⁷² Tommie Shelby, “Race and Social Justice: Rawlsian Considerations,” *Fordham Law Review* 72 (2004): 1697-1714.

⁷³ See three articles by Charles W. Mills: “‘Ideal Theory’ as Ideology,” *Hypatia* 20 (2005): 165-184; “Rawls on Race/Race in Rawls,” *Southern Journal of Philosophy* 47 (2009): 161-184; and “Retrieving Rawls for Racial Justice? A Critique of Tommie Shelby,” *Critical Philosophy of Race* 1 (2013): 1-27. Note also that Nozick rejects liberal egalitarianism, but presents a libertarian ideal theory that would need a “principle of rectification,” or something to approximate it, in the short run in order to extricate inequalities resulting from historical injustice. Nozick, *Anarchy, State, and Utopia*, 152, 231.

⁷⁴ Thompson, *Taking Responsibility for the Past*, vii. For a discussion of the role of the “root cause of many existing inequities” argument in reparations debates, see Derrick Darby, “Reparations and Racial Inequality,” *Philosophy Compass* 5 (2010): 55-66.

⁷⁵ Says Thomas Nagel: “A just society would have no need for racial preferences, and if they were introduced into a just society, they would make it unjust, by Rawls’ standards... I believe, speaking for myself, that it is a natural consequence of his ideal of justice that exceptional measures such as affirmative action are warranted if they serve in the long run to rectify the distinctly nonideal situation in which those injustices have left us.” Nagel, “John Rawls and Affirmative Action,” *Journal of Blacks in Higher Education* 39 (2003): 82-84, 84. In Chapter 7, I advocate understanding quota-based affirmative action in the United States as a form of reparative justice.

other strand of nonideal theory that Rawls describes, that of partial compliance theory. Partial compliance theory deals with a society that falls short of the ideal, but shares many features with a society that complies with the principles of liberal egalitarian justice. In a not-quite-just society, it is unrealistic to suppose that individuals and the laws that govern them are always going to be moral. Needed is a theory of criminal law and punishment to deal with unjust acts, sometimes by unjust persons, in an acceptable liberal democratic manner. Needed is a theory of civil wrongdoing to deal with the tortfeasors. Needed is a theory of judicial review, or some other mechanism if judicial review is rejected on principle, that explains how a liberal democracy can come to correct its mistake if it enacts an unjust law. Needed is a theory of civil disobedience that explains why individuals are not obligated to follow an unjust law, and furnishes moral guidelines as to what those protesting an unjust law may do to achieve their ends.

Yet unjust laws are often not easily or successfully resisted. Sometimes there is no obvious means of protest. Sometimes a group is so disempowered and used to being subject to the abuse of political power that civil disobedience is never entertained as possibly being effective. Sometimes further laws are piled on to enhance the capacity for enforcing abusive laws. Civil disobedience theory is insufficient to describe the constellated rights and duties deriving from unjust laws; it only tells us that we may reasonably disobey an unjust law in order to expedite its annulment. The sort of reparative justice that is relevant to partial compliance nonideal theory is motivated by the idea that individuals harmed by the abuse of power often have rights beyond having an unjust law annulled, and that the state often has duties beyond annulling an unjust law. The rights and duties of redress are an antidote to the dark side of real world liberal democracy, where those who hold political power may cater to the perceived

interests of the dominant group while letting individual rights go by the wayside. It would be nice, of course, if laws and political practices unwaveringly respected liberal democratic commitments, and checks and balances worked perfectly to ensure that political power was never abused. But this is also highly unrealistic. In the absence of failsafe preemptive controls able to bind a liberal democratic government to its own principles, needed are liberal democratic ways of thinking through wrongdoing when the wrongdoer is the state.

In the end, there may be no contradiction between the reparative justice of partial compliance nonideal theory and the reparative justice of transitional nonideal theory. A state that is meaningfully accountable to individuals subject to the abuse of power may in fact ascend a ladder leading to a society that satisfies liberal egalitarian ideals. But the two parts of ideal theory can go a long way in explaining the methodological differences between the intergenerational justice and state-centered approaches. One is concerned with the morality of redistributing from one group to another group on the basis of historical wrongs. For the other, since the aim is not to raze to the ground all inequalities resulting from historical wrongs, and bring all historically disadvantaged groups to the same starting point as historical injustice's beneficiaries, the metaphysics of intergenerational justice matter much less. But metaphysical issues are replaced by legal and political ones. Most obviously (and the subject of the next chapter), why should the government's accountability for unjust policies and practices take the form of reparations?

However, the difference between the intergenerational justice and the state-centered approaches is not only methodological. The two approaches also have implications for how reparations debates are conducted in real world practice. Take the black reparations claim, which is the most prominent reparations claim in the United States, and also faces the most vehement

opposition. An intergenerational analysis of black reparations only makes sense if the original perpetrators and victims are dead. Indeed, many assume that the basis of the black reparations claim is slavery—this view is even common among reparations proponents and activists. But as Boris Bittker observes, a “preoccupation with slavery has stultified the discussion of black reparations by implying that the only issue is the correction of an ancient injustice.”⁷⁶ Here, it is all too easy to assume “that the wrongs were committed by persons long since dead, whose profits may well have been dissipated during their own lifetimes or their descendants’ and whose moral responsibility should not be visited upon succeeding generations.”⁷⁷ Segregation is a more recent abuse whose detrimental effects persist to this day, but reparationists may be less inclined to focus on segregation because the benefits to whites are more nebulous, whereas slavery undoubtedly brought unjust enrichment to plantation owners. The state-centered approach, however, is indifferent to whether any present-day persons are the beneficiaries of past injustice. Citizens are not required to shoulder the cost of reparations because some of them benefited, but rather, because they are taxpayers who must shoulder the financial burden of a wide range of state enterprises. On the state-centered approach, it makes perfect sense for a reparations claim to focus on segregation, as well as on more recent state-sponsored injustices against blacks.

Bittker’s own state-centered account, the seminal 1973 book, *The Case for Black Reparations*, argues that it is the exceptional nature of the injustices against African Americans that makes the black reparations claim compelling. An objection frequently raised in reparations debates is that paying redress for one injustice would pave the way for a host of other claims, but Bittker is careful to say that black reparations would not set a precedent for monetary reparations

⁷⁶ Bittker, *Case for Black Reparations*, 9.

⁷⁷ *Ibid.*

to other groups, as no other group comes close to having experienced state-sponsored injustice to the same degree.⁷⁸ However, instead of this meaning that African Americans are the only group to whom the U.S. government owes its accountability, a rather different claim can be made. The American black case is a consummate illustration of the deeply problematic nature of unaccountable political power. But a wide range of injuries have resulted from a wide range of abuses. In a liberal democracy, a form of government that claims legitimacy in its ability to safeguard individual rights, there should be a means of recourse available to all parties who have suffered deep injuries at the hands of the state.

Lastly, in adopting a state-centered approach to reparations, I am by no means denying the complicity of members of society in injustice. I take it as a given that, in the majority of cases, a government would have no motivation to carry out injustice if not for the strong influence of the politically dominant group *qua* members of society, and the central role that this group's preferences, perceived interests, and pathologies play in shaping political policies and practices. In describing this, I do my best to stay away from the language of the "tyranny of the majority," since there are relevant examples of a minority (e.g., whites in Apartheid South Africa) using political power to subordinate the majority. Furthermore, as Robert Dahl famously argues, the idea of the tyranny of the majority seems to suggest that the majority actually rule in America: in fact, they do not, and if they did, they would not be prone to acting tyrannically.⁷⁹ Nevertheless, what is commonly meant by this terminology is that in an electoral democracy,

⁷⁸ Bittker, *Case for Black Reparations*, 21. The "Pandora's Box" worry was raised in the Rosewood Race Riot reparations debate, as well as in the debate over reparations for North Carolina sterilization victims. Bassett, "Comments: House Bill 591," 509; Margaret Newkirk, "Sterilized Women Would Get Reparations Extension in N.C.," *Bloomberg Business Week*, July 16, 2014, <http://www.businessweek.com/news/2014-07-16/sterilized-women-would-get-reparations-extension-in-n-dot-c>.

⁷⁹ Robert A. Dahl, *A Preface to Democratic Theory*, Expanded Edition (Chicago: University of Chicago Press, 2006), 133 *et passim*.

“majoritarian” beliefs may color the exercise of political power, leaving a minority powerless and susceptible to the invasion of rights.⁸⁰ Madison’s main solution to the problem of tyranny of the majority was the separation of powers, but it is evident from experience—and from the standpoint of theory as well, as Dahl persuasively demonstrates—that the separation of powers does not prevent the thing that the U.S. Constitution’s chief architect feared. And this is precisely my interest: the safeguards against the abuses of political power failing due to the influence of the dominant class on the practice of governance, and what is owed to those who are harmed. If I were a moral philosopher, I would probably not be making the argument that I make—and indeed, moral philosophers are within their right to find fault with my efforts. But if I am accused of being too focused on the political realm, or of having exaggerated the role played by political authority and power when it comes to injustice, so be it. Given a tendency among normative thinkers to uncritically conflate the state and society, at the very least, I have made an effort to theorize the relationship between the two, and to work out the different responsibilities that obtain in each realm.⁸¹

1.3 Outline of the Dissertation

What follows is the development of the thesis that liberal democracies should be willing to be held accountable for their injustices, and open their doors to reparations claims. By “open their doors,” I mean that in liberal democracies, taxpayers dollars should not fund the salaries of

⁸⁰ Of course, Dahl may be right that Madison did actually think that the majority would rule in America, and worried about the tyranny of the many, i.e., the poor. *Ibid.*, 30. This is discussed by Jennifer Nedelsky in *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy* (Chicago: University of Chicago Press, 1994), esp. Ch. 5. But see Alexis de Tocqueville, *Democracy in America*, tr. Henry Reeve (New York: Bantam Books, 2003), Volume I, Chs. XV-XVIII.

⁸¹ For a critique of this tendency, see Leonard Feldman, “Redistribution, Recognition, and the State: The Irreducibly Political Dimension of Injustice,” *Political Theory* 30 (2002): 410-440.

a hundred government attorneys whose job it is to fight a valid reparations claim.⁸² The African American case is central, and the subject of its own chapter, but throughout I shall discuss a variety of other reparations claims and programs—some of which are frequently discussed in the reparations literature, and others which are relatively unknown. The administration of the North Carolina sterilization reparations program began in 2014, so few have had a chance to write about it.

Also, though the focus is primarily on the United States, I draw examples of reparations programs from other countries when it is relevant to do so. This is due to my preference for illustrating theoretical principles about reparations with examples of actual reparations programs, and I would rather use a better example from another country than stretch an American example beyond its capacity. The reader may additionally find it interesting and relevant that, for example, the Canadian government has initiated a large-scale reparations program for assimilationist boarding schools, but that the American government has taken no such steps with regard to the same injustice. Further, I assume that the person who reads the present work is open-minded about justice-related endeavors in general, but remains to be persuaded that governments owe reparations. Most, if not all, of the injustices that give rise to reparations claims involve complex matters of fact, and my aim is to provide normative analyses of the different cases, not historical analyses. I expect that readers will have greater trust in the moral worthiness of a reparations claim, even the discussion of the details of the injustice is brief, if a government has paid redress in spite of the barriers to its doing so. And so, the case for liberal democracies like the United States to have their doors open to reparations claims generally, and

⁸² This is not to say that every reparations claim is valid.

to the African American reparations claim in particular, builds off of those cases where redress has already been paid.

The account proceeds as follows. In Chapter 2, I contrast the idea that reparations are a form of compensation to the idea that the meaning of reparations is accountability. I develop an accountability-based theory of reparations in which reparations claims call state power to account. Against those who think that political apologies and other symbolic measures are sufficiently reparative, I argue for the significance of monetary redress. The state is not obliged to be accountable unless it is actually responsible for injustice, and several examples are used to show when state responsibility does and does not obtain.

In Chapter 3, I contrast societal injustice to the injustice of the state. Many state-sponsored injustices have their roots in society, and I use the case of eugenical sterilization laws in the United States to show how unjust societal belief systems can give rise to state-sponsored injustice, and how state-sponsored injustice is in turn fed back into society. A framework for thinking through the injustice of the state is laid out consisting of six categories: authorization, protection, systemization, execution, enablement, and norm- and belief-formation. When we look at how the privileged nature of political authority aids the cause of injustice, it becomes clear that the institutional design of liberal democracy does not anticipate the harm of state-sponsored injustice to a sufficient degree. The accountability-based theory of reparations points to a political norm of redress: it is unlikely that states will ever figure out a way to not make unjust laws, but such a norm would at least facilitate recourse for those whom the state's wrongdoing targets.

Chapter 4 adds in the complicating factor of time. Some state-sponsored injustices took place half a century ago or more. Is it not an anachronism to hold our political predecessors to

today's moral and legal standards? I use the example of Indian boarding schools to outline a best-case scenario of an injustice that may have felt like a morally praiseworthy endeavor to the early proponents. Only recently has the moral vocabulary of multiculturalism enabled the politically dominant class to appreciate what was wrong with forced cultural assimilation. But as I argue, liberal democracies are designed to make progress, and often they do. It may therefore be necessary for the dominant group to revisit old wrongs in light of its new moral insights. This line of argumentation is complemented by work in legal theory showing that a strong adherence to the legal principle of irretroactivity creates an incentive structure that inhibits progress. In this chapter, I also tackle the question about whether individuals today have "dirty hands" for past injustice. I argue that members of the politically dominant class are morally complicit in injustice that takes place during their own lifetimes to the extent that their harboring prejudicial attitudes towards other groups facilitates the state's injustice. However, they are not responsible for redressing injustice due to their moral complicity; they are responsible because they are citizens and taxpayers.

Chapter 5 turns to the question of harm. Anyone could claim to be a victim of the state's "wrongdoing"; after all, new financial, trade, or environmental regulations may cost corporate shareholders billions. When does the state actually owe reparations? I work out distinctions between routine political decisions that have winners and losers, tragedies, and injustices. From there, I lay out a framework that sheds light on the kinds of reparations that are appropriate in different circumstances. Some harms affect individuals *qua* individuals who are arbitrarily the targets of state-sponsored injustice. Sometimes there are group-based harms, in which individuals experience injustice as members of a group that collectively experiences the injustice. Smaller-sized reparations to individuals and/or their immediate family members are

appropriate for the more individuated injustices, and larger group reparations for the more collective harms. Payers of reparations might also combine these two approaches based on the multipronged nature of the harm, or come up with a context-specific, tailored mode of redress.

With the basic theoretical elements in place—the meaning of reparations, the character of state-sponsored injustice, the role of time, and the nature of harm—Chapter 6 turns to matters of practice. If my argument is correct that liberal democracies should be much more willing to take responsibility for their unjust policies and practices, what would this actually look like? I analyze sovereign immunity in the United States, showing why judicial recourse is not a reliable option for those who suffer the abuse of political power. What is more, the adversarial setup of lawsuits concerning reparations claims is expensive, time-consuming, and inappropriate to the context. Individuals or groups who feel that they have been harmed by state-sponsored injustice may take their claims before the legislature, which perhaps is sufficient from an institutional design perspective, or even optimal. But as I argue, without a special institution set up to make the government accountable to a norm of redress, Congress is unlikely to routinely review reparations claims. My proposal is for the majority of reparations cases to be heard by a federal reparations commission. The commission would ideally operate in tandem with a federal bureaucratic agency tasked with assisting in the disbursement and use of monetary reparations awards. Together, the commission and the bureau would incorporate the redress of state-sponsored injustice into the routine operation of government.

However, given the racial contours of the American political landscape, it would be best if Congress passed legislation for black reparations first before authorizing a permanent reparations commission. Chapter 7 is devoted to the reparations claim of African Americans against the United States government. I discuss affirmative action as a remedy for a historical

trajectory of state-sponsored injustice, and outline the reasons why the practice did little for those whom William Julius Wilson calls “the truly disadvantaged.”⁸³ A group reparations award would ideally be used to combat the obstacles that characterize the situation of this group. However, if the experience of socioeconomically disadvantaged blacks is at the center of the present-day black reparations claim, then why not just focus on distributive justice? As Martin Gilens has argued, white Americans tend to oppose redistribution because they believe that blacks benefit from it disproportionately.⁸⁴ Deep-seated majoritarian beliefs about black undeservedness and dependency are at play, but substantial reparations from the federal government have the potential to unsettle racialized majoritarian ideas about socioeconomic disadvantage.

1.4 Conclusion

In his article, “The Case Against Black Reparations,” Richard Epstein quips of Boris Bittker: “The joke at Yale when I was a student was that Bittker, with his relentless intellectual rigor, was able to make his civil rights course resemble his courses in taxation, when most people hoped for the opposite result.”⁸⁵ An accountability-based theory of reparations aims to continue the project that Bittker began, and hopefully to do it some degree of justice, in analyzing the case for reparations from an institutional perspective. Some may be disappointed, therefore, that little time is spent on expounding the horrors of particular injustices. At points the analysis is a slow-moving delivery on the promise that reparations claims call state power to account. However,

⁸³ William Julius Wilson, *The Truly Disadvantaged: The Inner City, the Underclass, and Public Policy* (Chicago: University of Chicago, 1987).

⁸⁴ Martin Gilens, *Why Americans Hate Welfare: Race, Media, and the Politics of Antipoverty Policy* (Chicago: University of Chicago Press, 1999).

⁸⁵ Richard A. Epstein, “The Case Against Black Reparations,” *Boston University Law Review* 84 (2004): 1177-1192, 1178.

when the argument of the dissertation is taken as a whole, I hope to have provided not just a mass of different arguments to show why certain reparations claims are morally justified, but a comprehensive and balanced way of understanding the morality of reparations in general.

The overall claim of my dissertation is that state unaccountability for injustice can be understood in institutional terms. Whether the majority actually rules or not, laws and political decisions have a way of reflecting the perceived interests of the dominant group, and may trample on individual rights if doing so seems expedient. But we tend not to think that there is a way for the government to be on the hook for making unjust laws or for unjust acts of political discretion. Democracy is full of complex decision-making processes that result in winners and losers. Are not all laws and decisions unjust to someone? If individuals were to press a claim against the state every time the other side won, either taking the government to court for damages or seeking monetary redress from the legislature, this would be a political nightmare, severely compromising our ability to have a functioning democracy. This is a perfectly valid concern, and goes a long way in explaining the legal and political paradigm of “the King can do no wrong.” But at the same time, it is at odds with liberal democratic principles and commitments for there to be no readily available means of recourse when the government abuses its power.

In a 2002 article, William Weaver and Thomas Longoria motivated their empirical account by stating that “the domestic effects of sovereign immunity are almost never examined, even though those effects are profound and implicate a range of issues of interest to political scientists.”⁸⁶ To this we can add that the domestic effects of sovereign immunity are almost

⁸⁶ William G. Weaver and Thomas Longoria, “Bureaucracy that Kills: Federal Sovereign Immunity and the Discretionary Function Exception,” *American Political Science Review* 96 (2002): 335-349, 335.

never studied by normative political theorists. Legal scholars have long known of the tension between “two established principles”: “first, that for every right there must be a remedy; and, second, that sovereign immunity shields the federal government from damages.”⁸⁷ But this tension has not been evaluated using the equipment available to political theorists, even though it implicates issues that are the basis of the discipline, driving to the moral core of the relationship between a state and its subjects. In its best light, then, an accountability-based theory of reparations fits in with what Jeremy Waldron calls “*political* political theory,” a mode of theorizing that attempts to think through institutional arrangements, the principles that lie beneath them, and the consequences to which they give rise.⁸⁸ The excesses of political power are morally worrying. Though state-sponsored injustice may very well be an intractable part of political life, a liberal democracy can at the very least require itself to be meaningfully accountable to those harmed as a result.

⁸⁷ Cornelia T. Pillard, “Taking Fiction Seriously: The Strange Results of Public Officials’ Individual Liability Under Bivens,” *Georgetown Law Review* 88 (1999): 65-104, 69.

⁸⁸ Jeremy Waldron, “*Political* Political Theory: An Inaugural Lecture,” *Journal of Political Philosophy* 21 (2013): 1-23, 9.

Chapter 2

An Accountability-Based Theory of Reparations

The Western legal tradition has a variety of conceptual underpinnings. One idea, which goes back to ancient times, is *restitutio in integrum*, the restoration of something to an earlier condition or position.¹ *Ubi jus ibi remedium*, by contrast, refers to the right to a remedy (literally rendered, “where there is a right, there must be a remedy”).² In reparations scholarship, the dominant view links reparations to *restitutio in integrum*, with reparations as a form of compensation intended to literally correct historical wrongs. However, as I argue in this chapter, the dominant view is misguided. The meaning of reparations relates most closely to *ubi jus ibi remedium*. In modern language, we would say that reparations are fundamentally about accountability. The distinction between *restitutio in integrum* and *ubi jus ibi remedium* relates to the distinction made in the previous chapter about a concern with historical injustice versus state-sponsored injustice. Realizing reparative justice’s aims is not about equalizing inequalities that result from past injustice, but rather, having a perpetrator (i.e., the state) be accountable to the claimants (i.e., individuals subject to the abuse of state power), thus fulfilling the latter’s right to a remedy.

The argument of the chapter proceeds as follows. First, I outline the view that reparative justice is compensatory justice, showing the ways in which an accountability-based theory of reparations represents a departure. From there, I discuss the monetary element of reparations claims, asking: if reparations are not compensatory, then why should the state pay the claimants a

¹ *Oxford Dictionary of Law*, Seventh Edition, ed. Jonathan Law and Elizabeth A. Martin (Oxford: Oxford University Press, 2013), 476.

² Alternatively, *ubi jus ibi remedium* can be translated as “where there is a right, there *is* a remedy. *Ibid.*, 564.

sum of money? Finally, I examine the idea that the state must be responsible for injustice for accountability to obtain, going through several cases to show when the state is and is not responsible.

2.1 Reparations as Compensation?

In the U.S. legal system since the late 1800s, the operative definition of just compensation has been a sum that is the “full and perfect equivalent” of property.³ In his 1974 book, *Anarchy, State, and Utopia*, Robert Nozick presents a formalized definition in this spirit that has become more or less standard in contemporary discussions of compensation in philosophical and legal scholarship. “Something fully compensates a person for a loss if and only if it makes him no worse off than he otherwise would have been,” writes Nozick.⁴ “It compensates person X for person Y’s action A if X is no worse off receiving it, Y having done A, that X would have been receiving it if Y had not done A.”⁵ Clearly, Nozick’s definition is useful when it comes to calculating tort damages, non-litigated negotiations between automobile insurance companies concerning an accident between two clients, and perhaps even interpersonal situations in which a person breaks or loses something belonging to another person and offers to pay for it. The amount of compensation and the cost of the injury or loss are commensurable; compensation makes up for whatever happened. Nozick’s definition is moreover sufficiently

³ *Monongahela Navigation Company v. United States*, 148 U.S. 312 (1893). The notion of compensatory redress is also apparent in the Judeo-Christian tradition. Numbers 5:6-7 reads: “Any man or woman who wrongs another in any way and so is unfaithful to the Lord is guilty and must confess the sin they have committed. They must make full restitution for the wrong they have done, add a fifth of the value to it and give it all to the person they have wronged.” Quoted from *Holy Bible, New International Version* (Colorado Springs, CO: Biblica, Inc., 2011). The payment of one-fifth extra may also be thought of as punitive damages, as Elliot Klayman and Seth Klayman argue in “Punitive Damages: Toward Torah-Based Reform,” *Cardozo Law Review* 23 (2001-2002): 221-251.

⁴ Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 57.

⁵ *Ibid.*

flexible to account for tort damages for pain and suffering in civil litigation, at least on some theories.⁶ Pain and suffering may not be nullified by compensation, particularly when it comes to a life-changing injury or circumstances that ultimately lead to death, but compensation may provide solace, and thus help make a person or surviving family members whole again.⁷

Many theorists who advocate monetary reparations employ the Nozickian understanding of compensation. Susan Sharpe calls “the simple fairness of replacing what one has taken or destroyed” as “the essential idea of reparation.”⁸ Thinkers like George Sher, Bernard Boxill, Renée Hill, and Andrew Cohen use a compensatory definition as the basis of their intergenerational justice-based arguments for reparations.⁹ So does Elazar Barkan in discussing reparations “as a proxy for social justice.”¹⁰ Richard America undoubtedly has compensation in mind in arguing for an “Exploitation Index” that would show “how much groups benefit from

⁶ See a discussion in David W. Leebron, “Final Moments: Damages for Pain and Suffering Prior to Death,” *New York University Law Review* 64 (1989): 256-363, 271.

⁷ Robert E. Goodin, “Theories of Compensation,” *Oxford Journal of Legal Studies* 9 (1989): 56-75, 63. See fine-grained distinctions between Aristotle’s notion of “restoring equality” after wrongdoing, a return to the *status quo ante*, and making the victim whole in Renée Hill, “Compensatory Justice: Over Time and Between Groups,” *Journal of Political Philosophy* 10 (2002): 392-415. Hill, however, is perhaps wrong to uncritically gloss over these distinctions in the definition she ultimately adopts. *Ibid.*, 398.

⁸ Susan Sharpe, “The Idea of Reparation,” in *Handbook of Restorative Justice*, ed. Gerry Johnstone and Daniel Van Ness (New York: Routledge, 2011), 24.

⁹ George Sher has written a variety of articles on the subject over the years, most notably: “Compensation and Transworld Personal Identity,” *Monist* 62 (1979): 378-91; “Ancient Wrongs and Modern Rights,” *Philosophy & Public Affairs* 10 (1981): 3-17; and “Transgenerational Compensation,” *Philosophy & Public Affairs* 33 (2005): 181-200. See also Bernard R. Boxill, “A Lockean Argument for Black Reparations,” *Journal of Ethics* 7 (2003): 63-91; Andrew I. Cohen, “Compensation for Historic Injustices: Completing the Boxill and Sher Argument,” *Philosophy & Public Affairs* 37 (2009): 82-102; and Hill, “Compensatory Justice.” Though by no means an intergenerational justice theorist, Boris Bittker discusses the “case for reparations” and the “case for compensation” interchangeably in Bittker, *The Case for Black Reparations* (Boston: Beacon Hill Press, 2003).

¹⁰ Elazar Barkan, “Reparation: A Moral and Political Dilemma,” in *Reparations: Interdisciplinary Inquiries*, ed. Jon Miller and Rahul Kumar (Oxford: Oxford University Press, 2007), 1-23, 6.

unjust economic relations with each other in a kind of input-output matrix.”¹¹ Robert S. Browne has attempted to quantify the monetary amount that would be due to the descendants of slaves for uncompensated slave labor.¹² The connection between Nozickian compensation and reparations is no accident. Within contemporary political theory, *Anarchy, State, and Utopia* contains one of the earliest attempts to articulate why the existence of historical injustice is morally problematic.¹³ Nozick famously critiques John Rawls’s theory of distributive justice for being ahistorical: distributive holdings cannot be evaluated from a “current time slice” perspective for the purposes of redistribution; there needs to be an examination of how holdings came about.¹⁴ Accordingly, if holdings were acquired justly (satisfying Nozick’s principle of justice in acquisition) and transferred justly (satisfying his principle of justice in transfer) then it is unjust to take from one person and give to another, even if there are inequalities between the former and the latter.¹⁵ But as Nozick concedes, many persons are unjustly enriched due to historical violations of the principles of justice in acquisition and transfer, and many persons are unjustly worse off. From this set of ideas emerges so many conceptual difficulties, however, that the task of rectification is daunting. In Nozick’s words:

If past injustice has shaped present holdings in various ways, some identifiable and some not, what now, if anything, ought to be done to rectify these injustices? What obligations do the performers of injustice have toward those whose position is worse than it would have been had the injustice not been done? Or, than it

¹¹ Richard America, “Unjust Enrichment and Restitution: Defining and Measuring Current Benefits from Past Wrongs—Estimation and Policy Implications,” *New York Law School Journal of Human Rights* 5 (1987-1988): 411-423, 421.

¹² Robert S. Browne, “The Economic Basis for Reparations to Black America,” *Review of Black Political Economy* 21 (1993): 99-110.

¹³ See Chapter 1 for a critique of a focus on historical injustice rather than state-sponsored injustice.

¹⁴ Nozick, *Anarchy, State, and Utopia*, Ch. 7.

¹⁵ *Ibid.*, 150.

would have been had compensation been paid promptly? How, if at all, do things change if the beneficiaries and those made worse off are not the direct parties in the act of injustice, but, for example, their descendants? Is an injustice done to someone whose holding was itself based upon an unrectified injustice? How far back must one go in wiping clean the historical slate of injustices? What may victims of injustice permissibly do in order to rectify the injustices being done to them, including the many injustices done by persons acting through their government? I do not know of a thorough or theoretically sophisticated treatment of such issues. Idealizing greatly, let us suppose theoretical investigation will produce a principle of rectification...¹⁶

It is clear that for Nozick, the principle of rectification is a compensatory principle. The notion of “wiping clean the historical slate of injustices” directly relates to his idea of making a person “no worse off than he otherwise would have been” had the historical violation of the principles of justice in acquisition and transfer not occurred. But Nozick is pessimistic about being able to come up with a viable exploitation index or its equivalent. Instead Nozick concedes that the principles of distributive justice may suffice as “rough rules of thumb” in approximating the principle of rectification.¹⁷ “Although to introduce socialism as the punishment for our sins would be to go too far,” writes Nozick, “past injustices might be so great as to make necessary in the short run a more extensive state in order to rectify them.”¹⁸

In spite of the fact that some have found the accounts of Nozick, Sher, Boxill, and Cohen persuasive, the compensatory understanding of reparations is the basis of widespread skepticism towards reparative justice. This was vividly dramatized at a 2002 Bowling Green State University conference on reparations for slavery and Jim Crow when an audience member walked up to the podium, waved her checkbook, and asked how much money would be needed

¹⁶ Ibid., 152.

¹⁷ Ibid., 231.

¹⁸ Ibid. Note that some have formally argued for taking the “rough rules of thumb” approach to compensatory reparations seriously. See Robert Goodin, “Disgorging the Fruits of Historical Wrongdoing,” *American Political Science Review* 107 (2013): 478-491.

to “settle the matter.”¹⁹ Defining reparations at the outset as having compensation as the primary aim has allowed authors like Stephen Kershnar and Nahshon Perez to write highly critical books dismissing many of the reparations claims to whose defense the present account is devoted.²⁰ (“Since compensation is a complex term, it may be defined in different ways,” writes Perez, “I shall follow, by and large, Nozick’s famous definition: bringing the victim to a level of well-being s/he would have enjoyed had the wrong not occurred.”²¹) All of the worries that Debra Satz raises about redressing historical injustice are formulated on the basis of Nozick’s definition.²² Jeremy Waldron’s widely-cited essay arguing that historical injustices are “superseded” with the passage of time is part of his broader critique of large-scale reparations dispensed “in an effort actually to rectify past wrongs,” with the word “actually” suggesting a compensatory definition as the basis of the critique.²³

To see the issue with the compensatory understanding of reparations, consider an argument made by Benjamin Zipursky in the context of tort law.²⁴ Zipursky argues that the meaning of torts is not first-order correction, but bringing about civil recourse. If my neighbor damages my fence, it would not be sufficient to settle up by removing the exact amount of cash

¹⁹ Preface to *Redress for Historical Injustices in the United States*, ed. Michael T. Martin and Marilyn Yaquinto (Durham: Duke University Press, 2007), xiii.

²⁰ Stephen Kershnar, *Justice for the Past* (Albany: State University of New York Press, 2004); Nahshon Perez, *Freedom From Past Injustice: A Critical Evaluation of Claims for Intergenerational Reparations* (Edinburgh: Edinburgh University Press, 2012).

²¹ *Ibid.*, 13.

²² Debra Satz, “Countering the Wrongs of the Past: The Role of Compensation,” in *NOMOS LI: Transitional Justice*, ed. Melissa Williams (New York: New York University Press, 2012): 129-150, 139-140.

²³ Jeremy Waldron, “Superseding Historic Injustice,” *Ethics* 103 (1992): 4-28, 7. See also Christopher W. Morris, “Existential Limits to the Rectification of Past Wrongs,” *American Philosophical Quarterly* 21 (1984): 175-182; Tyler Cowen, “Discounting and Restitution,” *Philosophy & Public Affairs* 26 (1997): 168-185.

²⁴ Benjamin Zipursky, “Civil Recourse, Not Corrective Justice,” *Georgetown Law Journal* 91 (2002): 695-756.

necessary to cover the cost of repair from her wallet.²⁵ I am made whole, but this does not capture the spirit of what it means to have a remedy; the right to a remedy is “about permitting those who have been wronged in the relevant sense to have an avenue of recourse against the wrongdoer.”²⁶ So it is with reparations. If the targets of a given state-sponsored injustice were to stealthily cheat on their tax returns, underreporting a bit every year until doing so nullified their material losses, the meaning and significance of reparations would be completely lost.²⁷ The compensatory understanding of reparations fails, moreover, to appreciate the significance of reparations claims targeting the state in real world practice. In the long passage quoted from *Anarchy, State, and Utopia*, Nozick refers to the “performers of injustice” generally, and the “beneficiaries” of injustice, but there is no sense in which he is saying that the state is the perpetrator of those historical injustices that should command our attention. Since Nozick is only interested in historical violations of the principles of justice in holdings and transfer, it would be arbitrary, on his view, to restrict our attention to only those inequalities that result from past injustice in which the state was the wrongdoer. We should rather be asking ourselves: who is benefited by past injustice, and who is harmed? Someone who begins with this question may nevertheless advocate for taxpayers to foot the bill for reparations; reparations could be sought from the state because it is a proxy for the descendants of the perpetrators of historical injustice.²⁸ It is not surprising that such arguments quickly lead into the metaphysics of

²⁵ Ibid., 737.

²⁶ Ibid.

²⁷ In a more blatant version of this scenario, in 1994, the Internal Revenue Service reported that 20,000 African Americans wrote “exempt” on their tax forms on the grounds that the descendants of slaves were owed reparations. Kershner, *Justice for the Past*, 5-6.

²⁸ See, e.g., Iris Marion Young, *Responsibility For Justice* (Oxford: Oxford University Press, 2011), esp. 176-177.

intergenerational justice.²⁹ However, if reparations claims do not aim at literal correction, at wiping clean the historical slate of injustice, but at a sort of civil recourse, then these issues become much less salient. Reparations claims target the state not as a proxy, but because the wrongdoing in question consists of the state abusing its power and political authority.

In most cases, there are feasibility constraints on compensation based on the *restitutio* principle. In a few cases, there are no such constraints, and it might be possible to bring a sick person to health (i.e., unethical human subjects experimentation claims), repatriate annexed lands (i.e., Indian land restoration claims), and so on. However, the *restitutio* principle cannot on its own account for the importance of the process by which something is restored. When a government causes harm to individuals, it owes them its accountability, and whatever further measures can make its accountability concrete, whether this is monetary redress or some specific course of action that is in its power to undertake, tailored to the particular situation.³⁰

2.2 An Accountability-Based Theory of Reparations

For Zipursky, again, torts provide an avenue of recourse for a person to take a claim against a wrongdoer. There is thus an institutionalized means of accountability: a tort claim demands that the defendant “be accountable” for a civil wrong. Likewise, on my analysis, a reparations claim calls state power “to account,” demanding that the state “be accountable” to the

²⁹ Ibid. Note that my argument is *not* that passage of time related-difficulties do not matter. See Chapter 4 for a discussion of their relevance to an accountability-based theory of reparations.

³⁰ Note that throughout the account, I adhere to the distinction between “reparations” and “compensation” that has been presented here, occasionally using “monetary payments” or “redress” in place of reparations if the context is clear. That being said, claimants do not always understand themselves as seeking *reparations* from the government. Often they do, but in some contexts, particularly when a claim is litigated, claimants themselves may use the term “compensation.” This does not seem to matter at all for my argument. For example, I discuss the Radiation Exposure *Compensation* Act as reparations since the context of the claim fits the definition of state-sponsored injustice that I give in Chapter 5, and the legislation contained an apology.

claimants. The state allows itself to be held to account by making good upon a reparations demand (if it is valid), and opening its coffers.

What does it mean to be accountable to someone for something? And why does accountability mean that a state should pay a monetary sum? Moral philosophers tend to consider accountability a form of responsibility, and see “being accountable” as more demanding than “accepting responsibility.” Since some scholars of historical injustice assume that the state’s accepting responsibility is all that is owed, and recommend acknowledgement or an apology but not reparations,³¹ it is worth it to see how accountability and responsibility relate.

What is the meaning of responsibility? Peter Strawson has famously argued for understanding the notion of an agent *being* responsible for something in terms of the correctness of another agent *considering* her responsible.³² Assessing the justifiability of the injured party’s “reactive attitude” towards the wrongdoer helps to shed light on the latter’s responsibility for an act of wrongdoing: we do not tend to resent the actions of a deranged person who cannot help but act as she does, as she is not a responsible moral agent. Justified resentment implicitly considers the injurer responsible for her act of wrongdoing.

As David Shoemaker argues, however, the Strawsonian picture of responsibility is only part of the story. Considering someone responsible *attributes* to them an action that is “reflective of... the agent’s self.”³³ But “attributability” is only one of three senses of responsibility. It

³¹ Jeff Spinner-Halev, *Enduring Injustice* (Cambridge: Cambridge University Press, 2012).

³² P.F. Strawson, “Freedom and Resentment,” in *Freedom and Resentment and Other Essays* (New York: Routledge, 2008), 1-28. The accounts of both Strawson and Shoemaker (see below) are focused on interpersonal considerations of responsibility. I bring the state in towards the end of this section.

³³ David Shoemaker, “Attributability, Answerability, and Accountability: Toward a Wider Theory of Moral Responsibility,” *Ethics* 121 (2011): 602-632, 604. Even though I discuss responsibility for *actions*, Shoemaker makes it clear that his analysis also applies to responsibility for *attitudes*.

means that she has performed an act, but that she is not responsible for doing *something else* as a result. A person to whom responsibility is attributed can furthermore be *answerable* or *accountable* for ϕ . Responsibility-as-answerability involves an agent owing reasons to justify her actions.³⁴ Responsibility-as-accountability means that an agent can be held to account: “to hold someone to account is precisely to sanction that person, whether it be via the expression of a reactive attitude, public shaming, or something more psychologically or physically damaging,” as Shoemaker writes.³⁵ In her response to this tripartite understanding of responsibility, Angela Smith uses a variety of hypotheticals to show that Shoemaker fails to demonstrate a meaningful difference between responsibility-as-answerability and responsibility-as-accountability, such that the two can be held conceptually distinct.³⁶ Smith argues that on Shoemaker’s account, an *accountable* agent is still *answerable*; she is just answerable in a different, more extreme way: an agent’s appropriate answerability-responsible response to the wronged party is to *allow herself* to be held to account, whether through shaming or some other mechanism.³⁷

My own view is that Shoemaker is correct that answerability and accountability are distinct conceptions of responsibility, but that Smith is correct that Shoemaker’s formulation does not get this distinction right. Shaming “or something more psychologically or physically damaging” is a very odd response to the accountability-responsible agent, and does not fit with conventional understandings of accountability. It is common to speak of nonprofit organizations that are accountable to donors, CEOs who are accountable to corporate shareholders, teachers

³⁴ Ibid., 610-611.

³⁵ Ibid., 623.

³⁶ Angela M. Smith, “Attributability, Answerability, and Accountability: In Defense of a Unified Account,” *Ethics* 122 (2012): 575-589.

³⁷ Ibid.

who are accountable to school administrators, and school administrators who are accountable to state boards of education. Implied in each case is that there is an B who is accountable to A for ϕ . Shaming does not speak to B's ongoing responsibility for carrying out ϕ , or for A's right to demand that B undertake a special set of efforts if she is doing ϕ poorly. If a CEO fails to turn a profit, if a nonprofit undertakes a community project that is a complete flop, or if a teacher fails to keep his students on grade level, this does not mean that each deserves to be shamed. Rather, each may be obliged to do something extra for failing to do ϕ —and “something extra” usually goes beyond providing justificatory “answerability-responsible” reasons.³⁸ This is because one is ultimately in a deferential position relative to a person or persons to whom one is accountable. If B is accountable to A, A is in a position to make demands on B.³⁹

In a relationship characterized by accountability-responsibility, B is always technically accountable to A, but the nature of ϕ often requires that B be given autonomy and leeway so that she can carry out ϕ without being micromanaged (usually because too much oversight begs the point of delegated responsibilities or suggests distrust).⁴⁰ But if ϕ has been grossly neglected,

³⁸ I thus am in partial agreement with Christopher Kutz, who argues that accountability refers to “the responses warranted by an agent's relation to harm.” Kutz, *Complicity: Ethics and Law for a Collective Age* (Cambridge: Cambridge University Press, 2000), 124 *et passim*. However, Kutz's understanding of accountability is broader than the one I present here.

³⁹ Traditionally, accountability was linked to bookkeeping; a shop owner might be forced to show his accounts to a tax collector or another public official. But meanings have evolved: as Mark Bovens points out, we almost never speak of citizens as accountable to the state, but it is extremely common to speak of the state as accountable to citizens. Bovens, “Public Accountability,” in *The Oxford Handbook of Public Management*, ed. Ewan Ferlie, Laurence E. Lynn, Jr., and Christopher Pollitt (Oxford: Oxford University Press, 2005), Ch. 8, 183. Moreover, a demand to disclose one's financial records is one kind of demand that might be relevant to contemporary accountability contexts (e.g., the nonprofit-donor relationship). If I am right that relationships characterized by accountability involve one party getting to step in and make demands of some sort on the other party, this reflects that our understanding of accountability has broadened over time.

⁴⁰ See Bovens, “Public Accountability,” 194.

then A has the right to pull rank on B, and demand that a particular course of action be taken.⁴¹ Of course, when A calls B to account and makes a demand, the demand may be reasonable or unreasonable. Morality does not provide blanket approval for everything that A might demand, or for how A behaves as she pulls rank—Shoemaker’s discussion of shaming, again, gives rise to a strange and morally sophomoric understanding of accountability.⁴² A’s response is surely the most legitimate and morally appropriate if it directly relates to ϕ , and if it gives B another chance with regard to ϕ if it seems that B is corrigible agent.

This is where the notion of “repair” comes into play. When one has accountability-responsibility towards someone and fails to perform the duties that come with this relationship—or worse, contravenes one’s duties and in doing so subverts the relationship—it is natural and reasonable to resent the act, to want the wrongdoer to work to fix things and to try make things right. In interpersonal relationships, this is clear enough. When one says of an adulterous spouse, “It’s one thing for him to cheat, but what really makes me upset is that he did not even try to fight for the relationship; *he just left!*” it is apparent that the spurned party believes that she has the right to demand that her spouse be accountable for having had an affair, and considers this a distinct moral failing if he is not.⁴³ “Accountability” and “repair” are linked because undertaking

⁴¹ Alternatively, if no demands are made, if A pulls rank for the sake of pulling rank, then this not accountability at all; it is just power play. If A fires B, however, this might be an appropriate accountability-based course of action.

⁴² Shoemaker is not alone in understanding the accountable person to be subject to a hostile reactive attitude. Robert Behn, *Rethinking Democratic Accountability* (Washington, D.C.: Brookings University Press, 2001), understands accountability as being fundamentally about punishment.

⁴³ Cf. Shoemaker’s “cheating” example in “Attributability, Answerability, and Accountability,” 620-621. And so, against Shoemaker, if a wife learns of her husband’s cheating and gleefully anticipates the opportunity to humiliate him, refusing his pleas for reconciliation because shaming is more satisfying, we would typically think that the wife has acted wrongly.

the work of repair is often the most directly relevant, realistic, and reasonable request when a person has failed at doing their duty, and put a relationship or common enterprise in peril.⁴⁴

With these distinctions in mind, let us turn to the realm of democratic theory. In ordinary political discourse, it is common to speak of democratic lawmakers as accountable to the people, or particular representatives as accountable to their constituents' desires. However, when "accountability" is used in this sense, I want to suggest that what is in play is not accountability-responsibility in the sense that I have described it, but rather, answerability-responsibility in Shoemaker's sense.⁴⁵ There is a rich tradition of scholarship on the meaning of political representation, and I shall not attempt go into it all here. But suffice it to say, if the majority of constituents desire something that is deeply immoral, or that harms a minority, except on an extremely crude version of a "delegate" theory of representation, a democratic lawmaker is not obliged to represent the popular will literally.⁴⁶ But she may still be answerable to her constituents: though she is not obliged to "repair" her choosing not to embody the majority will, she has a general duty to provide justifiable reasons for her legislative vote.⁴⁷

Are political officials ever accountability-responsible to citizens in the sense that I have described? The fact that there is a venue for taking claims against the state concerning contracts,

⁴⁴ Though Christopher Kutz uses the language of "compensate" and "compensation," his discussion of the link between accountability and repair is similar to mine here. See Kutz, *Complicity*, 40-41.

⁴⁵ Of course, if a representative-constituent relationship is severed due to deeply unethical behavior on the part of the representative (e.g., accepting bribes), accountability-responsibility is in play. But this is not the usual sense in which we speak of the "accountability" of elected officials in our everyday political discourse.

⁴⁶ Dennis F. Thompson, *Political Ethics and Public Office* (Cambridge, MA: Harvard University Press, 1987), 99. See also Arthur Applbaum, *Ethics for Adversaries: The Morality of Roles in Public and Professional Life* (Princeton: Princeton University Press, 1999), 220-239, for a discussion.

⁴⁷ Applbaum, *Ethics for Adversaries*, 233. Though Thompson points out that this may not always be done on the basis of a perceived moral duty: "Like most people, legislators rationalize their conduct: the reasons they give may not be their real reasons." Thompson, *Political Ethics and Public Office*, 111.

eminent domain, and so on, suggests that there are clear situations in which the United States government has anticipated its need to be held accountable, and has provided a clear means for individuals to do so. But my larger argument is that a liberal democracy ought to be accountable to its citizens when the moral stakes are even higher.⁴⁸ Liberal democratic principles serve to clearly define the moral terms of the relationship between the government and citizens—viz., rights are a constraint on the exercise of political power, citizens cannot be made subject to arbitrary decrees, and laws must afford equal protection to all.⁴⁹ When a government violates the terms of the relationship according to which it claims its right to govern, then what is owed is more than an explanation. If these legitimizing principles are to have teeth, what is owed is allowing itself to be held meaningfully accountable. In being held accountable for *governing in view of these principles* [φ], the *state* [B] allows the *sovereign people* [A] to pull rank, asserting their supremacy. By contrast, a state that exercises sovereign immunity in response to a reparations claim that has been brought before the court, or a legislature that refuses to give a reparations bill a fair hearing, does not consider itself accountable if it violates the commitments that define the terms of its relationship with the people.

Of course, one might object and say that such an understanding is bound to be overly inclusive. The experience of injustice is subjective, it may be argued, and so anyone can claim that the state's policies have treated her unfairly if she considers herself to be on the losing side of a political decision—by making one to go to school, pay taxes, etc. To heed all reparations claims would have a chilling effect on governance. However, there are non-subjective ways of

⁴⁸ See Mark Bovens, "Public Accountability," 183-184, for a discussion of the broad to the point of meaningless uses of the term "accountability" in contemporary political life.

⁴⁹ See Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law* (Indianapolis: Liberty Fund, 1955), 64-65.

distinguishing between “losing” and “injustice,” and the state can be held accountable for the latter without meaningfully sacrificing its being a state.⁵⁰ A government by no means has a duty to prevent losers from losing, but it does have a duty to not violate its legitimizing principles and commitments and, if my analysis is correct, a duty to allow itself to be held accountable if it does.

2.3 The Significance of *Reparations*

When it comes to the difference between the compensatory understanding of reparations and an understanding based on accountability, it may seem odd to dismiss the former view, and yet at the same time suggest that the latter requires a monetary transfer. From the standpoint of the state’s meaningful accountability to the sovereign people, if compensation is not the aim, why reparations per se?

First off, not all monetary transfers are meant to be compensatory. A payment for a good or a service to someone who is seeking a profit is not compensatory: it would be odd to say that food at a restaurant has been lost to the customer, and that payment makes the restaurateur indifferent between a given customer’s patronage and the counterfactual. Even within the context of civil law, not all court-ordered payments amount to compensation. Punitive damages are not compensatory; they are punitive.⁵¹ And, though some have argued that damages for pain and suffering fit into the framework of compensation,⁵² others have analyzed this view as falling

⁵⁰ Injustice versus losing is discussed in Chapter 5.

⁵¹ See, e.g., David G. Owen, “Punitive Damages in Products Liability Litigation,” *Michigan Law Review* 74 (1976): 1257-1371, esp. 1265-1267.

⁵² See Leebron, “Final Moments,” 271.

short, arguing that they are for deterrence,⁵³ or serve as an insurance mechanism.⁵⁴ Cash gifts from one party to another are not compensatory, nor is a grant, nor is the payment of taxes. In the universe of monetary transfers, compensation only occupies one (albeit large) corner. Monetary transfers have different meanings in different situations.

On an accountability-based theory of reparations, the meaning of monetary redress is, not surprisingly, accountability. However, reparations by no means have the ability to signify accountability across all situations. If a cheater were to offer to pay a sum of money to a spurned spouse to demonstrate his accountability for violating the bonds of marriage, this is not likely to go over well.⁵⁵ So why is the particular case of a state harming individuals through the abuse of political power one in which accountability ought to be shown by means of monetary redress?

Numerous volumes have been written by political and social theorists, anthropologists, and economic historians analyzing the existence of money as a social and cultural convention.⁵⁶ The advantage of money systems is that money is highly flexible in its use, an impersonal means of valuation facilitating the exchange of commodities.⁵⁷ Not everything of value is a commodity;

⁵³ See, e.g., Guido Calabresi, "Optimal Deterrence and Accidents," *Yale Law Journal* 84 (1975): 656-671.

⁵⁴ See, e.g., Steven P. Croley and Jon D. Hanson, "The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law," *Harvard Law Review* 108 (1995): 1785-1917; Mark Geistfeld, "Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries," *California Law Review* 83 (1995): 773-852.

⁵⁵ Satz uses this example in her discussion of compensatory reparations. Satz, "Countering the Wrongs," 136. See also Adrian Vermeule's response to Satz, arguing that reparations show that "we can at least do better than we have." Vermeule, "Reparations as Rough Justice," *NOMOS LI: Transitional Justice*, 151-165, 163.

⁵⁶ Classic treatments of this subject include Locke, "Second Treatise," § 46-51; Karl Marx, "Economic and Philosophical Manuscripts of 1844," *The Marx-Engels Reader*, ed. Robert C. Tucker (New York: W. W. Norton & Co., 1972), esp. 79-83; and Georg Simmel, *The Philosophy of Money*, tr. and ed. David Frisby (London: Routledge, 2004). Contemporary works include, e.g., Viviana Zelizer, *The Social Meaning of Money* (Princeton: Princeton University Press, 1997).

⁵⁷ Locke, "Second Treatise," § 50; Simmel, *Philosophy of Money*, 131-132.

there are many things that money cannot buy or replace.⁵⁸ But at the same time, money has meanings that extend beyond the marketplace, and can symbolically indicate that something has value.⁵⁹ For this reason, when it comes to irreparable harm and loss, monetary redress is considered by many cultures to be a necessary part of making up for wrongdoing. As Margaret Jane Radin writes in her discussion of monetary redress in criminal and civil law, expressing a view that ends up being close to Zipursky's, redress "means showing the victim that her rights are taken seriously... affirming that some action is required to symbolize public respect for the existence of certain rights and public recognition of the transgressor's fault in disrespecting those rights."⁶⁰ Of course, it may not be wrong to assume there to be societies in which this is not the case, and an offer of monetary redress is considered to be insulting. Moreover, we can observe that internal to societies wherein there is a norm of offering monetary redress, there may be some who wish to reject reparations as a way of expressing the depth of their suffering.⁶¹ But for the expressive act of rejection to be possible, reparations have to be offered. When reparations are not offered, or when they are sought by the injured party and the injurer refuses, this has huge moral implications in a society in which offering monetary redress is a general practice.

Generally speaking, the unwillingness to pay can indicate a lot. It can indicate that the perpetrator feels no remorse, or does not believe the injured party's account of what happened to

⁵⁸ Debra Satz, *Why Some Things Should Not be For Sale: The Moral Limits of the Market* (Oxford: Oxford University Press, 2010); Michael Sandel, *What Money Can't Buy: The Moral Limits of Markets* (New York: Farrar, Straus, and Giroux, 2012).

⁵⁹ Simmel, *Philosophy of Money*, 140-142, 155-162.

⁶⁰ Margaret Jane Radin, "Compensation and Commensurability," *Duke Law Journal* 43 (1993): 56-86, 61.

⁶¹ See a discussion of this with reference to Argentina's Madres de Plaza de Mayo in Claire Moon, "'Who'll Pay Reparations on My Soul?' Compensation, Social Control and Social Suffering," *Social & Legal Studies* 21 (2012): 187-197. More generally, see Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Boston: Beacon Press, 1998), 93.

her. It can indicate a belief that the injured party “had it coming,” that she somehow deserved the wrong. It can indicate the injured party’s worthlessness in the eyes of the perpetrator; she lacks the capacity to retaliate, and it is not necessary to give someone of her stature what she demands. (“What need we fear who knows it, when none can call our power to account?” as Lady Macbeth reassures herself, rubbing imagined bloodstains from her hands.⁶²) Significantly, these meanings can be present if the injurer does not offer monetary redress *even if* there is some form of apology.⁶³ If an apology is crafted so as not to fully admit the wrong, thus opening up the possibility of legal liability, many of these meanings are activated in spite of there being an acknowledgement of what happened. Sometimes this is done blatantly, such as the Senate version of a U.S. Congressional apology for slavery and Jim Crow, which closed with the following line: “Disclaimer: Nothing in this resolution (A) authorizes or supports any claim against the United States; or (B) serves as a settlement of any claim against the United States.”⁶⁴ Other times, a buffer against legal liability is more subtle—though the intention is usually quite transparent to the injured parties—expressing “regret” or “sorrow” for the wrong, but not actually taking responsibility for it.⁶⁵

⁶² *Macbeth*, Act 5, Scene 1, in *The Oxford Shakespeare: The Complete Works*, ed. Stanley Wells and Gary Taylor (Oxford: Clarendon Press, 2005), 969-994.

⁶³ Mihaela Mihai, “When the State Says “Sorry”: State Apologies as Exemplary Political Judgments,” *Journal of Political Philosophy* 21 (2013): 200–220, 207, 218, 219, is equivocal on this point. On one hand, Mihai seems to think that apologies have the potential to “expand membership, re-establish equality, and empower formerly excluded groups,” “stir the public into processes of reckoning with the past,” and “communicate a concern for the plight of those formerly disenfranchised and their descendants.” But she also—briefly!—acknowledges that reparations are one of several important “follow-up” measures: “Should the public statement remain without follow-up, victims and their descendants are likely to be wronged a second time.” But see Charles Griswold, *Forgiveness: A Philosophical Exploration* (Cambridge: Cambridge University Press, 2007), 152-153, on the potential perils of linking an apology to reparations: both may be appropriate, but they should be pursued separately on their own independent grounds.

⁶⁴ S. Con. Res. 26, 111th Cong. (2009). The House version does not have this language. It expressed “its commitment to rectify the lingering consequences of the misdeeds committed against African Americans under slavery and Jim Crow and to stop the occurrence of human rights violations in the future.” H. Res. 194, 110th Cong. (2008).

⁶⁵ Dinah Shelton criticizes non-apology apologies: “Unless the sincerity and meaning are clear, apology may exacerbate rather than mitigate the sense of injury resulting from historical injustices,” in *Remedies in International*

In this light, the offer of monetary reparations gives weight to an apology, and makes its meaning unambiguous.⁶⁶ An apology and reparations in tandem do not come with accountability-skirting disclaimers; the very thing that political apologies are often worded so as to avoid is actually taking place. Even if “I apologize and take responsibility for X” is said outright, words are often felt to be cheap and easy, especially to persons who feel the injury to have been an expression of their perceived worthlessness in the eyes of the state. In paying reparations in conjunction with an apology, the state is taking advantage of the wide array of customary practices that are available when wrongdoing has taken place, indicating a strong sense of duty towards the injured. Paying reparations communicates that the state takes its relationship with the claimants seriously, that repairing this relationship is just as important to the state as carrying out all of its other duties that involve the expenditure of taxpayer resources.⁶⁷ As such, reparations have the capacity to embody the state’s accountability in a way that a standalone apology cannot.

“Embodying” means to making something visible, giving it a tangible form. One might argue, then, that “embodying” accountability is different from being *directly* accountable, and

Human Rights Law (Oxford: Oxford University Press, 2005), 447. See also Minow, *Between Vengeance and Forgiveness*, 115; Griswold, *Forgiveness*, 166-167; Nancy Rosenblum, “Justice and the Experience of Injustice,” in *Breaking the Cycles of Hatred: Memory, Law, and Repair*, ed. Nancy Rosenblum (Princeton: Princeton University Press, 2002), 77-106, 98. Cf. Spinner-Halev, *Enduring Injustice*, 105-113, who argues that acknowledgment is generally more appropriate than apologizing.

⁶⁶ As Suyako Kitashama said of her internment reparations check, “Attorney General (Richard) Thornburgh got on his knees and presented each one with a check and an apology and said he was sorry it took so long... I just broke down... Many old people, the mere fact that the president apologized is what they were living for... [But] the money made the apology more meaningful—it would be empty without it.” Stephen Magagnini, “A Nation’s Apology: Formal Gesture Erases a Half Century of Shame,” *Sacramento Bee*, originally published October 8, 2001, <http://www.sacbee.com/2012/05/11/4483809/mending-the-past.html>. Cf. William Jelani Cobb, who critically considers the Senate apology for slavery: “I would have been impressed if, say, Roland Burris, the only black senator, had refused to support the bill unless it included some form of redress.” Cobb, “Slavery Issue: No Apology Necessary,” *Politico*, June 25, 2009, <http://www.politico.com/news/stories/0609/24157.html>.

⁶⁷ See Simmel’s discussion of how value is demonstrated by one’s willingness to sacrifice something of value in *Philosophy of Money*, 91-93.

that paying reparations is an inferior substitute for the latter. One might be tempted to look to other accountability-based relationships in order to find different, perhaps better ways of holding a state to account. But the political relationship is not like the relationship between a CEO and shareholders, a nonprofit and donors, or a teacher and school administrators. If a teacher's students do not make academic progress, it is reasonable to hold him accountable with more frequent classroom observations by the principal, and individualized training sessions with a master teacher. Donors or shareholders, similarly, might respond to a poor performer by taking away some of their autonomy, demanding frequent reports and the right to dictate what decisions a CEO or nonprofit managers should make. However, this is not a realistic option when it comes to the state. Elected officials have complex sets of responsibilities to many constituencies.⁶⁸ It would be undesirable for any one set of individuals or group to dictate how elected officials should fulfill the duties of their office, even if they have been legitimately wronged by the state—indeed, accountability in this form would subvert the meaning of democracy itself. One still might argue that the state should not necessarily be directly accountable to the claimants, but should recommit to them, and sincerely promise to never again disregard their interests or rights. But this is precisely what officials say when a political apology is issued, vowing with euphemious phrases that the state will act *as if* it is directly accountable to the claimants in the future.⁶⁹ Paying reparations is no more a guarantee that such a promise will be kept than an apology. But with a civil wrong like trespassing, a successful plaintiff may not demand GPS tracking of the defendant's whereabouts, even though this would be an extremely useful way of

⁶⁸ Thompson, *Political Ethics and Public Office*, 110-111.

⁶⁹ Kathleen Gill, "The Moral Function of an Apology," *Philosophical Forum* 31 (2000): 11-27, 12.

assuring that the latter never trespasses again.⁷⁰ In light of practical and moral constraints preventing reparations claimants from directly overseeing the state to ensure that it will respect their rights down the road, the convention of paying redress at the very least involves the state's demonstration of respect for the rights that have already been violated.⁷¹

Because they are not about literal correction, accountability-based reparations solve the “trying to repair the irreparable” conundrum that Spinner-Halev and others worry about.⁷² There are no delusions about them making an individual “whole.” Skeptics need not fear that buying into reparative justice means that the claimants have the moral right to keep coming back again and again for further deposits into a black hole bank account of historical obligation if an aboveboard reparations process has taken place. A state that has been meaningfully accountable once does need to again and again be accountable for the same deed. True, successful reparations claimants may wish for the process of injury–claim–repair to have an educative effect on the government and citizens that lasts beyond the reparative justice process. But if the claimants want ongoing work of this sort to be carried out by the state in a formal way, for instance, building and funding a museum, then this should be negotiated as a part of the reparations package. Furthermore, for the reparative justice process to be morally satisfactory, an award may need to be substantial, but this is not the same as meaning that the state must issue to claimants the ceiling amount that they request. Some, like Christopher Kutz, worry that anything below an

⁷⁰ The considerations in this section raise interesting questions about the role of accountability with regard to criminal acts and punishment, but I shall not open this can of worms here. For the view that accountability is about either punishing or preventing a punishable act, see Coleen Macnamara, “Holding Others Responsible,” *Philosophical Studies* 152 (2011): 81-102, 89-95; Behn, *Rethinking Democratic Accountability*.

⁷¹ As per Roy Brooks, “Remedies concretize rights; they make rights meaningful.” Brooks, “Getting *Reparations For Slavery Right*—A Response to Posner and Vermeule,” *Notre Dame Law Review* 80 (2004-2005): 251-288, 286.

⁷² Spinner-Halev, *Enduring Injustice*, Ch. 2.

upper-bound amount that he presumes reparations claimants want “will leave claimants dissatisfied that justice has been done at all, much less fully.”⁷³ (Therefore, “one might as well choose a cheaper form of symbolism, saying it with daisies instead of roses.”⁷⁴) Indeed, in real world practice, it is often part of the injury–claim–repair script for a claimant to say that a reparations award was not enough, that it will never be enough, because of course on some deep level it never is. But Kutz ignores the next part of the injury–claim–repair script, in which the reparations recipient expresses her satisfaction that the government did something. And in real world practice, returning for further payments from a state that has already meaningfully demonstrated its accountability is not something that reparations claimants do.⁷⁵ If the implicit meaning of reparations as understood by the claimants themselves was about literal correction, or if they were unsatisfied with a substantial but nevertheless symbolic amount, then this would not make sense. The accountability-based theory of reparations rings truer to real world claimants’ actions and the spirit of their demands.

Thus far it has been argued that that monetary payments do a better job at embodying the state’s accountability than standalone apologies. However, there are other ways of demonstrating the state’s accountability beyond a monetary payment. Later on, a variety of reparative measures given in conjunction with cash reparations tailored to a particular harm are discussed. The survivors of the Tuskegee syphilis experiments and their families were provided free medical

⁷³ Christopher Kutz, “Justice in Reparations: The Cost of Memory and the Value of Talk,” *Philosophy & Public Affairs* 32 (2004): 277-312, 304.

⁷⁴ *Ibid.*

⁷⁵ Another reparations claim may be triggered by some shocking new piece of evidence that makes a state look morally blameworthy in a way that it had not appeared before—see, e.g., the case of Frank Olson, which is discussed in Chapter 6—but these cases are rare. And indeed, in such cases, it seems clear that the state’s accountability for injustice is at issue, rather than a claimant’s opportunistic sense of entitlement to more money.

care for life. First Nations, Inuit, and Metis individuals who had gone through the Canadian residential school system were provided psychological counseling if they had suffered trauma, and funds were put towards healing programs and memorialization projects. These more tailored forms of reparations can be an effective way for the state to show its understanding of the specific nature of the harm its policies and practices caused.

The restoration of lands is another alternative to monetary redress, and in certain cases, a more appropriate reparative measure than a large cash sum.⁷⁶ For example, in 1876, the Lakota and Dakota (Sioux) Nations were made to give up the sacred He Sapa, or the Black Hills, “at the bayonet’s point.”⁷⁷ Throughout the early twentieth century, a loosely affiliated group of Lakota tribes repeatedly pressured the U.S. federal government to hear their claim that they had been defrauded. The He Sapa claim was more successful than most as a lawsuit. “A more ripe and rank case of dishonorable dealing will never, in all probability, be found in our history,” as the Court of Claims judge ruled. The case went all the way to the Supreme Court, which decided in favor of the Lakota in 1980, awarding \$102 million.⁷⁸ However, the tribes refused the money, knowing that this would nullify their claim to the land. Interest has accrued, and as of 2011, \$1 billion is earmarked should the money be claimed.⁷⁹ Currently, the He Sapa Reparations Alliance

⁷⁶ Land restitution is, of course, controversial. See the disagreement between David Lyons and Jeremy Waldron: Lyons, “The New Indian Claims and Original Rights to Land,” *Social Theory and Practice* 4 (1977): 249-272; Waldron, “Superseding Historic Injustice.” See also A. John Simmons, “Historical Rights and Fair Shares,” *Law and Philosophy* 14 (1995): 149-184; Lukas H. Meyer, “Historical Injustice and the Right of Return,” *Theoretical Inquiries in Law* 5 (2004): 305-316; Burke A. Hendrix, “Memory in Native American Land Claims,” *Political Theory* 33 (2005): 763-785.

⁷⁷ Jeffrey Ostler, *The Lakotas and the Black Hills: The Struggle for Sacred Ground* (New York: Penguin Books, 2010), 131.

⁷⁸ *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980).

⁷⁹ “Sioux Forgo \$1B, Continue Fight to Reclaim Black Hills,” *Indian Country Today Media Network*, February 15, 2011, <http://indiancountrytodaymedianetwork.com/2011/02/15/sioux-forgo-1b-continue-fight-reclaim-black-hills-17579>; Maria Streshinsky, “Saying No to \$1 Billion: Why the Impoverished Sioux Nation Won’t Take Federal

is working to get the land back.⁸⁰ It is not an absurd struggle: in Canada and in the United States, tribes have successfully convinced the government that money is not sufficiently reparative when it comes to sacred lands.⁸¹ Of course, one might object and say that Indian land claims are about *restitutio in integrum*, about literally correcting a past wrong by giving back land that was stolen. And indeed, it is perhaps due to the prominence of Indian land claims in the academic reparations scholarship that leads authors to conclude that all reparations claims must be based on the *restitutio* principle. But it is possible to make sense of land claims on the accountability-based theory: in some contexts, money *cannot* satisfactorily demonstrate the state's accountability.⁸² Consider the historical circumstances of the Lakota claim. Treaties had protected the Lakota right to the “absolute and undisturbed use and occupation” of the Black Hills, but government officials realized that the value of these lands had been underestimated, and sent troops.⁸³ A surprise attack was successfully countered by the Lakota, with Crazy Horse and Sitting Bull swiftly defeating George Custer, the handsome cowboy-general—“Custer’s Last Stand,” as the battle is often called.⁸⁴ In response to this humiliation, Congress passed legislation

Money,” *Atlantic Monthly*, February 9, 2011; <http://www.theatlantic.com/magazine/archive/2011/03/saying-no-to-1-billion/308380>.

⁸⁰ *Ibid.*

⁸¹ Most notable in the United States was the return of the Sacred Blue Lake to the Taos Pueblo. See John J. Bodine, “Blue Lake: A Struggle for Indian Rights,” *American Indian Law Review* 1 (1973): 23-32. Canada’s first land repatriation effort was recent; the Tsilhqot’in of British Columbia were awarded an “aboriginal land title,” putting territory and resources under the control of the Tsilhqot’in Nation. See Dene Moore, “Supreme Court Ruling Grants Land Title To B.C. First Nation,” *Huffington Post*, June 26, 2014, http://www.huffingtonpost.ca/2014/06/26/supreme-court-decision-bc-first-nation_n_5533233.html.

⁸² “Restitution becomes the proper remedy where there is no other remedy for a distinct and worthy claim,” as Martha Minow writes in *Between Vengeance and Forgiveness*, 110.

⁸³ *Sioux Nation*, 448 U.S. at 382. The two treaties were signed in 1851 and 1868 at Fort Laramie. Ostler, *Lakotas and the Black Hills*, 38-44, 58-68.

⁸⁴ Ostler, *Lakotas and the Black Hills*, 81-98.

ordering the Lakota to cede a large area that included the Black Hills.⁸⁵ He Sapa—as of 1912, Custer State Park—is now managed by the state of South Dakota; millions of tourists flock to the Black Hills each year to see the faces of four U.S. presidents carved into the sacred peaks. The Lakota maintain that they never wanted monetary redress, and that the reparations claim had always been about the land.⁸⁶ The 1980 Supreme Court case was originally undertaken in the Lakota name by a do-gooder white lawyer, and was not endorsed by the majority of Lakota.⁸⁷ The Court’s monetary award is widely viewed with suspicion, perceived to be another legal maneuver meant to forever extinguish the Lakota claim. If the Lakota Nations were to accept monetary reparations, an individual Lakota would still have to drive past a sign with Custer’s name on it, and pay an entrance fee to the state of South Dakota, every time she went to the Black Hills. Accountability cannot actually be demonstrated with He Sapa under the control of the state of South Dakota as Custer State Park. In the eyes of the Lakota people, transferring He Sapa to the Lakota is the only way for the government to demonstrate that its accountability is genuine.

⁸⁵ Ibid., 98. The legislation was preceded by an expedition to secure the “agreement” of the Lakota. Ten men signed a document agreeing to relinquish the Black Hills, but the 1868 treaty stipulated that the signatures of three-fourths of all Lakota men were needed to cede any lands protected by the treaty, as described in *Sioux Nation*, 448 U.S. at 382. (Those who signed later said that they did so under coercion.)

⁸⁶ As Simon Broken Leg, a Sicangu Lakota, put it: after the money is spent, “then what you got tomorrow? You got no land; you got no future; you got nothing.” Quoted in Edward Lazarus, *Black Hills/White Justice: The Sioux Nation Versus the United States, 1775 to the Present* (New York: Harper Collins, 1991), 404. Note that Lazarus’s book is controversial: the author’s father represented the Lakota in the 1980 Supreme Court case, and Lazarus (the son) paints the Lakota position as inexcusably naïve.

⁸⁷ With great facility, Ostler devotes Chapter 5 of his book to navigating the knotty historical controversy as to whether the Lakota nations’ preference for the repatriation of the Black Hills over monetary compensation was consistent throughout the twentieth century, as there are some who have argued that it was not. His conclusion: the “Lakotas did not necessarily see compensation and the return of the land as mutually exclusive. They recognized that the only realistic goal in the short term was to seek compensation. This was a compelling objective, as it promised significant relief from hardship and poverty. But to seek a monetary award did not rule out eventually regaining the land.” *Lakotas and the Black Hills*, 138-139.

When reparations do take the form of a monetary payment, we can ask, does it matter what is done with the money? The response is pluralistic: sometimes it matters a lot, and in other cases, it may not matter at all. To explain, let us preview an argument that will be made more fully in Chapter 5. Some state-sponsored injustices affect individuals in their capacity as individuals, targeted almost at random, as they do not share characteristics with other targets that might distinguish them as a “group.” Some injustices are felt collectively by groups. Individuated harms typically are not transmittable over time, so reparations claims are usually made by living victims or their immediate family members. Group harms, however, are more likely to be transmitted over time, with different generations experiencing the harmful impact of the injustice in different ways, and sometimes new injustices as well.⁸⁸

With this framework in mind, it is possible to observe that when reparations for individual harms go to living victims or their immediate family members, the usage of reparations awards tends to matter little. Since the targets of state-sponsored injustice are often economically vulnerable, it would be overly paternalistic for the state to dictate how a reparations check ought to be spent. When it was determined that the North Carolinian victims of forced sterilization should be paid \$50,000 each, one woman who had been sterilized, Rita Thompson Swords, was asked by a journalist whether she was satisfied with the amount and how she would spend it. “I think that number sounds fantastic,” Swords responded. “That is surely going to help a lot. Lord, I wouldn’t know how to act if I get to buy me some new clothes.”⁸⁹ Swords grew up poor in a family of 16 children and was sterilized during a Caesarean section at

⁸⁸ In Chapter 5, I discuss “symptomatic harms” as another possibility besides individual and group harms.

⁸⁹ Kim Severson, “Payment Set for Those Sterilized in Program,” *New York Times*, January 10, 2012, <http://www.nytimes.com/2012/01/11/us/north-carolina-sterilization-victims-get-restitution-decision.html>.

age 21 without her consent. If she had been subject to medical malpractice by a private doctor, sued, and was awarded \$50,000 in damages by the court, an interloper is unlikely to inquire about where the money was going, except possibly out of disinterested curiosity. Accordingly, the state ought not to dictate what someone like Swords should do with the money.

But when it comes to group harms, especially those with historical roots, there are good reasons why individual checks should not be sent out. First, the group is typically so large that it would seem to be an affront to considerations of distributive justice for only those poor individuals to get a life-altering amount of money who belong to it.⁹⁰ Second, individuals may be economically incentivized to assert an identity that is not authentic, bringing out an ugly strain of identity politics over who is or is not a group member.⁹¹ Third, even if all parties were perfectly civil, there are still hard questions that do not come up in more individuated cases of state-sponsored wrongdoing. Who counts as black when it comes to reparations for slavery and segregation?⁹² All African immigrants and their descendants as well native-born African Americans? Or just the latter? What about mixed racial individuals? These questions, though difficult, are not impossible to answer, and there have been plausible attempts at working them out.⁹³ But the three concerns taken together—competing distributive justice claims, high

⁹⁰ Eric K. Yamamoto, “Racial Reparations: Japanese American Redress and African American Claims,” *Boston College Third World Law Journal* 19 (1998): 477-526; Spinner-Halev, *Enduring Injustice*, 31, 36.

⁹¹ For an example of these dynamics in a reparations case, see William Glaberson, “Who Is a Seminole, and Who Gets to Decide?” *New York Times*, January 29, 2001, <http://www.nytimes.com/2001/01/29/us/who-is-a-seminole-and-who-gets-to-decide.html>, about a reparations payment that pitted “black” against “blood” Seminoles. See also Lawrie Balfour’s more general discussion in “Reparations after Identity Politics,” *Political Theory* 33 (2005): 786-811.

⁹² This question is formulated by Olamide Olatunji, “‘Black Is, Black Ain’t’: The Complication of Black Identity in the Allocation of Black Reparations” (senior thesis, Harvard College, 2014), Ch. 3.

⁹³ *Ibid.*

economic stakes identity politics, and substantively difficult questions of identity—suggests that group reparations awards are a better route.

When it comes to group reparations awards, it matters very much how the money is used. The group is likely to be diverse from the standpoint of socioeconomic class. Though all group members are almost certain to have felt the effects of state-sponsored injustice in various ways throughout their lifetimes, its weightiest burdens are carried by the poor. A reparations award should be directed at trying to break through the cycle of disadvantage that was set in motion and maintained by state-sponsored injustice.

A 2003 Chappelle's Show sketch on black reparations, provocatively offensive in trademark Dave Chappelle fashion, shows late night news reporters doing deadpan interviews with African American males lined up in mass numbers to get into the liquor store, and describing fried chicken and Sprint telephone stock skyrocketing. "Folks, I am happy to report that the recession is now officially over, and we have nobody to thank but all these black people," as one reporter quips. "With their taste for expensive clothes, fancy cars, and of course, gaudy jewelry."⁹⁴ The sketch could very well be called "How White Folks Think African Americans Would Spend Slavery Reparations." A huge gap exists between white perceptions of the black reparations claim, and scholarly and popular accounts that focus on forward-looking uses that would benefit disadvantaged African Americans.⁹⁵ As per a statement issued after the First National Reparations Congress in 2004, which was convened to discuss slavery and Jim

⁹⁴ "Reparations 2003," *Chappelle's Show*, Comedy Central, February 12, 2003, Television, <http://www.comedycentral.com/video-clips/wiivgt/chappelle-s-show-reparations-2003>.

⁹⁵ See Robert Westley, "Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?" *Boston College Law Review* (1998-1999): 429-476; Charles J. Ogletree, Jr., "Reparations for the Children of Slaves: Litigating the Issues," *University of Memphis Law Review* (2002-2003), 245-264; Randall Robinson, *The Debt: What America Owes to Blacks* (New York: Plume, 2001); and the anonymous essay, "Bridging the Color Line," *Harvard Law Review* 115 (2001-2002): 1689-1712.

Crow redress: “Reparations is not a plea for a handout, another welfare program, or an extortion plot to fleece whites.”⁹⁶ Rather, the aim of reparations is “Black assessment and identification of those negative and debilitating aspects of our communities that we can mobilize and organize our efforts to repair, reform and correct for our own benefit.”⁹⁷ There are black-led programs like Geoffrey Canada’s Harlem Children’s Zone that have been proven to be transformative for communities and the individuals within them. The chance to fund community-level projects in this spirit, led by a “Talented Tenth” of black leaders, is often what motivates black reparations proponents.⁹⁸

Beyond the proposed uses of black reparations, however, what monetary redress is ultimately capable of providing is accountability. If they are about accountability, is the implication, then, that monetary reparations will not close the cavernous wealth gap between blacks and whites?⁹⁹ On the compensatory understanding of reparations, the latter is undoubtedly the aim. Indeed, for many, the language of reparations expresses the yearning for radical racial equality; in this regard, reparations are supposed to do, and be, *everything*.¹⁰⁰ But at least among the charitable naysayers, skepticism towards reparative justice arises precisely because of a

⁹⁶ Larry Aubry, “Building on the First National Reparations Congress,” *Los Angeles Sentinel*, reprinted April 6, 2006, <http://sentinel-los-angeles.vlex.com/vid/building-national-reparations-congress-62969735>.

⁹⁷ *Ibid.*

⁹⁸ W. E. B. Du Bois, “The Talented Tenth,” in *The Negro Problem: A Series of Articles by Representative Negroes of To-day* (New York: James Pott and Company, 1903).

⁹⁹ Melvin Oliver and Thomas M. Shapiro, *Black Wealth/White Wealth: A New Perspective on Racial Inequality*, (New York: Routledge, 2006); Dalton Conley, *Being Black, Living in the Red: Race, Wealth, and Social Policy in America* (Berkeley: University of California Press, 1999).

¹⁰⁰ See Adjoa A. Aiyetoro, “Why Reparations to African Descendants in the United States are Essential to Democracy,” *Journal of Gender, Race, and Justice* 14 (2011): 633-664, esp. 662-663. But even Oliver and Shapiro, who argue that reparations are the right way of addressing the black-white wealth gap, acknowledge that the payment of reparations itself will not close the gap, and is rather “a first step in a collective journey to racial equality.” Oliver and Shapiro, *Black Wealth/White Wealth*, 192-194.

concern that levelling such longstanding inequalities through a redress program, no matter how ambitious and well-implemented the program is, is unrealistic. There is validity to this concern—to think otherwise is to overlook the depth of the harm whose existence warrants reparations in the first place. To endorse the accountability-based theory of reparations in favor of the compensatory understanding is not to give up on overcoming racial inequality, however. It is to endorse coming to terms with the role that government policies and practices have played in creating and maintaining it, something which in turn is our best hope when it comes to the color line’s dogged endurance in the twenty-first century.¹⁰¹

For now, let us conclude the exposition of the accountability-based theory of reparations by examining the concept of responsibility. Without responsibility, accountability is meaningless; it does not make sense to hold the state accountable for something for which it is not responsible. In what sense are governments responsible for the injustices for which reparations claimants hold them to account?

2.4 When Is the State Responsible for Injustice?

Once again, the injustices that are relevant to the accountability-based theory of reparations are injustices conducted by the state. It is clear enough in the interpersonal context that for it to be fair to hold someone accountable for something, she must actually be responsible for the deed. How do we assess responsibility when it comes to state-sponsored injustice? The easiest cases—the majority of them—involve a specific law, set of laws, executive order, military

¹⁰¹ This, anyway, is the claim to which Chapter 7 is devoted, where it is argued that, beyond the value of accountability for its own sake, reparations have the potential to subvert stereotypical majoritarian explanations of black socioeconomic disadvantage. As Martin Gilens has persuasively demonstrated in *Why Americans Hate Welfare: Race, Media, and the Politics of Antipoverty Policy* (Chicago: University of Chicago Press, 1999), the trope of the black “undeserving poor” has great explanatory power when it comes to the low levels of redistribution in the United States.

act, administrative practice, and/or court ruling. Bracketing (for now) potential difficulties related to the passage of time, there is a causal connection between a political action and some kind of injury: the injury took place according to the law. However, a number of cases are more difficult because there was no official policy, no order handed down. Some involve the state failing to protect individuals from wrongdoing. Others involve the state failing to respond to wrongdoing in an appropriate manner. Is the state responsible for the in-the-moment actions of state officials along with its formal policies? For its inactions as well as for its actions?

Ultimately, these are questions that need to be addressed according to the details of a given case. But a few examples will show that assessing responsibility is not as difficult as some commentators contend, at least when we are trying to evaluate *state* responsibility and not something more nebulous like the collective responsibility of whites for racial prejudice.

If a state official or employee acts wrongly and the relevant higher authorities disavow the actions, taking steps that are appropriate given the nature of the wrongdoing, then it is not the injustice of the state that is at issue, but rather, the actions of a corrupt individual. For instance, in 2013, a white police sergeant, Ron King, made shooting targets bearing the image of Trayvon Martin (the black teenager who was shot to death by a militant neighborhood watchman as he walked through a gated community) and distributed the targets to his underlings at the shooting range.¹⁰² The Port Canaveral Police Department acted appropriately in promptly firing King.

By contrast, the state can choose to ignore or protect a corrupt individual, or safeguard a culture of corruption. Consider the case of the Huronia Regional Centre, a state residential institution for the intellectually disabled in Ontario. Throughout the institution's history, staff

¹⁰² Michael Martinez, "Florida Police Sergeant Fired for having Trayvon Martin Shooting Targets," *CNN*, April 14, 2013, <http://www.cnn.com/2013/04/13/us/florida-trayvon-martin-targets>.

members subjected the residents to physical abuse and a variety of unusual punishments, and some to sexual abuse as well.¹⁰³ Over 2,000 residents who died while on the institution's watch were buried, mostly in unmarked graves, in a field behind the institution.¹⁰⁴ Huronia was not shut down until 2009; in 2010, former residents initiated a series of class action lawsuits against the Ontario government. That the Ontario government settled and agreed to pay reparations no doubt was the right course of action.¹⁰⁵ For decades, the government took no action against the employees of the institution. Ignorance was no excuse; newspapers periodically ran articles on the facility's overcrowded conditions and the abuses that took place.¹⁰⁶ Through its inaction, the Ontario government protected a culture of abuse, and is rightly understood as responsible for it.

In the case of the Huronia Regional Center, state employees carried out injustice while higher-ups looked the other way. But what about *citizens* carrying out injustice, with state officials looking the other way? Lynching is a quintessential example. By definition, lynching refers to the extra-judicial hanging of an individual by a mob, which suggests that citizens, not the state, are responsible. However, though death by lynching was a practice external to the U.S.

¹⁰³ Kate Rossiter and Annalise Clarkson, "Opening Ontario's 'Saddest Chapter': A Social History of the Huronia Regional Centre," *Canadian Journal of Disability Studies* 2 (2013): 1-30; Tim Alamenciak, "Ontario Judge Approves Settlements in Institutions Denounced for Abuse," *Toronto Star*, February 24, 2014, http://www.thestar.com/news/gta/2014/02/24/ontario_judge_approves_settlements_in_rideau_and_southwestern_institutions.html.

¹⁰⁴ Rachel Mendleson, "Huronia Institution Cemetery a Painful Reminder of Neglect and Abuse," *Toronto Star*, September 17, 2013, http://www.thestar.com/news/gta/2013/09/17/former_residents_settle_huronia_lawsuit_for_35m.html; Paola Loriggio, "Huronia Regional Centre: Class-Action Lawsuit Set to Begin over Alleged Abuse," *Toronto Star*, September 16, 2013, http://www.thestar.com/news/canada/2013/09/16/huronia_regional_centre_classaction_lawsuit_set_to_begin_over_alleged_abuse.html.

¹⁰⁵ Alamenciak, "Ontario Judge Approves Settlements."

¹⁰⁶ As per a 1960 *Toronto Star* editorial, "Remember this: After Hitler fell, and the horrors of the slave camps were exposed, many Germans excused themselves because they said they did not know what went on behind those walls: no one had told them. Well, you have been told about Orillia." Pierre Berton, "What's Wrong with Orillia: Out of Sight—Out of Mind," *Toronto Daily Star*, January 6, 1960. Quoted in Rossiter and Clarkson, "Opening Ontario's 'Saddest Chapter'." (Orillia was the name of the Huronia Regional Centre at the time.)

legal system during Jim Crow, it was a practice that was systematically tolerated. This was acknowledged in a 1947 report commissioned by President Harry S. Truman, which described the “almost complete immunity from punishment enjoyed by lynchers.”¹⁰⁷ Sheriffs sometimes attended lynchings, but even if they did not, intentionally staying home on nights when rumors of a planned lynching were going around, it was their unwillingness to punish lynchers that allowed the practice to continue for nearly a hundred years after the end of slavery.¹⁰⁸ However, the federal government was ultimately responsible, as it was known that with the appropriate Congressional action, the practice of lynching would have ceased. This is something for which the Senate issued an official apology, describing how 200 Congressional anti-lynching bills were proposed which it had the opportunity to vote into law, and how seven presidents had petitioned Congress to put a stop to lynching.¹⁰⁹ Lynching became obsolete only as the topic of civil rights received mainstream political support in increasing proportions in the 1950s and 1960s. From a

¹⁰⁷ *To Secure These Rights: The Report of the President's Committee on Civil Rights* (New York: Simon and Schuster, 1947): 24-25.

¹⁰⁸ Stanley Lieberson, *A Piece of the Pie: Blacks and White Immigrants Since 1880* (Berkeley: University of California Press, 1980): 103-105.

¹⁰⁹ S. Res. 29, 109th Cong. (2005). The House passed two anti-lynching bills as well, so it seems that the Senate is indeed to blame. However, we might also think of the federal government as a whole as responsible for an action brought about by any one of its branches. It is standard to consider a government a corporate body and agent. David Miller captures this idea in discussing governance as a “cooperative practice” where “people who find themselves on the losing side of a vote must regard themselves as bound by the result.” Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007), 121. Drawing from Peter French, *Collective and Corporate Responsibility* (New York: Columbia University Press, 1984), 48-66, governments have a “corporate internal decision structure” which produces actions, such that moral responsibility and accountability can be attributed to the state as a whole. This applies for decisions and practices more complex than with a simple majority rule vote, as Anna Stilz explicitly argues in “Collective Responsibility and the State,” *Journal of Political Philosophy* 19 (2011): 190-208, so long as the procedures enjoy legitimacy. Finally, note the distinction between corporate and collective responsibility. In Steven Sverdlick’s words: “[C]ollective responsibility is the idea that individual persons within a group are responsible for an outcome produced collectively. That is, responsibility is apportioned to individuals and to them alone. With corporate responsibility the group is treated as a being distinct from its members and responsibility for wrongdoing is attributed to it. If one supposes that corporate responsibility is possible then it is an open question whether the individuals in the group are also responsible for the outcome or whether the group as such is alone responsible.” Sverdlick, “Collective Responsibility,” *Philosophical Studies* 51 (1987): 61-76, 62. In Chapter 4, I consider whether citizens are responsible for state-sponsored injustice.

legal point of view, the idea that the state might be responsible for something that it failed to do is not as strange as it might seem. As Kim Forde-Mazrui points out, during American hostage crisis of 1979-1980, the International Court of Justice held the Iranian government to be responsible for the actions of the hostage-takers because its inaction “amounted to a ‘seal of approval.’”¹¹⁰

It seems, then, that there are at least three categories of state responsibility for injustice: injustice that is specifically authorized by government officials, officials failing to prevent abuses carried out by state employees, and officials failing to prevent egregious wrongdoing by members of society. To this, a fourth can be added. A horrific event like a natural disaster or terrorist attack might take place that state authorities did not foresee. Perhaps the event’s occurrence is attributable to the state’s gross lack of precautions. In this case, responsibility is fairly straightforward, as the state is a kind of corporate agent that has acted negligently.¹¹¹ But state authorities may not have reasonably foreseen a disastrous incident, and yet still have obligations in its aftermath to treat the injured parties with respect and be responsive to their requests for an investigation.¹¹² Depending on the situation, it may be appropriate for the state’s tortious liability to be assessed, or for a criminal proceeding to be carried out. Take the example of the 1998 car bombing in Omagh, Northern Ireland, which left 29 dead and many more injured. It was widely supposed that Irish and British officials did not prosecute the members of Real Irish Republican Army who admitted to carrying out the attack for fear that a trial would upset

¹¹⁰ Kim Forde-Mazrui, “Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations,” *California Law Review* 92 (2004): 683-753, 722.

¹¹¹ Philip Pettit discusses corporate responsibility and negligence in “Responsibility Incorporated,” *Ethics* 117 (2007): 171-201. See also French, *Collective and Corporate Responsibility*, 129-144.

¹¹² In Chapter 5, I differentiate between a tragedy and injustice.

the peacemaking process that was taking place.¹¹³ The families of the deceased fought for three years to have a preliminary investigation conducted and a decade for a full investigation, being made to undergo Kafkaesque treatment as they tried to find out information about the bombing and whether there would be a criminal trial.¹¹⁴ Though the bombers are fully responsible for the attack, the state is nevertheless fully responsible for its own response. This may not mean that it owes an amount of monetary redress that is equivalent to the damages that the bombers were eventually found liable for, but it was appropriate for the Omagh District Council to have set up and contributed to a fund for a memorial site in honor of the deceased.¹¹⁵

One might object, however, that these four categories of responsibility make governments out to be on the hook for everything. It may therefore be useful to look at a case where the government is not responsible for injustice. The Knoxville Race Riot took place during the “Red Summer” of 1919, and was triggered, like so many race riots that summer, by the alleged murder of a white woman by a black man. Fearing that a lynching mob would break into the jailhouse the night following the murder, the sheriff took the accused to a neighboring county.¹¹⁶ When a

¹¹³ I draw from “The Omagh Bombing: Some Remaining Questions,” Northern Ireland Affairs Committee, Fourth Report of Session 2009-10, House of Commons, March 16, 2010, <http://www.parliament.the-stationery-office.co.uk/pa/cm200910/cmselect/cmniaf/374/374.pdf>; and Nuala O’Loan, *Statement by the Police Ombudsman for Northern Ireland on her Investigation of Matters Relating to the Omagh Bombing on August 15, 1998*, December 12, 2001, <http://cain.ulst.ac.uk/issues/police/ombudsman/po121201omagh2.pdf>.

¹¹⁴ A criminal trial did not take place until 2014. “Man Charged with Murder of 29 People in 1998 Omagh Bombing,” *Guardian*, April 10, 2014, <http://www.theguardian.com/uk-news/2014/apr/10/man-charged-murder-29-people-omagh-bombing>.

¹¹⁵ The memorial was built in time to commemorate the bombing’s tenth anniversary. “Omagh Remembers,” from website of the Omagh District Council, last accessed January 27, 2015, http://www.omagh.gov.uk/district_of_omagh/omagh_remembers. The families of the deceased sued four members of the Real Irish Republican Army for damages, who were ordered to pay £1.6m in reparations. See “Omagh Bomb: Colm Murphy and Seamus Daly Found Liable at Retrial,” *BBC News*, March 20, 2013, <http://www.bbc.com/news/uk-northern-ireland-21858904>.

¹¹⁶ Lee E. Williams and Lee E. Williams II, *The Anatomy of Four Race Riots* (Jackson: University Press of Mississippi, 1972), 27; Matthew Lakin, “A Dark Night: The Knoxville Race Riot of 1919,” *Journal of East Tennessee History* 72 (2000): 1-29, 12.

mob of a thousand white Knoxvilleans successfully broke into the jailhouse with battering rams and dynamite, the mayor realized that the Knoxville police force had been overwhelmed, and called in the National Guard.¹¹⁷ As the riot developed into an all-out battle between heavily armed rioters and law officials, more National Guardsmen were called in, as well as hundreds of special policemen and deputy sheriffs.¹¹⁸ A group of armed rioters repeatedly attempted to attack a group of African Americans who had been blockaded in trying to flee the riot, but law officers and soldiers successfully staved off each attempt.¹¹⁹ In the end, seven persons—several of whom were law enforcement officials—were killed, and hundreds of Knoxville residents, black and white, suffered gunfire wounds.¹²⁰ While certainly violent, unlike many other race riots during the summer of 1919, the Knoxville riot lacked random lynchings and the destruction of black homes.¹²¹ In fact, much of the property damage done during the riot was the looting of white-owned stores that carried ammunition.¹²² While the black Knoxville community certainly had the right to complain about the riot, it seems that there is little more that government actors could have done to suppress it, and indeed, losses to the black Knoxville community as a whole were minimal. Responsibility thus falls squarely on the shoulders of the rioters, not the state of Kentucky. To varying degrees, other riots that took place during the summer of 1919 and beyond were, by contrast, characterized by local or state officials watching or participating in the riot,

¹¹⁷ Williams and Williams II, *Anatomy of Four Race Riots*, 28; Lakin, “Dark Night,” 4-5.

¹¹⁸ Williams and Williams II, *Anatomy of Four Race Riots*, 34.

¹¹⁹ *Ibid.*, 34-35.

¹²⁰ *Ibid.*

¹²¹ Lakin, “Dark Night,” 2.

¹²² Williams and Williams II, *Anatomy of Four Race Riots*, 30.

deputizing white rioters and lynchers, and interning blacks while their homes and businesses burned.¹²³ However, though today there are outstanding reparations claims pertaining to riots from that period, it is revealing that there has never been any mention of the idea of Knoxville Race Riot reparations. Reparations claims derive much of their energy from a belief in a blameworthy state.¹²⁴

In a federal system, it is true of course that “the state” is multi-layered, making the assessment of responsibility ostensibly more complicated. The separation of powers and the administrative functions of government add to the complication. But there is a difference between determining which political actors are causally responsible for an injustice—a task that involves parsing complex “many hands” problems—and figuring out where a reparations claim should be directed.¹²⁵ In a political apology, it may make sense to assign responsibility to specific actors, naming names perhaps, but it is still going to be the case that taxpayer dollars are

¹²³ See, e.g., Robert Whitaker, *The Red Summer of 1919 and the Struggle for Justice that Remade a Nation* (New York: Three Rivers Press, 2009).

¹²⁴ N.B. In Chapters 3 and 7, I point out that activists for black reparations have been unsuccessful in holding the U.S. government responsible for its injustices against African Americans, and have been pragmatically motivated to turn their attention to obtaining redress from commercial firms. Firms, as well as social, religious, educational, and privately funded civic organizations may choose to apologize, set up memorials and scholarship funds, investigate their own history, make a concrete commitment to be more inclusive of the group that was treated unjustly, and/or pay direct monetary redress. The state may even require non-state actors to pitch in with the work of reparative justice: as discussed in Chapter 7, until Supreme Court intervened in 1978, the federal-level Equal Employment Opportunity Commission pushed firms and universities to undertake affirmative action, which might reasonably be considered a form of reparative justice. This raises the interesting question, though, as to whether a state ought to require non-state actors to undertake the work of redress—not in a “pitching in” sense, but *for their own unredressed injustices*—on the accountability-based theory. I reply in the negative. The duty of redress derives from the special nature of the relationship between a liberal democracy and individual subjects. Social institutions may wield great power, but it is not akin to the power of states, as social institutions cannot make laws, set up their own militaries, run courts, etc. On my theory, the exercise of political power requires having legitimate authority, and accountability is owed if the values and commitments that legitimize power are ignored. I accept that there may be a rich theoretical account of the moral relationship between citizens and non-state institutional actors that grounds a relationship of accountability and a duty of redress, but I do not take a stand on what human beings owe to one another *generally*, just what liberal democracies owe to a sovereign people.

¹²⁵ For guidance on how to resolve questions about assigning responsibility, see Dennis F. Thompson, “Responsibility for Failures of Government: The Problem of Many Hands,” *American Review of Public Administration* 44 (2014): 259-273.

budgeted at the federal, state, or local level for paying redress.¹²⁶ In practice, reparations claimants do a fairly good job of identifying the appropriate level of government as the target of their claim, usually choosing the highest level that can be reasonably held responsible for the fact of the injustice having taken place. And so, for example, with the Tulsa Race Riot of 1921, in which the actions of law enforcement officials greatly exacerbated African American losses, though the episode may appear to have been an entirely local matter, claimants sought reparations from the state of Oklahoma due to the Governor's heavy involvement in both the riot and its aftermath.¹²⁷ Because the question as to the appropriate level of government to hold accountable is so sensitive to the details of a particular injustice, it is one that is best left to practice.

The majority of cases of state-sponsored injustice, again, are not acts of omission. Huronia Regional Centre and lynching are exceptions rather than the norm. Usually responsibility is found in state actions that enjoy the backing of the law, and often the protection of the courts as well. The state's involvement exacerbates injustice by directing taxpayer resources to unjust ends, coordinating the activities of state employees and lending officiality to the practice. It gives an injustice's proponents a platform to make a case for its legitimacy in liberal democratic language, which in turn provides the members of the politically dominant class with socially acceptable reasons to lend their support to the injustice. What is the nature of law and political authority such that state-sponsored injustice can take place in a political system

¹²⁶ On naming names, see *Ibid.*, 262.

¹²⁷ Scott Ellsworth, *Death in a Promised Land* (Louisiana State University Press: Baton Rouge, 1982), 94 *et passim*.

that subscribes to liberal democratic ideals? This all-important question is the subject of the next chapter.

2.5 Conclusion

Opening the door to reparations claims solves a deep problem within liberal democracy, as much as the problem can be solved: checks and balances and a commitment to rights will not always prevent political power from being abused. A liberal democracy's willingness to pay reparations indicates its willingness to be accountable to the people, who are sovereign in principle, though not always in practice. It is impossible to undo the past, and impossible to make up for it completely, thus realizing the high-bar demand of *restitutio in integrum*. Asking for accountability is a natural and morally appropriate response to the state's wrongdoing.

Reparations claims sometimes get a bad rap. They are portrayed as an opportunistic strain of identity politics and a form of victimhood one-upmanship. The monetary incentive encourages people to fixedly identify as members of groups, it is argued, or worse, to dress up the specters of invisible injuries to use in a symbolic political game.¹²⁸ My claim is not that every reparations claimant is driven by the all of the right reasons, and none of the wrong ones. But I do not think that an interest in accountability belongs to the realm of symbolism, and hope to have laid the groundwork for understanding the reasonableness of reparations claims against the state.

¹²⁸ See the warnings against "contrition chic" in Griswold, *Forgiveness*, 182.

Chapter 3

The Injustice of the State

You knew the reasons were wrong but you found ways to justify your wrong. Not just your wrong—your wickedness, cowardliness. You found ways to justify it. You said that they would produce a generation of people, of children, that would be feeble-minded, inept, unable to care for themselves... But they brought out their personal intentions to attack my mother and other women, they brought out their personal desires and they used the state's money and the state's authority to bring this punishment upon my mother and people like my mother.

- Tony Riddick, June 22, 2011, Testimony before the Governor's Task Force to Determine the Method of Compensation for Victims of North Carolina's Eugenics Board ¹

An accountability-based theory of reparations finds it to be of first-order importance that reparations claims target the state. When reparations claims target the state, this is not for instrumental reasons—*viz.*, because of the depths of the state's coffers, its continuity over time, or because it is a satisfactory proxy for society or "us." Rather, there is something *about* the nature of political authority and power, and particularly the meaning of the exercise of political authority and power in a liberal democracy, that makes the state the target. In a liberal democracy, political authority is legitimized by a commitment to individual rights; its constitutional design regulates against a variety of potential abuses of power. It is due to a belief in the inconsistency of a state-sponsored injustice and the broader aspirations of the state that leads redress seekers to think that the injustice ought not have happened. But to make sense of reparations claims, it is necessary to examine how state-sponsored injustice does in fact happen. And so, of practices like segregation, slavery, Indian land removal, forced cultural assimilation,

¹ *Preliminary Report of the Governor's Task Force to Determine the Method of Compensation for Victims of North Carolina's Eugenics Board*, Pursuant to Executive Order 83, January 27, 2012, Appendix D: Transcript – June 22, 2011 Public Hearing for Sterilization Victims, D-9. Transcript of live testimony; edited for spelling and one punctuation error. Report available online at http://www.sterilizationvictims.nc.gov/documents/preliminary_report.pdf.

nonconsensual medical procedures and human subjects research, and internment, a seemingly naïve yet fundamental question can be asked. How is state-sponsored injustice possible within a liberal democracy?

What follows is an attempt to provide a theoretical framework for responding to this question. On my account, liberal democratic language can accommodate a wide range of beliefs and social schemes, some of which belie a faithful adherence to liberal democratic principles. There are a variety of reasons and motivations for an unjust practice to be conducted by the state and according to the law. Not only does the state's participation expand the reach of an unjust practice, what takes place through law is, by definition, legal—which is important if a practice thereto occupies murky legal waters. The perpetrator who commits a wrong through the law is buffered from accountability: the victim of injustice cannot claim that she has been *legally* wronged. As I argue, the legality of the law and the privileged nature of political authority give rise to a capacity for state-sponsored injustice that is not anticipated in the institutional design of liberal democracy to a sufficient degree. Liberal democracies ought to be much more willing to repair injuries caused by their unjust policies and practices not merely as a matter of justice for a particular set of victims—though this is certainly important—but because doing so makes for a liberal democratic enterprise that is more consistent with its own principles and commitments. To carefully devise a variety of institutional safeguards to moderate and balance power, yet not foresee that these safeguards will not always be failsafe, is a serious flaw in the design of liberal democracy. Though it is unlikely that a better means of preempting state-sponsored injustice will emerge anytime soon, instituting and institutionalizing a norm of redress would provide much-needed ex post facto accountability.

The chapter takes the following outline. First, I problematize the focus on the injustice of the state, as the wrongs to which reparations claims refer have much to do with the attitudes and convictions of societal actors. I then turn to the case of forced sterilization in the United States, describing both the societal and legal-political circumstances that led to the eugenically-motivated sterilizations of 65,000 individuals up until the mid-1970s. Next, I present a framework for thinking through the injustice of the state. Finally, I examine existing ways in which harms caused by the state are managed in order to defend the claim that state-sponsored injustice is not sufficiently anticipated in the design of liberal democracy.

Before proceeding, two points should be made. First, throughout the present chapter, I use the term “injustice” in a rather unsophisticated way, as if to suggest that what counts as injustice is stable across groups and over time. In later chapters, I work out a more developed conception of injustice; for now, let us assume that “injustice” is conceptually unproblematic in order to focus on the fact that injustice may be carried out by the state. Second, comparing the case for reparations to individual eugenical sterilization victims to the case for a group reparations payment to African Americans, the former is obviously an easier case. But examining the easier case allows for a clear exposition of a framework that theorizes the injustice of the state, providing insights that will be valuable when examining more complex cases down the road.

3.1 Reparations for Structural Injustice?

Let us begin by briefly reviewing Robert Nozick’s compensatory understanding of reparations. In *Anarchy, State, and Utopia*, Nozick observes that his argument for a minimal state is undermined by the fact that past injustice has shaped present-day distributive arrangements. But coming up with a satisfactory “principle of rectification” is challenging.

“How, if at all, do things change if the beneficiaries and those made worse off are not the direct parties in the act of injustice, but, for example, their descendants?” he asks. “How far back must one go in wiping clean the historical slate of injustices?”² Nozick appreciates that any holistic project of rectification is bound to be futile: given that the number of interpersonal wrongs that have shaped present-day socioeconomic outcomes is probably infinite, there would be no reasonable way to go around rectifying all these past wrongs without unduly burdening present-day individuals who had no part in them. It is thus not possible to come up with a principle of rectification without “idealizing greatly”; Nozick concedes that more extensive redistribution than is justified on his theory might suffice in lieu of correcting all past wrongs.³

One might reasonably argue, though, that it is not actually necessary to redress all wrongs from the past. To use a well-known example from the contemporary reparations literature, if your grandfather stole my grandfather’s automobile, and you inherit a vehicle that you rely on and count among your possessions, it would be an injustice to take it from you to give to me. Unrectified interpersonal injustices may thus be superseded by the passage of time.⁴ But there are many wrongs that have meaning beyond the interpersonal context; they are endogenous to an entire social system that is unjust. And so, as authors like Iris Marion Young contend, when systemic injustice of the past is the root of systemic injustice in the present, this is “structural injustice.”⁵ Unlike historical interpersonal wrongdoing, which consists of discrete wrongs between identifiable individuals, structural injustice is defined by “a large amorphous collective

² Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 152.

³ *Ibid.*, 231.

⁴ Jeremy Waldron, “Superseding Historic Injustice,” *Ethics* 103 (1992): 4-28.

⁵ Iris Marion Young, *Responsibility For Justice* (Oxford: Oxford University Press, 2011), 45 *et passim*.

of persons” sharing responsibility.⁶ Consider a slave-holding family that treated its slaves well. Yes, they bought persons and forced them to labor against their will. But slavery was a “peculiar institution,” and treating persons as objects is just what white plantation-owning families did. *Of course* the owners of slaves are to blame for slavery. However, they share this responsibility with pro-slavery politicians, corporations that profited from slavery, Northern whites who did not provide refuge to runaway slaves, and even slaves themselves who curried favor with their owners by treating their fellow slaves inhumanely—“victim-perpetrators” as they are sometimes called in these contexts.⁷ As Young argues, the complexity of the web of injustice, the way in which it implicates an entire system, an entire *people*, must be appreciated.

On this account, should we try to rectify the structural injustices of earlier generations? Seeking redress from the descendants of long-dead slaveowners is a nonstarter; few who have thought about the subject have advocated this. But as Young herself acknowledges, there is some sense in trying to sort out particular contributions to injustice when a continuous non-state actor, like a corporation, is willing to take responsibility.⁸ Should they pay, though? Some reparationsists would respond in the affirmative. On my account, though, attempts to obtain monetary redress from organizations, firms, and the like—the activities of the “corporate restitution” movement—are often misguided.⁹ For example, lawsuits against American insurance

⁶ *Ibid.*, 175.

⁷ Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge: Cambridge University Press, 2004), esp. 100-114; Catherine Lu, “Colonialism as Structural Injustice: Historical Responsibility and Contemporary Redress,” *Journal of Political Philosophy* 19 (2011): 261-281, 270. Lu uses Young’s structural injustice framework to argue that colonial injustices like the Japanese military’s practice of recruiting Korean “comfort women” are injustices for which societies, not states, are responsible.

⁸ Young, *Responsibility for Justice*, 175-176.

⁹ Adjoa A. Aiyetoro, “Formulating Reparations Litigation Through the Eyes of the Movement,” *NYU Annual Survey of American Law* 58 (2001): 457-474.

companies for issuing policies on slaves' lives to slaveowners were pursued largely because monetary redress from the United States government has not been forthcoming.¹⁰ No descendent of slaves had reason to begrudge Aetna prior to a surprising archival discovery of the firm's slave insurance policies in the late 1990s. When the policies came to light, the idea was that a successful lawsuit against Aetna would set a precedent for a successful slavery reparations lawsuit against the U.S. government—at the time, the actual target of the reparations seekers. All this does not mean that Aetna should not issue an apology (which it did), or publicly disclose records of its involvement in the slave industry (which it also did).¹¹ It should, and if a non-state actor has the ability to more meaningfully narrate its role in past injustice, it should do this too. Brown University, for instance, issued a report of its involvement with the slave trade, and opened a Center for the Study of Slavery and Justice, which sponsors ongoing research and programming in the spirit of report.¹² But what about more nebulous wrongs where a combination of social, economic, and political forces worked together, and no particular agent steps forward to take responsibility? Or what about the fact that when they do, responsibility-taking for particular contributions to past injustice is inevitably piecemeal, a far cry from a sweeping project of rectification that could wipe the historical slate of injustice clean? On Young's account, that is just the nature of structural injustice.

¹⁰ Paige Fogarty, "Speculating a Strategy: Suing Insurance Companies to Obtain Legislative Reparations for Slavery," *Connecticut Insurance Law Journal* (2002-2003): 212-241, esp. 220-224. See also Margalynne Armstrong, "Reparations Litigation: What About Unjust Enrichment?" *Oregon Law Review* 81 (2002): 771-782.

¹¹ "Testimony at the Chicago City Council Hearing on the JP Morgan Chase Manhattan Bank Merger," *Racism.org*, last accessed December 27, 2012, http://racism.org/index.php?option=com_content&view=article&id=536:repara30&catid=117&Itemid=140

¹² Brenda A. Allen et al., *Slavery and Justice: Report of the Brown University Steering Committee on Slavery and Justice* (Providence, RI: Brown University, 2006), http://brown.edu/Research/Slavery_Justice/documents/SlaveryAndJustice.pdf.

My approach stands in contrast to those that see history as full of myriad injustices that have interacted in complex ways, obviating the meaningful assignment of responsibility, and private symbolic acts of rectification as the best any present-day individual could hope for. It stands in contrast to claims like the following, from Young's *Responsibility for Justice*:

[T]hinking of the U.S. government as a specific agent distinct from the society it governs can tend to let the people of the United States off the hook too easily. Slavery and its aftermath were social ills, not simply matters of public policy. If there are responsibilities in relation to these historic injustices, then these belong in some sense to the people of the United States, or at least to some of them...¹³

In evaluating past injustice, it is difficult, but possible, to separate out what societal actors did, and what the state did. The extent to which state policies and practices are responsible for the maintenance of societal norms is in fact quite underappreciated by theorists of historical injustice. Contra Young, I worry that *not* thinking of the U.S. government as a specific agent distinct from the society it governs tends to let *the government* off the hook too easily.¹⁴ Let us turn to a concrete example.

3.2 State vs. Societal Injustice: The Case of Eugenical Sterilization Laws

It seems that Young does not wish to minimize the complexity of structural injustice by parceling out responsibility among particular actors. But on my account, calling it all “structural” inevitably leads to a rather superficial account of the privileged nature of political power when it comes to large-scale injustice. Today’s racism is much less harmful than the system of Jim Crow and institutionalized slavery, and this is essentially due to the diminution of the government as a complicit agent. What is it, then, about the government’s participation that facilitates an

¹³ Young, *Responsibility For Justice*, 177. See also Chandran Kukathas, “Responsibility for Past Injustice: How to Shift the Burden,” *Politics, Philosophy, and Economics* 2 (2003): 165-190, esp. 185.

¹⁴ Leonard Feldman raises similar criticisms about Nancy Fraser’s work in “Redistribution, Recognition, and the State: The Irreducibly Political Dimension of Injustice,” *Political Theory* 30 (2002): 410-440.

injustice's harmful impact, allows it to endure, and impresses it deeply into the structure of the social system at large?

To answer this question, let us examine the case of eugenically-motivated sterilization laws in the United States. Like most injustices that are the subjects of reparations claims, eugenical sterilization could well be cast as a structural injustice, since it is the product of societal as well as political factors. But precisely for that reason, the example is fruitful for illustrating the enabling power of a system of law when it comes to injustice that is organized, deliberate, and ambitious. What is ordered by the law is, by definition, legal, and has much greater reach than even the highly coordinated activities of private individuals. Thus the power of the state can be harnessed to legitimize and broaden injustice. Though one may question an unjust law and challenge it in court, if democratically elected legislators will the injustice and it is given the court's constitutional protection, there is no higher authority to whom one can appeal. An individual or group may work to win over public opinion, and seek change through the democratic process, but this takes time, and in the meantime, much damage can be done. Injustice of this sort is not anticipated by liberal democracies to a satisfactory degree.

3.2.1 Forced Sterilization: The Societal Roots of a State-Sponsored Injustice

Before it became a movement, and well before the goals of this movement were made into law, eugenics was studied by members of the scientific intelligentsia. Though not the first American eugenics researcher, biologist Charles Davenport was largely responsible for spreading eugenicist ideas in the United States.¹⁵ In 1910, with funding from private

¹⁵ There is a growing body of historical research on the American eugenics movement. See Philip Reilly, *The Surgical Solution: A History of Involuntary Sterilization in the United States* (Baltimore, MD: Johns Hopkins University Press, 1991); Stefan Kühl, *The Nazi Connection: Eugenics, American Racism, and German National Socialism* (Oxford: Oxford University Press, 2002); Harry Bruinius, *Better For All the World: The Secret History of Forced Sterilization and America's Quest for Racial Purity* (New York: Random House, 2006); Paul A. Lombardo, *Three Generations, No Imbeciles: Eugenics, The Supreme Court, and Buck v. Bell* (Baltimore: Johns Hopkins

philanthropists, Davenport founded the Eugenics Record Office in Cold Spring Harbor, New York, where he installed his protégé, Harry Laughlin, as director. Laughlin eventually became a co-founder and president of the American Eugenics Society, and along with the Race Betterment Foundation and the Galton Society, the organization sponsored scientific conferences devoted to eugenics. The American Eugenics Society moreover worked to generate public enthusiasm for the eugenics cause with “Better Baby” and “Fitter Family” contests at state fairs. The eugenics movement was fueled by widespread indignation that the resources of hardworking, fit men and women would be directed towards the care of dependent persons at the state’s charge, and traveling propaganda exhibits bore slogans like, “Some people are born to be a burden on others” and “Every 15 seconds \$100 of your money goes for the care of persons with bad hereditary.”¹⁶ As the crusade took off, books like *A Eugenics Catechism* interpreted biblical passages (“Do men gather grapes from thorns, or figs from thistles?”) in a eugenical light.¹⁷ Students were exposed to eugenical ideas in their biology textbooks, films like “Are You Fit to Marry?” appeared in the theaters, and publications like the *Eugenical News* and the *Eugenics Review* kept eugenics devotees up to speed on scientific and political developments. The endowments of the Carnegie, Rockefeller, and Kellogg families all helped conduct, publicize, and defend eugenics research.

University Press, 2008); and the essays collected in *A Century of Eugenics in America: From the Indiana Experiment to the Human Genome Era*, ed. Paul A. Lombardo (Indianapolis: Indiana University Press, 2011). Political scientists and theorists may be particularly interested in an excellent recent book, Randall Hansen and Desmond King, *Sterilized by the State: Eugenics, Race, and the Population Scare in Twentieth-Century North America* (Cambridge: Cambridge University Press, 2013), for its keen attention to the political aspects of sterilization policies.

¹⁶ Bruinius, *Better For All the World*, 237. Molly Ladd-Taylor, “Saving Babies and Sterilizing Mothers: Eugenics and Welfare Politics in the Interwar United States,” *Social Politics* 4 (1997): 136-153, argues that reducing the number of “dependents” for taxation reasons was the driving force behind public support for eugenics.

¹⁷ *Ibid.*, 232.

Eugenics, then, might well be understood as a societal movement. But it should not come as a shock that taxpayer-funded institutions would be used to legitimate and promote ideas and values that have their origin in society. Indeed, it would be surprising if they did not. Few ideas are so obviously antisocial that they are unable to be given a public rationale, and justified in political, even democratic terms. Consider a passage from the introduction to Harry Laughlin's hefty 1922 work, *Eugenical Sterilization in the United States*:

The success of democracy depends upon the quality of its individual elements. If in these elements the racial values are high, government will be equal to all the economic, educational, religious and scientific demands of the times. If, on the contrary, there is a constant and progressive racial degeneracy, it is only a question of time when popular self-government will be impossible, and will be succeeded by chaos, and finally a dictatorship.¹⁸

Though the notion that democracy would be impossible if “feebleminded” individuals kept breeding at a constant rate was widespread, this particular passage was written by Harry Olson, the Chief Justice of the Municipal Court of Chicago. The Municipal Court ran a research center, the Psychopathic Laboratory, which had a focus on cutting edge research pertaining to incarceration and institutionalization. The laboratory employed Laughlin as a “Eugenics Associate”; the court held the copyright for and published Laughlin's *Eugenical Sterilization*.

That public dollars would be used to fund and publish *Eugenical Sterilization* is a piece of trivia worth mentioning in a case study of how ideas with a societal origin become political injustices—to be fair, had a private publisher issued it, its influence would have probably been the same. *Eugenical Sterilization* was incredibly significant for the American eugenics movement, putting compulsory sterilization on track to become a national project. Prior to the book's publication, a handful of states had sterilization laws on the books, but these were subject

¹⁸ Justice Harry Olson, “Introduction” to Harry H. Laughlin, *Eugenical Sterilization in the United States* (Chicago: Psychopathic Laboratory of the Municipal Court of Chicago, 1922), v.

to a variety of legal challenges. For example, the Indiana Supreme Court invalidated the state's 1907 sterilization law on the basis of it inflicting cruel and unusual punishment, denying sterilization targets due process, and violating the equal protection clause of the Fourteenth Amendment. *Eugenical Sterilization*, however, contained a "Model Eugenical Sterilization Law" designed by Laughlin to surmount constructional obstacles such as these. First, Laughlin's model law emphasized that the motive of the state was "Purely eugenic, that is, to prevent certain degenerate human stock from reproducing its kind. Absolutely no punitive element."¹⁹ Since feebleminded persons were often criminals, targeted for sterilization while incarcerated, this was an important stipulation. Secondly, to provide due process, contested cases would be put before a State Eugenics Board. The sterilization target or her guardians could obtain legal representation to defend against the sterilization recommendation—at the state's expense if need be, though this was hardly to the defendant's advantage.²⁰ Finally, "class legislation" was argued to withstand the equal protection clause if the class divisions were natural and if there existed a pressing social purpose that the law served. As Laughlin analogized, compulsory vaccinations were a sort of class legislation, but were generally upheld by the courts due to their medical importance.²¹ Indeed, the latter argument was mentioned explicitly in the majority opinion of the 1927 Supreme Court test case, *Buck v. Bell*.²²

¹⁹ Laughlin, *Eugenical Sterilization*, 446.

²⁰ *Ibid.*, 447. The fact that due process was built into most sterilization laws did not mean that it took place. In the initial hearing for the sterilization of Carrie Buck, her appointed lawyer waived Buck's right to have her case heard by a jury, did not call any witnesses, and did not present a case against sterilization on her behalf. Moreover, Buck's record at school did at all not suggest feeble-mindedness, and her licentiousness was a focus in the trial, when in fact, she was raped. The duplicitous case behind the *Buck* decision is the focus of Lombardo, *Three Generations, No Imbeciles*. See also Hansen and King, *Sterilized by the State*, 110-115.

²¹ Laughlin, *Eugenical Sterilization*, 130.

²² See Lombardo, *Three Generations, No Imbeciles*, for the now widely accepted argument that *Buck* was a test case.

3.2.2 From State Legislatures to the Supreme Court

Virginia was the first to pass legislation using Laughlin's template in 1924, and when the Supreme Court gave Dr. John Bell's petition to sterilize Carrie Buck under the Virginia law its backing, many other states either passed new sterilization laws or revised existing ones to be more in line with Virginia's. By 1930, sterilization laws modeled off of Laughlin's template were on the books in 30 states, and the number of sterilizations that had taken place in the United States doubled.²³ The Supreme Court's approval was crucial for the practice's proliferation.²⁴ Justice Oliver Wendell Holmes wrote the majority opinion, upholding the Commonwealth's argument that sterilization was to the benefit of those who would undergo the operation. Sexual licentiousness and imbecility went hand in hand, thus an imbecile could not be out in society without supervision; she would not be able to resist mating.²⁵ As an alternative to institutionalizing these sorts of persons during their childbearing years, sterilization was freedom-enhancing. "Defective persons... if now discharged, would become a menace, but, if incapable of procreating, might be discharged with safety and become self-supporting with benefit to themselves and to society," as Justice Holmes wrote.²⁶ However, there was undeniably an even greater overall societal benefit, as described in the opinion's most famous passage:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be

²³ Hansen and King, *Sterilized by the State*, 77.

²⁴ Desmond King, *In the Name of Liberalism: Illiberal Social Policy in the USA and Britain* (Oxford: Oxford University Press, 1999), 61.

²⁵ For more on the correspondence between feeble-mindedness and licentiousness, see Wendy Kline, *Building a Better Race: Gender, Sexuality, and Eugenics from the Turn of the Century to the Baby Boom* (Berkeley: University of California Press, 2001), 38-48 *et passim*; Anna Stubblefield, "'Beyond the Pale': Tainted Whiteness, Cognitive Disability, and Eugenic Sterilization," *Hypatia* 22 (2007): 162-181, esp. 177.

²⁶ *Buck v. Bell*, 274 U.S. 200 (1927).

such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world if, instead of waiting to execute degenerate offspring for crime or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind... Three generations of imbeciles are enough.²⁷

Why does the fact that eugenical sterilization was a state-sponsored practice matter?

Generally speaking, unjust practices either violate the law, or go against the spirit of broadly written constitutional protections. In the early 1900s, any reasonable doctor asked to perform a sterilization surgery on a person without her consent would have been worried about the professional and legal consequences. He might perform the surgery anyway, but would do so in secret for fear of losing his medical license. “Therapeutic” sterilization—to use the euphemistic language of medical and psychiatry journals beginning in the 1920s, which not surprisingly was the same time that the eugenics movement was becoming more politically and legally sophisticated—needed the backing of the law so that it could be undertaken by doctors out in the open. But this was not all. Eugenics was a scientized political philosophy that had the ambition of transforming American society. Persuading eugenics-friendly doctors to secretly sterilize

²⁷ Ibid. Note that “imbecilic” was a meaningless diagnosis that, in practice, was used to label any person whom a hospital superintendent, psychologist, or doctor wanted to sterilize. Though Stanford-Binet tests were used to distinguish “low grade morons” from “medium grade morons,” this was not even necessary in states where the language of the sterilization laws was broad. Laughlin’s Model Sterilization Law, for example, recommended sterilizing criminals, epileptics, alcoholics, the blind, deaf, and deformed, persons with tuberculosis, syphilis, leprosy, or other chronic illnesses, and finally, “dependent” persons, i.e., “orphans, ne’er-do-wells, the homeless, tramps and paupers.” Laughlin, *Eugenical Sterilization*, 446-447. The selective breeding theory of eugenics was, in short, far from selective. I therefore believe that accounts of forced sterilization that paint the practice as a war against the “mentally handicapped” is overblown. See Reilly, *Surgical Solution*; Hansen and King, *Sterilized by the State*. To be sure, individuals with intellectual disabilities and mental illnesses in state institutions were a high priority for sterilization enthusiasts. But many sterilization victims made it a point to say that they had no mental handicaps; they were the victims of childhood neglect, abuse, or rape. Carrie Buck was in foster care during her mother’s institutionalization; later on in life she was visited by Stephen Jay Gould, who reported in *The Mismeasure of Man* (New York: W. & W. Norton, 1996), 336: “neither she [Carrie] nor Doris would be considered mentally deficient by today’s standards.” Criminals, particularly men, were sterilized in penal, not mental institutions. Finally, as I discuss later, a high share of American Indian women were sterilized during the 1970s. This is an incredibly random assortment of individuals. If forced sterilization was indeed meant to be a war against the intellectually disabled, then social workers and doctors did an incredibly poor job at identifying appropriate targets. And so, I follow Bruinius, *Better For All the World*, and use “feble-minded,” an outdated term that in effect means nothing more than the persons targeted for sterilization by the state.

feeble-minded persons without the public taking notice would hardly bring about this transformation on the scale that was needed. The aid of those with stalwart bodies, sharp minds, and pure morals was needed to help “bring about gradual increase of the capacity of institutions” for the sterilization of the hereditarily inferior.²⁸ Eugenics thus had to be part of the public mission. For this to take place, to selectively breed feeble-minded, criminal, and dependent Americans out of existence, the formal backing of the law was needed. And this is what eugenics enthusiasts got with *Buck v. Bell* and compulsory sterilization laws across 30 states.

3.3 Theorizing State-Sponsored Injustice

Let us abstract from the example of eugenical sterilization laws—though I reserve the right to recur to it—in order to make some general observations about how the legality of the law and the presumptive legitimacy of the state’s authority aids the cause of injustice. It is clear that in a totalitarian regime, the unmitigated power of the state over all aspects of the political, social, and economic lives of the individuals who live within its bounds creates an unlimited potential for state-sponsored injustice. But liberal democracies are designed to be limited governments: among other things, a commitment to individual rights and the electoral mechanism work to provide safeguards against the overreach of state power. And so, in order to understand the nature of state-sponsored injustice within a liberal democracy, it is necessary to inquire about the mechanisms by which it comes about. How is state-sponsored injustice possible within a liberal democracy?

²⁸ Harry H. Laughlin, “Report of the Committee to Study and to Report on the Best Practical Means of Cutting Off the Defective Germ-Plasm in the American Population: The Legal, Legislative and Administrative Aspects of Forced Sterilization,” *Eugenics Record Office*, Bulletin No. 10B (Cold Spring Harbor, NY: Eugenics Record Office, 1914), 9.

My account can be summarized as followed. As a matter of definition, the state has the sole claim on making and executing laws. In a liberal democracy, the power to make laws is grounded in the sovereignty of the people; a commitment to individual rights and welfare steers the realization of the common good. For a state-sponsored injustice to take place in a lawful manner—that is, for its execution to be sanctioned or directed by positive law—the injustice must secure its rationalization in liberal democratic language, using one set of liberal democratic commitments to justify violations of another set.²⁹ As arguments put in this language disseminate and win adherents, either because they themselves seem credible or because they credibly camouflage other interests that the injustice is likely to advance, the injustice’s baseline inconsistency with liberal democracy becomes obscure. Conducting the injustice through the state—that is, as one of the myriad functions of government authorized by law—legitimizes the injustice, normalizes it, and as time wears on, entrenches it.³⁰ If able to withstand a variety of judicial challenges, this furthers the perception of the injustice’s legitimacy, as well as setting a precedent as to the injustice’s constitutionality that is difficult to upend. A single state-sponsored injustice creates a set of conditions where different injustices against the same targets (or similar

²⁹ This fits in with Philip Converse’s discussion of “ideological constraints” in his classic essay, Converse, “The Nature of Belief Systems in Mass Publics,” in *Ideology and Discontent*, ed. David E. Apter (New York: The Free Press, 1964), 207-256. This strand of analysis is also friendly to a growing body of research within political science and political sociology on the role of ideas in politics. See especially the essays collected in *Ideas and Politics in Social Science Research*, ed. Daniel Béland and Robert Henry Cox (Oxford: Oxford University Press, 2011). King, *In the Name of Liberalism*, more specifically considers how liberal democracies can successfully implement policies that are deeply at odds with their legitimizing ideals.

³⁰ The concept of legitimacy—or more accurately, the concept of the *perception* of legitimacy—is present throughout the account. I do not use “legitimacy” as some ideal theorists use it, referring to a trait of laws and political decisions that meet a very high bar for procedural fairness, impartiality of bargaining conditions, and so on. When I describe liberal democratic arguments and the lawmaking process as having a legitimizing character, I mean that they contribute to the *appearance* that an injustice meets many of the conditions for legitimacy on the ideal-theoretic account. This usage of “legitimacy” and “legitimize” are common in social dominance theory and other sub-disciplines which explain how elites “legitimize” inequality, “legitimize” policies that serve their own interests, “legitimize” the prejudices of the majority group, etc. See Jim Sidanius and Felicia Patto, *Social Dominance* (Cambridge: Cambridge University Press, 1999), 19 *et passim*.

injustices against a different set of targets) are more politically palatable, and helps to shape the moral life of the community such that individuals *qua* private citizens act in ways that complement the injustice of the state.

Of course, not all state-sponsored injustices are conducted by means of formal legislation. A state can still be responsible for injustice if it fails to enforce a law, or if state officials abuse their executive or bureaucratic power, acting in ways that are blatantly at odds with the state's legitimizing ideals.³¹ Moreover, as I discuss in the next chapter, state-sponsored injustices do not need to be intentionally unjust for the state to bear responsibility. For now, though, let us examine some general patterns about how unjust systems of belief that have their origin in society derive legitimacy and expand their scope through the law. As a way of describing most important of these patterns, I use a framework that consists of six categories: authorization, protection, systemization, execution, enablement, and norm- and belief-formation. The framework is surely not comprehensive, but it helps to organize a discussion of how a liberal democratic government can perpetrate injustice against individuals, and explain the sense in which forced sterilization and other injustices discussed in the present work are distinctly political injustices.

3.3.1 Authorization

For an unjust societal practice to be conducted within a society in which the rule of law is present, it somehow must navigate the legal system. It can do this by operating discreetly, escaping the legal system's detection. Its beneficiaries can hire sleazy lawyers who know how to exploit legal loopholes and constitutional protections, and bribes may be made to corrupt state

³¹ I make this argument explicitly in Chapter 2.

officials. But though some unjust practices either benefit from illegality or could not easily justify their purpose in liberal democratic terms—e.g., organized crime—there are many reasons for an injustice to have governmental endorsement, or to even be carried out by the state itself. For one thing, legality can greatly expand the reach of the practice. Taxpayer resources, state institutions, and state officials can all be deployed in the practice’s service. Most crucially, though, planned, large-scale injustice often occupies murky legal waters, if it is not outright illegal. Thus the law must be changed so as to accommodate the injustice. The governmental authorization of an injustice takes place when the conditions of the practice of injustice are made possible by law or the backing of state authority.³²

To become law, an injustice must speak for itself in liberal democratic language, claiming its justification in arguments that harmonize with liberal democratic ideals—or at the very least, liberal democratic interests—and thereby win supporters.³³ This may take time and effort, but lofty goals that seem to serve a social mission can usually be framed in a way that appears compatible with liberal democracy. As Desmond King observes in *In the Name of Liberalism*, “social reform” and “individual moral improvement” have always been closely linked to the liberal democratic tradition, which means that ideas formulated in the reformist mode can easily violate the rights of society’s most vulnerable members while claiming to better their condition.³⁴ Self-interest, of course, plays an important role alongside arguments, and not

³² The authorization of injustice through law usually does not happen all at once. State legislatures experimented with different versions of a compulsory sterilization law. A process of learning took place in which eugenics opponents brought a variety of successful courtroom challenges to these laws, and different states tried out different wording to see what would pass judicial muster.

³³ Converse, “The Nature of Belief Systems in Mass Publics,” esp. 216; Jal Mehta, “The Varied Role of Ideas in Politics: From Whether to How,” in *Ideas and Politics in Social Science Research*, 36.

³⁴ King, *In the Name of Liberalism*, 138.

all supporters are going to be persuaded by the content of the arguments in favor of injustice for liberal democratic reasons. But the ostensible consistency of the injustice with liberal democratic ideals and interests is integral to the process of legal authorization.³⁵

Authorizing an injustice through law often has the effect of further enhancing support for it—or at least, the perception of its legitimacy—among those who are not targeted as its victims. For an individual who had not thereto given the matter much thought, the fact that the injustice comes with a liberal democratic justification that the legislative arm of the liberal democracy endorses is often decisive, especially if he or she stands to gain from the injustice.³⁶ In representative democracies, legislators are presumed to be motivated to represent the public will—both because that is their job and because they presumably want to be reelected. When a bill with unjust content is passed by a group of democratically elected lawmakers, the standing of their office and the presumption of their responsiveness to the public will contributes both to the injustice’s legitimacy and the appearance of broader public support.³⁷ There may be debate, and there may be loud dissent, but that a group of democratically elected legislatures is able to approve the injustice moderates its extreme nature. One is less inclined to ask, “How could this

³⁵ Ibid., esp. Chs. 1-2, emphasizes the role of experts in making illiberal policy proposals palatable in a liberal democracy. If mine were intended to be a fuller account, I would discuss expert knowledge as well as other sources of legitimacy for unjust policies; using liberal democratic language is definitely not the only source. However, I believe that it is the most general and most common. Liberal democratic ideals and interests are potentially so broad that even, as we saw, Social Darwinism was able to get a foothold in this language.

³⁶ Many of the claims that I make about moral uncertainty among citizens and the way in which the actions and decisions of the political elite send cues are standard within mainstream political science—for a classic take, see Samuel L. Popkin, *The Reasoning Voter: Communication and Persuasion in Presidential Campaigns* (Chicago: University of Chicago Press, 1994), Chs. 1-3. For a good normative discussion of the varieties of democratic indifference that make one vulnerable to political conformity, see Eric Beerbohm, *In Our Name: The Ethics of Democracy* (Princeton: Princeton University Press, 2012), 151-155.

³⁷ See Richard H. McAdams, “The Origins, Development, and Regulation of Norms,” *Michigan Law Review* 96 (1997-1998): 338-433, 402-407, for a discussion.

ever be public policy?” if an injustice already is public policy. One is less inclined to notice how shocking the injustice is if one only hears talk of the details of its implementation.

Due to the impression of lawmakers as representing and being responsive to a free and equal citizenry, there is something particularly insidious about authorizing an unjust practice by means of law. Authorization, however, does not always take place through the legislature. An injustice may be authorized by traversing established channels of communication and command within the executive, police, military, or bureaucratic arms of the government. In these cases, not every benefit that goes with legislative authorization is present: majority support is not necessarily presumed, and individual citizens might be more likely to question the injustice (that is, if they know about it). An act, or repeated acts, of omission can moreover amount to informal authorization, with the state’s inaction effectively serving as a stamp of approval.³⁸

I have already discussed the legislative authorization of forced sterilization at length; the model sterilization law that eventually made it on the books in 30 states was written in view of the commitment to due process and the constitutional prohibition of cruel and unusual punishment. I have also tried to illustrate a broad range of arguments used to make a case for eugenical sterilization within the democratic context, from fears about the excessive breeding of feebleminded citizens making self-rule impossible, to Holmes’ use of utilitarian and patriotic reasoning. Let us turn, then, to the remaining steps in the framework: protection, systemization, execution, enablement, and norm- and belief-formation. Though authorization is usually the first

³⁸ Kim Forde-Mazrui, “Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations,” *California Law Review* 92 (2004): 683-753, 722. In Chapter 2, I distinguish between a state official acting without authorization who is promptly fired vs. a state official who acts unjustly while higher authorities look the other way. Though the former may do unjust things as a state official, this is not an injustice of the state.

step in the state's undertaking of an injustice, the rest take place in a much less sequential fashion, and sometimes they are operative all at once.

3.3.2 Protection

In Indiana, the first state to enact a compulsory sterilization law, sterilizations were conducted for two years beginning in 1907, then stopped for over a decade after hospital superintendents and doctors became fearful about the possible legal repercussions of their conducting sterilization surgeries. Speaking before the Indiana General Assembly in 1921, Governor James P. Goodrich expressed his disapproval of the cessation. "Ever since Governor Marshall raised the question as to the constitutionality of the present law authorizing the desexualization of inmates of certain institutions," Goodrich stated, referring to Indiana's governor in 1909, "it has been a dead letter and no serious attempt has been made to enforce it."³⁹ Goodrich explained that he "repeatedly urged" state hospital superintendents "to take advantage of the present law and desexualize all persons who would be fit to return to their homes."⁴⁰ But the superintendents "pretty generally have declined to enforce the law for fear of personal liability in the event the law should be held invalid."⁴¹

Courts serve different functions in different contexts, and certainly not all countries practice judicial review in the manner of the United States. But in the American system, and in other legal systems where courts, at least to some degree, hear challenges as to the legality or constitutionality of laws enacted by the legislature, the courts may protect an injustice that has

³⁹ "Message of Governor James P. Goodrich, Delivered at the Opening of the 72nd Biennial Session of the Indiana General Assembly," Indianapolis, January 6, 1921.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

been authorized legislatively. The example of Indiana's sterilization law is pertinent because it shows that even though a law may direct an injustice's execution, if not protected by the courts, state officials will not always agree to execute the law. The same year that Governor Goodrich spoke before the Assembly about the importance of enforcing the sterilization law, the Indiana Supreme Court heard *Williams v. Smith* and officially declared the law unconstitutional.⁴²

Laughlin's *Eugenical Sterilization* published the proceedings of *Williams v. Smith* in full, setting crucial passages in bold type, with the aim of showing how his model sterilization law was responsive to the objections raised by the court.⁴³ Like Virginia and the 16 other states that revised or enacted sterilization statutes following *Buck v. Bell*, the Indiana General Assembly passed a new sterilization law in 1927 that followed the design of Laughlin's judicially failsafe model law.⁴⁴

In the case of sterilization laws, it is clear how the court's protection assured doctors and officials that their "fear of personal liability" is irrational, and that it would be highly unlikely for them to ever face retroactive prosecution. *Buck v. Bell*, again, was decisive for the eugenical sterilization movement; had the Supreme Court struck down Virginia's law, this would have brought the practice of forced sterilization to a halt.⁴⁵ But Holmes' decision set an important

⁴² Hansen and King, *Sterilized by the State*, 78.

⁴³ Laughlin, *Eugenical Sterilization*, 258-270. The book subjects court cases from Washington, New Jersey, Iowa, Michigan, New York, Nevada, and Oregon (along with the family histories of each sterilization target) to a similarly thorough treatment.

⁴⁴ N.B. Indiana passed its 1927 Laughlin-inspired sterilization law in March, about six weeks before the *Buck* decision was issued. The law underwent several revisions in the 1930s, "reaffirm[ing] the authority of individual governing boards of state institutions to decide on an inmate for sterilization." Hansen and King, *Sterilized by the State*, 79.

⁴⁵ *Buck v. Bell* is a case where constitutional protection was sought deliberately by eugenics advocates; it was the definition of a test case, as Lombardo, *Three Generations, No Imbeciles*, argues. But sometimes an injustice acquires judicial protection by means of a test case brought by the opponents of the unjust law. If the Supreme Court sides with the legislature, or holds judicial invalidation to be inconsistent with a state's delegated powers, this protects the state-sponsored injustice, setting a precedent as to the opinion of the Court, and making it less likely that it will

legal precedent, and not only on American soil. “*Buck v. Bell*...definitely committed the United States to a policy of human sterilization as a means of coping with the socially undesirable in their midst,” as the Lieutenant Governor of Ontario assessed matters. “May the day speedily come when Ontario will awake, as Alberta and British Columbia have awakened, and as 27 States in the American Union have awakened, to the enormity of this peril and the necessity for prompt action.”⁴⁶

Evidently, then, the Supreme Court has an authority that extends beyond formal legal spheres. Many scholars have described its unique prestige, and its association with “powerful symbols of authority and procedural fairness ranging from the Constitution itself to jurists’ black robes and the image of blind justice.”⁴⁷ These images powerfully convey an impression of the Court’s having moral authority.⁴⁸ Oliver Wendell Holmes, to be sure, would disagree with the latter characterization; “Three generations of imbeciles are enough” is in line with his general thinking that judges are to weigh “considerations of social advantage,” and do so independently

choose to reopen another case on the matter anytime soon. *Plessy v. Ferguson*, 163 U.S. 537 (1896), famously, was brought by anti-segregationists, and resulted in the Supreme Court upholding the doctrine of “separate but equal.” *Korematsu v. United States*, 323 U.S. 214 (1944), was brought by opponents of Japanese-American internment during World War II, and resulted in the Court declaring internment to be constitutional, interpreting the power to wage war guaranteed by the Constitution as “the power to wage war successfully.”

⁴⁶ Herbert A. Bruce, “Sterilization of the Feebleminded,” *Canadian Medical Association Journal* 29 (1933): 260-263, 263.

⁴⁷ Joseph Daniel Ura, “Backlash and Legitimation: Macro Political Responses to Supreme Court Decisions,” *American Journal of Political Science* 58 (2014): 110-126, 114.

⁴⁸ The prestige of the Court is a recurring theme of Robert G. McCloskey’s celebrated work, *The American Supreme Court* (Chicago: University of Chicago Press, 2010). Robert A. Dahl discusses the “unique legitimacy” of the Supreme Court in “Decision-Making in a Democracy,” *Journal of Public Law* 6 (1957): 279-295, 293. Charles Franklin and Liane Kosaki present an empirical account of “the legitimation hypothesis”: “when the Court rules, it confers legitimacy on the position it favors”; thus the Supreme Court is like a “republican schoolmaster” which, “through its explication of the law and its high moral standing, may give the populace an example of the way good republicans should behave.” Franklin and Kosaki, “Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion,” *American Political Science Review* 83 (1989): 751-771, 752.

of morality.⁴⁹ But given the very deliberate efforts on the part of the American eugenics movement to characterize their aims in terms palatable to the American people, Holmes' endorsement of the same arguments that were being messaged in publications like the *Eugenics Review* did not help those wishing to argue against it.⁵⁰ That the Court ruled forced sterilization to be within the legitimate scope of state power helped camouflage the fact that the practice is deeply unjust, and indeed, that die-hard eugenicists were driven by the same ruthless fanaticism that many condemned as the eugenical practices of the Nazis came to light.⁵¹ This does not mean, of course, that all members of the American public were hoodwinked into aligning their personal moral beliefs with the opinion of the Court. Forced sterilization had its critics, and for them, the language of *Buck* stoked the fires of already vehement disapproval.⁵² But oftentimes individuals who identify with majority interests are never put in a position where they have to make up their mind about public policy matters of great moral importance.⁵³ Though the extreme

⁴⁹ Oliver Wendell Holmes, "The Path of the Law," *Harvard Law Review* 110 (1997): 991-1009, 999. Reprinted from the 1887 publication.

⁵⁰ Dahl argues that the idea of the Supreme Court's deciding along the lines of the "Right or Justice" is incoherent; the Court does not live up to the standards of the moral authority that it is often perceived to have. Rather, and somewhat cynically, he describes how the "main task of the Court is to confer legitimacy on the fundamental policies of the successful coalition." Dahl, "Decision-Making in a Democracy," 294.

⁵¹ "*Buck* does not merely represent a popular triumph of eugenical theory, but also the success of a small group of professionals who were able to use the specious 'scientific' tenets of eugenics to legitimize their private prejudices." Paul A. Lombardo, "Three Generations, No Imbeciles: New Light on *Buck v. Bell*," *New York University Law Review* 60 (1985): 30-62, 33.

⁵² See Hansen and King, *Sterilized by the State*, esp. 131-138, for a discussion of Catholic opposition to sterilization laws. See Franklin and Kosaki, "Republican Schoolmaster," for a more theoretical discussion of backlash. Ura argues that, even though backlash is inevitable, this is a short-term effect rather than a long-term one: "over the long run, the authoritative voice of the Supreme Court has the capacity to pull at least some of the disagreeing public toward its decisions" creating a "a long-run movement in public opinion toward the ideological position taken up by the Court." Ura, "Backlash and Legitimation," 111, 118.

⁵³ There are reasons to characterize the Supreme Court not as a moral authority in the ethical sense, but in the epistemic sense. As Adrian Vermeule writes, "Where citizens cannot directly observe the state of the world, yet know that different branches of government, controlled by officials with uncorrelated or opposing biases, have agreed on a common policy, citizens can more confidently infer that the policy is correct." Vermeule, *The Constitution of Risk* (Cambridge: Cambridge University Press, 2014), 157.

flippancy of the *Buck* opinion may have pushed some on-the-fencers over to the other side, for many others, the Court's protection of forced sterilization was reason enough to go along with the practice.

3.3.3 Systemization

Unjust practices authorized by laws often broaden their impact by coordinating the activities of state institutions and personnel to conduct an injustice. Through this process of systemization, the injustice gains force. The systemization of injustice has all sorts of benefits from the perspective of its supporters. It increases the number of persons who are actively carrying out the injustice, directing taxpayer resources towards its end. A coordinated process is devised by which different officials in different capacities work together to see the injustice through. This organizational structure adds efficiency and creates mechanisms of accountability for achieving desired outcomes.

Systemization involves redefining the roles of existing officials and assigning new duties, as well as creating new roles altogether, to ensure that the policy is put to practice.⁵⁴ Roles often fall naturally on particular officials because of their being written into a law that they had a part in crafting. Hospital and prison superintendents, for example, were vital to the systemization of forced sterilization at the level of individual state hospitals, mental institutions, and prisons where the sterilizations took place. Whether because of their actively endorsing eugenical beliefs or the instrumental benefits that a compulsory sterilization law would bring about, superintendents oftentimes played a part in lobbying for and crafting the law.⁵⁵ To take another

⁵⁴ For a discussion of the role of roles in public life, see Arthur Applbaum, *Ethics for Adversaries: The Morality of Roles in Public and Professional Life* (Princeton: Princeton University Press, 1999), esp. Part II.

⁵⁵ Hansen and King, *Sterilized by the State*, esp. Ch. 4.

example, it was fitting that the most enthusiastic supporters of eugenics within a state government should be assigned to their State Eugenics Board, given their interest and presumed expertise. As superintendents systemized the practice of compulsory sterilization at the level of individual institutions, State Eugenics officials saw to its systemization at the level of state government. According to the direction and delegation of these leading state officials and employees, the finer procedural details needed to fully integrate the practice of compulsory sterilization into the daily inner workings of state government were worked out. And so, state social workers learned to observe the families assigned to them for signs that a woman would be a candidate for sterilization, and were provided the protocol for reporting out-of-wedlock pregnancies.⁵⁶ At state hospitals, the superintendent coordinated personnel to board individuals whom the social workers brought in.⁵⁷ (At prisons and mental institutions, sterilization targets were identified from the inside.) Psychiatrists were assigned to administer tests of feeble-mindedness, physicians to report on the physical health of the patient, and obstetricians to perform sterilization surgeries. State Eugenics Boards would convene periodically to review medical reports, and would make recommendations on any disputed cases.

The systematized efforts of state institutions and personnel lends officiality to an unjust practice. Officiality often facilitates easy acquiescence. Here forced sterilization is an extreme case; it met much less resistance than many other state-sponsored injustices. In prisons and mental institutions, the sterilization targets were already incarcerated, and susceptible to a variety of power inequalities that made it more likely that they would comply with the superintendent or state psychologist's will. Targets outside of the institutionalized setting were often equally

⁵⁶ See Kline, *Building a Better Race*, 54, for the various signs that were used to indicate female sexual deviance.

⁵⁷ Hansen and King, *Sterilized by the State*, 21.

vulnerable. Many were barely teenagers, living in foster care or orphanages; no meaningful distinction was made between a girl's licentiousness and her being the victim of child abuse or rape.⁵⁸ Frequent visits from a social worker, being told that one needed to come in for a procedure and ought to sign this form, thus had a predictable effect. It is easy to see how an individual might have trusted state authorities to act in her interests, especially if each one seemed to be saying the same thing. If the social worker, psychiatrist, and doctor all told her she was unwell and needed a tubal ligation, a simple and painless operation, who was she to say that these experts were wrong?⁵⁹ Once the practice of forced sterilization was systemized, this unsurprisingly left State Eugenics Boards with little to do.

Finally, the systematization of injustice normalizes it. Though usually this is a point made in the context of aberrant, despotic political regimes—most notably, Hannah Arendt's characterization of Adolf Eichmann as personifying "the banality of evil"—it applies equally to injustices carried out in a democracy.⁶⁰ One needed not buy into the idea of eugenics to simply go along with it, to play one's role, to not give it any thought. This brings us to the next step in our framework, the execution of injustice.

3.3.4 Execution

The systemization of an injustice involves assigning roles to state officials, determining procedures by which these roles are carried out, and creating mechanisms of accountability. As roles are assigned and procedures fall into place, the execution of an injustice comes about with

⁵⁸ Carrie Buck was raped by the nephew of her foster parents. *Ibid.*, 111.

⁵⁹ Gregory Michael Dorr, "Protection or Control? Women's Health, Sterilization Abuse, and *Relf v. Weinberger*," in *A Century of Eugenics in America*, 179.

⁶⁰ Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin Books, 2006).

little effort; to use Arthur Applbaum's phrase, it benefits from a "division of moral labor."⁶¹ If one is a doctor, correctional officer, or social worker who is undecided on the morality of eugenics, it is easy to not make a decision about its morality, yet go along actively promoting eugenical aims. Once an injustice is authorized by law, and responsibility for its execution is parceled out and coordinated by procedures, what is one to do but do one's role?⁶² True, one may become sympathetic to the victims of injustice. In this case, one is faced with the difficult decision of staying in one's role so that there is a man (or woman) on the inside, undermining the injustice in various ways. Or, one can quit—perhaps publicly and dramatically, hoping that others will follow suit and that this will grab the public's attention. But whatever one does as an individual, a state-sponsored injustice already set in motion is difficult to impactfully obstruct or overturn. Meanwhile, much harm can be done.⁶³

And all too often, the heroic civil servant does not emerge. On the contrary, state officials sometimes see themselves as deputized to further the cause of injustice by whatever means, even those that run contrary to the letter of the already unjust law. Many documented sterilizations took place without an individual's knowledge. To doctors and public officials, it seemed "inconsistent to require both that the client consent and be feeble-minded"; there are documented requests as to whether "some of the 'red tape' [could] be cut in regard to the consent of the

⁶¹ Applbaum, *Ethics for Adversaries*, 6 *et passim*; Christopher Kutz, *Complicity: Ethics and Law for a Collective Age* (Cambridge: Cambridge University Press, 2000), 150.

⁶² For a more extensive look at these claims, see Applbaum's discussion of "obedience to role" in *Ethics for Adversaries*, 69-71.

⁶³ Applbaum evaluates different courses of action for public officials in morally difficult situations. *Ibid.*, Ch. 9.

feeble-minded adult.”⁶⁴ It was common for consent forms to be forged, or signed by an illiterate parent or spouse with an ‘X’.⁶⁵ Later on, forms were written so obscurely as to basically ensure that a person who signed them would not understand their purpose—appended, of course, by a clause in legalese absolving all medical staff of liability.⁶⁶ And in a number of cases, there would be no forms at all authorizing the procedure; the sterilization would take place during a cesarean section without a doctor bothering to even go through the motions of consent. Later on in life, a woman would have trouble getting pregnant and see doctor, and she would be told that her fallopian tubes had been severed.⁶⁷ Or she might never find out at all. The state is responsible for surgeries carried out by state doctors without due process, as it was not authorizing *consensual* sterilizations, but rather *compulsory* sterilizations. If in practice due process was an illusory formality, with public defenders making no real effort to argue against a sterilization procedure on a woman’s behalf, if the women who signed the form without requesting a hearing consistently underwent the surgery without a clue what was happening, then it is only a matter of degrees before one does not feel obliged to consult with a sterilization target at all; the outcome is the same in every case.

⁶⁴ Moya Woodside, *Sterilization in North Carolina* (Chapel Hill, N.C.: University of North Carolina Press, 1950). Quoted in Mary Ziegler, “Reinventing Eugenics: Reproductive Choice and Law Reform after World War II,” *Cordozo Journal of Law and Gender* 14 (2008): 319-350, 319.

⁶⁵ Dorr, “Protection or Control?” 161.

⁶⁶ Antonia Hernandez, “Chicanas and the Issue of Involuntary Sterilization: Reforms Needed to Protect Informed Consent,” *Chicana/o Latina/o Law Review* 3 (1976): 3-37, 28. Hernandez refers to the findings of a 1975 American Civil Liberties Union report by Elissa Krauss, “Hospital Survey on Sterilization Policies.”

⁶⁷ This is precisely what happened to Carrie Buck’s sister, as described in Gould, *Mismeasure of Man*, 336.

3.3.5 Enablement

In a system where injustice takes place out in the open, supported by taxpayer resources, it has the effect of enabling other state-sponsored and societal injustices in a similar spirit. This is sometimes direct, sometimes indirect, and the mechanisms by which enablement occurs are sometimes obscure. But a primary mechanism has to do with a unity of ends over time: though means may change, a given end adapts as political circumstances progress, along with the arguments that rationalize it. As difficult as it is to eradicate the injustice of the state after it has been authorized by law, it is even more difficult to eradicate the various social goals whose existence precipitates the injustice. “Enablement,” then, is a way of describing how state-sponsored injustice impresses illiberal, undemocratic social goals that recurrently make their way into political practice in new and unforeseen ways.

The practice of compulsory sterilization did not take place in a vacuum. If one really wishes to understand the history of eugenical sterilization in the twentieth century, one must look to the history of state-run psychiatric and penal institutions in the nineteenth century.⁶⁸ The practice of “segregating” the criminal, mentally ill, and otherwise “defective” members of society helped to enable the practice of sterilization, making possible the argument that the latter was a lesser evil—remember the opinion of Justice Holmes.⁶⁹ Once an individual’s rights are

⁶⁸ Another practice that enabled compulsory sterilization were eugenical marriage laws. By 1914, thirteen states had laws prohibiting a marriage to a person who, to use the language of the state of Washington’s law, is “a common drunkard, habitual criminal, imbecile, feeble-minded, idiot or insane person, or person who has theretofore been afflicted with hereditary insanity, or is inflicted with pulmonary tuberculosis, or any contagious venereal disease.” C. P. Wertenbaker, “Should Virginia Have a Marriage Law Based on Eugenics?” in *Transactions of the Forty-Fourth Annual Session of the Medical Society of Virginia* (Richmond: Richmond Press, 1914), 37. Affidavits were required from a licensed physician before a county auditor would issue a marriage license, and one who could not get a doctor’s approval could not marry. Like eugenical segregation, eugenical marriage laws were thought to be more freedom-limiting than sterilization surgeries. Further, the marriage laws were perceived as inefficient: feebleminded persons would have bastard children rather than no children at all. Sterilization laws thus were thought to be more in line with the eugenical mission, in addition to being more humane.

⁶⁹ Sterilization also happened to be more cost-effective. Kline, *Building a Better Race*, 81.

trampled on in one way, this helps to create both formal and informal precedents for rights-trampling in another way. The new injustice seems to be no more than an extension of what the state is already doing, or even an improvement.⁷⁰

If the practice of eugenical segregation enabled the practice of sterilization, then it should come as little surprise that the practice of sterilization itself had a lasting, enabling influence. Consider, for example, Susan Thomas's claim that "To be a woman, poor and fertile, in the United States in the 1990s is to be blamed by politicians and social reformers for an increase in poverty and alleged immorality in society."⁷¹ Or in the words of Fraser and Gordon, "In current debates, the expression 'welfare dependency' evokes the image of 'the welfare mother,' often figured as a young, unmarried black woman (perhaps a teenager) of uncontrolled sexuality."⁷² In an article entitled "Three Generations of Welfare Mothers Are Enough," Nicole Huberfeld argues that the 1996 U.S. workfare initiative contained many measures specifically designed to lower the birthrate for single mothers on public assistance.⁷³ Compared to forced sterilization,

⁷⁰ This is apparent in Justice Olson's introduction to *Eugenical Sterilization*: "Sterilization protects future generations, while segregation safeguards the present as well... the two theories of segregation and sterilization are not antagonistic, but both may be invoked." Harry Olson, Introduction to *Eugenical Sterilization*, vi.

⁷¹ Susan L. Thomas, "Race, Gender, and Welfare Reform: The Antinatalist Response," *Journal of Black Studies* 28 (1998): 419-446, 419.

⁷² Nancy Fraser and Linda Gordon, "A Genealogy of Dependency: Tracing a Keyword of the U.S. Welfare State," *Signs* 19 (1994): 309-336, 311. Also quoted in King, *In The Name of Liberalism*, 270.

⁷³ Nicole Huberfeld, "Three Generations of Welfare Mothers Are Enough: A Disturbing Return to Eugenics in the Recent 'Workfare' Law," *UCLA Women's Law Journal* 9 (1998): 97-132, 101-102. Huberfeld's is not critical of all the aims of workfare, but in her words, "the Act seeks to control all women's reproduction, rather than to promote welfare recipients' transition to self-sufficiency." Workfare allows states to enact "family caps," where mothers who have more children while on public assistance are not given additional support, and provides a "Bonus to Reward Decrease in Illegitimacy Ratio," with the top five states decreasing illegitimacy without increasing the number of abortions receiving \$20 million each. For criticism of workfare in a similar vein, see, e.g., Nancy Rose, *Workfare or Fair Work: Women, Welfare, and Government Work Programs* (New Brunswick, N.J.: Rutgers University Press, 1995); Randy Albelda, "Fallacies of Welfare-to-Work Policies," *Annals of the Academy of Political and Social Science* 577 (2001): 66-78; and Joel F. Handler and Yeheskel Hasenfeld, *Blame Welfare, Ignore Poverty and Inequality* (Cambridge: Cambridge University Press, 2006).

the provisions that Huberfeld discusses are mild. But her overall point seems to be that America still operates in a political paradigm where curbing the number of births had by unfit, dependent mothers remains a goal, even if forced sterilization is no longer considered a valid means.⁷⁴

The notion of enablement also encompasses the idea that a state-sponsored injustice may intersect with and exacerbate other injustices. At the beginning, America's quest for racial purity was not necessarily about race; stamping out feeble-mindedness was the goal.⁷⁵ But increasingly after World War II, blacks, Hispanics, and American Indians were sterilized in disproportionate numbers. A "Mississippi appendectomy," for example, was a 1970s Southern idiom used to refer to the nonconsensual sterilization of black women during abdominal surgery.⁷⁶ The American Indian case, however, is the most extreme: an audit by the Government Accountability Office found that between 1973 and 1976, Indian Health Service doctors and affiliates had sterilized 3,406 Native women in four of the twelve service regions it examined.⁷⁷ (By way of comparison, Indiana sterilized 2,500 individuals in its entire history.) If the four regions surveyed were representative, then the staggering implication is that 25% of American Indian teenage and adult women were sterilized during the early 1970s—some studies put the percentage even higher.⁷⁸

⁷⁴ For the relationship between ideas about the fertility of poor racial minorities and ideas about welfare dependence, see Hansen and King, *Sterilized by the State*, Ch. 13; King, *In The Name of Liberalism*, 258-286; Dorr, "Protection or Control?"; Thomas, "Race, Gender, and Welfare Reform"; Ladd-Taylor, "Saving Babies and Sterilizing Mothers"; Darci Elaine Burrell, "The Norplant Solution: Norplant and the Control of African-American Motherhood," *UCLA Women's Law Journal* 5 (1995): 401-444; and Denise A. Pierson-Balik, "Race, Class, and Gender in Punitive Welfare Reform: Social Eugenics and Welfare Policy," *Race, Gender & Class* 10 (2003): 11-30.

⁷⁵ Hansen and King, *Sterilized by the State*, 9-11. See also Ziegler, "Reinventing Eugenics," 335-336.

⁷⁶ Dorr, "Protection or Control?" 174.

⁷⁷ Comptroller General of the United States, "Investigation of Allegations Concerning Indian Health Service," Report to Senator James G. Abourezk, B-164031(5), Government Accountability Office, November 4, 1976, <http://www.gao.gov/assets/120/117355.pdf>.

⁷⁸ Jane Lawrence, "The Indian Health Service and the Sterilization of Native American Women," *American Indian Quarterly* 24 (2000): 400-419.

Two interview studies conducted after the report was released found that the doctors believed that sterilization created fewer welfare recipients, lessening their own tax burden, and that groups with high birthrates like American Indians did not have the wherewithal to learn how to use birth control.⁷⁹

Again, enablement occurs because the unjust practices of the state entrench the goals that underlie support for these practices. Let us turn, finally, to the category that goes hand-in-hand with enablement: namely, the formation of norms and beliefs through state-sponsored injustice.

3.3.6 Norm- and Belief-Formation

I have thus far discussed the authorization and protection of unjust societal ideas through law in terms of interests. Because injustices are often legally murky, it is necessary to secure the right of conducting the injustice through law in order to safeguard its execution. Doing so moreover expands the reach of the practice. However, framing the legal authorization-seeking of an injustice in terms of interests and strategy makes the interplay between the societal and legal-political elements of an injustice seem much less spontaneous than it actually is in practice. What has been missing from the analysis thus far are norms and beliefs. Both are crucial to explaining why societal actors naturally seek to have their aims translated into law.⁸⁰

⁷⁹ Ibid., 409. A white South Carolina doctor investigated for sterilizing black welfare recipients in the 1970s claimed “he worked hard to pay his taxes and was tired of having people come to him to have babies he would have to support with his tax dollars.” “Hell, man, don’t you realize we’re paying for her kids?” a white California doctor told a husband (who was black) reluctant to agree to his (also black) wife’s sterilization. The two did not receive welfare. Dorr, “Protection or Control?” 174-175.

⁸⁰ Many societal aims are, of course, extra-legal. If I want to convert others to my religion in the United States, I would not seek to initiate legal change that would require others to believe what I believe; I would appeal to their religious sensibilities.

The influence of the law on norms is something to which legal theorists have increasingly paid attention.⁸¹ Indeed, some go as far as to conceptualize the formation of norms as the main thing that law does.⁸² Because the law “expresses normative principles and symbolizes societal values,” as Richard McAdams puts it in an important article on the subject, it has a “moralizing” character.⁸³ The law teaches individuals about what is right and wrong in their society, conditioning them into a set of behavioral standards and belief systems upon which they operate without thinking. Legal change, then, simultaneously indicates a shift in societal norms and furthers this shift along. Take a classic example, that of antismoking laws in the United States. In a short span of time, smoking indoors in workplaces, bars, restaurants, etc., went from being incredibly common to almost taboo. Legislative victories on the part of antismoking activists did not merely curb smoking indoors because smokers and smoker-friendly restaurant owners feared punishment by law enforcement officials. Rather, antismoking laws bolstered an antismoking norm so much so that, as McAdams observes, it was not long before enforcement became entirely informal.⁸⁴ Without an antismoking movement, the legislative victories would not have taken place. But it is thanks to antismoking laws that antismoking norms formed as expeditiously as they did. It is difficult to judge counterfactuals, but it is quite possible that without antismoking laws, a general antismoking norm would not have formed at all.

⁸¹ The law and norms literature includes essays like Richard McAdams, “The Origins, Development, and Regulation of Norms”; Cass Sunstein, “Social Norms and Social Roles,” *Columbia Law Review* 96 (1996): 903-968; Cass Sunstein, “On the Expressive Function of Law,” *University of Pennsylvania Law Review* 144 (1996): 2021-2053; and Robert Cooter, “Expressive Law and Economics,” *Journal of Legal Studies* 27 (1998): 585-607.

⁸² For example, Donald Black defines law as “the normative life of a state and its citizens” in *Behavior of Law* (New York: Academic Press, 1976), 2. See also McAdams, “The Origins, Development, and Regulation of Norms,” 349 *et passim*.

⁸³ McAdams, “Origins, Development, and Regulation of Norms,” 398.

⁸⁴ *Ibid.*, 405.

A norm is a behavioral convention, or to use Edna Ullmann-Margalit's definition, "a regularity such that people generally conform with it" and "generally approve of conformity to it and disapprove of deviance from it."⁸⁵ Jon Elster similarly describes societal norms as "shared by other people and partly sustained by their approval and disapproval."⁸⁶ By what means, then, does a norm's observance garner approval and so regularize behavior? The notion of "beliefs" and "belief systems" is essential to any theoretical account of norms; it is due to the fact that members of a society share in a set of beliefs that converging on behaviors through the mechanisms of approval and disapproval are possible.⁸⁷ Beliefs do not have to be rationally determined. They can be internalized through social conditioning without conscious processing. Law thus forms norms by informing beliefs.⁸⁸ As McAdams observes, this often takes place indirectly by indicating the state of public opinion.⁸⁹ That antismoking legislation passed publicized the information that enough Americans saw smokers as "unhappy addicts" and second-hand smoke as a health hazard for "a well-financed tobacco lobby" to be defeated.⁹⁰ Hence an antismoking norm is preceded by the formation of new beliefs about where smoking may reasonably take place.

⁸⁵ Edna Ullmann-Margalit, "Revision of Norms," *Ethics* 100 (1990): 756-767, 756.

⁸⁶ Jon Elster, "Social Norms and Economic Theory," *Journal of Economic Perspectives* 3 (1989): 99-117. See Sunstein, "Social Norms and Social Roles," 914, for a similar definition.

⁸⁷ I follow Converse's definition of a belief system as "a configuration of ideas and attitudes in which the elements are bound together by some form of constraint or functional interdependence." Converse, "The Nature of Belief Systems."

⁸⁸ McAdams, "Origins, Development, and Regulation of Norms," 358-359.

⁸⁹ *Ibid.*, 396.

⁹⁰ *Ibid.*, 405.

In the literature on law and norms, authors often use examples in which new laws encourage salutary societal change: antismoking norms superseding smoking norms by way of antismoking legislation, racially tolerant norms superseding racially discriminatory norms by way of civil rights legislation, and so on.⁹¹ But just as “enacting a law might change the equilibrium and cause most people to switch behavior from wrong to right,” to use Robert Cooter’s words, the enactment of a new law can “tip aggregate behavior” in the other direction.⁹² The human social world is not characterized by a stable set of values and meanings. There is uncertainty and ambiguity, and often we are hard-pressed for information as to what to believe and how to behave, especially when faced with novelty and change.⁹³ That the law often “tracks morality” is a common enough notion that we are not irrational to take our cues about what is right and wrong from it.⁹⁴ Injustice, again, argues for itself in language ostensibly compatible with liberal democratic values, justifying itself in terms amenable to some conception of the common good. In this light, it is not hard to see how many would not rationally process that a law is extreme and unjust, and unthinkingly internalize it as part of a larger public morality.⁹⁵

To go back to our example, sterilization laws cultivated the perception of the feeble-minded as a dependent class whose societal presence was incompatible with the progressive understanding of democracy, and who could be reasonably bred out of existence. It

⁹¹ Cooter, “Expressive Law and Economics,” 594; Sunstein, “Social Norms and Social Roles,” 931. McAdams discusses how anti-miscegenation and anti-sodomy laws result from and reinforce the desire of some to impose their normative standards of behavior on others. McAdams, “The Origins, Development, and Regulation of Norms,” 414-415.

⁹² Cooter, “Expressive Law and Economics,” 595, 586.

⁹³ See Beerbohm, *In Our Name*, esp. Ch. 7, for more on the moral uncertainty that characterizes political life.

⁹⁴ *Ibid.*, 596.

⁹⁵ Citizens in a democracy who unthinkingly internalize an immoral set of norms and beliefs may be morally responsible for their having done so. Beerbohm, *In Our Name*, Ch. 9.

is the normative influence of sterilization laws that explains why doctors saw themselves as deputized to perform sterilization surgeries unlawfully, forging consent forms or performing Mississippi appendectomies. On a theory that considers laws to be no more than commands in the imperative form, such behavior would not make sense.⁹⁶

By way of conclusion, eugenical sterilization laws probably did much more than nourishing societal norms that obscured the injustice of forced sterilizations. In a 1990 *Harvard Law Review* article, Robert Hayman assiduously traces a host of legal norms and social practices surrounding the presumptive unfitness of the “mentally retarded parent”—e.g., the court-ordered placement of a child in foster care or group home instead of allowing her to live with her biological mom or dad—to state sterilization laws and the *Buck* decision.⁹⁷ More broadly, disability theorists have long been attune to the socially constructed elements of mental and physical handicaps, demonstrating many of the operative distinctions today to be historically contingent and arbitrary. Surely the disability theorists are right that in the United States, over half a century of legally-sanctioned compulsory sterilization surgeries have played a non-negligible role in modern constructs of disability and ability.⁹⁸

⁹⁶ H. L. A. Hart, “Positivism and the Separation of Law and Morals,” *Harvard Law Review* 71 (1958): 593-629.

⁹⁷ Robert L. Hayman, Jr., “Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent,” *Harvard Law Review* 103 (1990): 1201-1271.

⁹⁸ Mary L. Manion and Hank A. Bersani, “Mental Retardation as a Western Sociological Construct: A Cross-Cultural Analysis,” *Disability, Handicap & Society* 2 (1987): 231-245; Claire H. Liachowitz, *Disability as a Social Construct: Legislative Roots* (Philadelphia: University of Pennsylvania Press, 1988), esp. Ch. 4; Jonathan C. Drimmer, “Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities,” *UCLA Law Review* 40 (1992): 1341-1410; and Pamela Block, “Sexuality, Fertility, and Danger: Twentieth-Century Images of Women with Cognitive Disabilities,” *Sexuality and Disability* 18 (2000): 239-254.

3.4 Towards a Norm of Redress

In the previous chapter, an accountability-based argument for reparations applicable to a wide range of cases was laid out. It is now possible to make the move from reparations to a general norm of redress based on the idea that the injustice of the state is not anticipated by liberal democracies to a satisfactory degree.

Adrian Vermeule has recently argued for seeing constitutions as “devices for regulating and managing political risks,” *viz.*, “tyranny and dictatorship, self-dealing by officials, akratic decision making by majorities, exploitative oppression of minorities, and various forms of bias or corruption in adjudication, regulation, and political decision making.”⁹⁹ What I am referring to as the injustice of the state often takes the form of the “exploitative oppression of minorities” or, as in the case of eugenical sterilization laws, the exploitative treatment of those at the political margins—and this is but one risk among many. How well does the constitutional setup of liberal democracy manage the political risk of state-sponsored injustice at present?

To begin with, it is important to emphasize that the very institutions which I have described as facilitating state-sponsored injustice in the previous section can be harnessed to overturn an unjust law, or bring an unjust political practice to an end.¹⁰⁰ Perhaps more remarkable than state-sponsored injustice as a phenomenon is the fact that the democratic process is accessible to those who wish to fight injustice; that many have done so successfully means that democracy does reasonably well as a political risk management tool. One might, then, conceive of liberal democracy as a dynamic process of error and learning: mistakes will

⁹⁹ Vermeule, *Constitution of Risk*, 3.

¹⁰⁰ This is the theme of Michael J. Klarman, *Unfinished Business: Racial Equality in American History* (Oxford: Oxford University Press, 2007).

always be made, but these eventually sort themselves out with time. However, we can still ask, is the fact that an unjust practice can be (and often is) abolished enough? Let us turn to two domains in which there is an intentionally built-in institutional means of rectification that serve to manage political risks that are inevitable in the practice of governance.

The Takings Clause. The Fifth Amendment requires that the state pay just compensation if it seizes private property for public use. It is anticipated that there may be circumstances in which a state may need to take an individual's property, but the compensation provision is designed to keep the economic impact on individuals to a minimum. From a political risk management standpoint, it is wise to require that the state perform a cost-benefit analysis as to whether the compensation due to the landowner is worth it.¹⁰¹ This deters the state from taking individuals' property willy-nilly: there would presumably be many more acts of eminent domain than there currently are if the state never had to pay a fee. Eminent domain may always feel like a harm to the individual who would rather keep her property than receive compensation for it, but since there are good arguments in favor of occasionally taking private property for public use, the takings clause at least requires that the harm not go uncorrected.¹⁰²

The Federal Tort Claims Act. Since at least the antebellum period, there has been a general legal presumption of sovereign immunity for the federal and state governments. But by 1946, Congress realized that sovereign immunity was an inconvenient doctrine in certain situations—e.g., every time a government vehicle was at fault in an automobile collision, citizens

¹⁰¹ See, e.g., James Geoffrey Durham, "Efficient Just Compensation as a Limit on Eminent Domain," *Minnesota Law Review* (1984): 1277-1313.

¹⁰² Vermeule, *Constitution of Risk*, 42-43.

would put the complaint before Congress with a private claim bill.¹⁰³ The Federal Tort Claims Act (FTCA) was enacted so that individuals could bring tort suits against the government and obtain damages.¹⁰⁴ According to the FTCA, the government can only be sued if there is a direct private analogue to its action; it is not liable if it is acting in its capacity as the government.¹⁰⁵ Though this provision bars a wide range of cases (including nearly all reparations lawsuits), the FTCA *is* a built-in means of recourse for harm to individuals caused by the state.

Thus in at least two different ways, the American political system has adopted redress mechanisms to manage the risk of wronging individual political subjects.¹⁰⁶ The problem is that we do not tend to think of state-sponsored injustice as a political inevitability akin to an emerged need for an individual to give up her property for the sake of the greater public good, or accidental harm caused by state employees. But not only is this a political risk, it is one that is not managed very well if there only exists the institutional means of fighting for annulment: Peter is prevented from being robbed to pay Paul. It is perverse that there is an available remedy for someone who is injured when her car is accidentally hit by the postal truck, but not for someone who is deliberately subject to an irreversible surgery that prevents her from having children.¹⁰⁷

¹⁰³ Harry Street, "Tort Liability of the State: The Federal Tort Claims Act and the Crown Proceedings Act," *Michigan Law Review* 47 (1949): 341-368, 346.

¹⁰⁴ *Ibid.*

¹⁰⁵ U.S. Code § 2680.

¹⁰⁶ My treatment here is not meant to be exhaustive.

¹⁰⁷ *Feeley v. United States*, 337 F.2d 924 (3d Cir. 1964), involves Donald Feeley's getting hit by a postal truck. His claim was successful.

However, is not the real lesson here that a government should anticipate the injustice of a compulsory sterilization law, and not enact it in the first place? Vermeule makes the point that institutional constraints in the spirit of “precautionary constitutionalism” designed to minimize political risks are unwise, as “some abuse of power is the inevitable byproduct of cost-justified grants of governmental discretion.”¹⁰⁸ It is difficult, in other words, to tie the hands of the state so that it cannot enact unjust policies without the institutional constraints that do the work being overly broad. Whether Vermeule is right generally is a debate that has not been settled, but his concern is worth registering. Moreover, it is unlikely that more attention to the specific political risk of exploiting minority interests would effectually nullify the fact that men are not angels, and the government is run by men. Absent the hyper-vigilant moral supervision of politics by a people that wills laws treating all individuals as having equal worth, which of course is an ideal worth striving for, the phenomenon of state-sponsored injustice is unlikely to disappear anytime soon.¹⁰⁹

If the preemptive political risk management of the injustice of the state is unwise or impossible, what is a liberal democracy to do? Vermeule argues that in a wide range of political risk management contexts, ex post correction is preferable to ex ante risk minimization.¹¹⁰ When it comes to the injustice of the state, there are multiple possible means of an ex post remedy. One might think that the option to seek redress from the legislature is sufficient, as no institutional

¹⁰⁸ Here Vermeule is interpreting Federalist 41. *Constitution of Risk*, 59.

¹⁰⁹ The hyper-vigilant moral supervision of politics route is the outcome of Beerbohm’s discussion of the injustice of the state. Beerbohm, *In Our Name*. Note that I do not think that a norm of redress is a substitute for democratic responsibility as an unjust legislative measure is being debated. In fact, a worst case scenario would be that a democratic legislature decides that it can violate individual rights indiscriminately now knowing that it can pay for it later. But I do not think that this scenario is very likely. Factoring it in as an argument against a norm of redress would be precisely the sort of risk-averse political thinking that Vermeule is cautioning against.

¹¹⁰ See Vermeule, *Constitution of Risk*, 187.

mechanism formally precludes claimants from using the democratic process to obtain reparations. We should be realistic, however. If the government enacts legislation that is economically harmful to corporations—say, a new set of regulations that will be extremely costly for a pharmaceutical company to comply with—they can, and often do, lobby for compensation.¹¹¹ Conversely, when the state’s policies harm individuals already disadvantaged along political, social, and economic lines, similar lobbying efforts oftentimes do not take place precisely because these individuals tend to lack political clout. Things can be improved, however, though a norm of redress for the state’s unjust policies and practices.

A proposal for a norm of redress in the United States is not without precedent. Though generally skeptical of tort suits against governments, Carol Harlow is favorable towards the German legal norm of *Schutznormtheorie*, which recommends redress in cases in which there has been “a serious violation of a ‘superior rule of law’,” and the intent is “the protection of individuals.”¹¹² In French administrative law, *l’égalité devant les charges publiques* is a redress principle designed to promote, in Harlow’s words, “an ethos of social solidarity and collective responsibility,” so that a small group of individuals is not made to bear the entire weight of a social or economic policy on its own in order to promote some collective good.¹¹³ In the United States, the Federal Tort Claims Act is designed specifically so that the government is not held liable for torts when acting in its capacity as the government, which may be for good reason, but nevertheless rules out recourse for policies and practices that are deeply unjust and violate individual rights. A norm of redress hits the sweet spot of accountability optimization by being a

¹¹¹ Saul Levmore, “Changes, Anticipations, and Reparations,” *Columbia Law Review* 99 (1999): 1657-1700.

¹¹² Carol Harlow, *State Liability: Tort Law and Beyond* (Oxford: Oxford University Press, 2004), 59.

¹¹³ *Ibid.*, 60.

norm not of legal liability, but of moral responsibility.¹¹⁴ If wisely institutionalized—I will argue later for a permanently-instituted federal reparations commission—a norm of redress regulates against the risk of state-sponsored injustice against individuals while giving the government an out against the “strong financial incentive to blame others for loss or death or wrongful injury.”¹¹⁵ Against those who nevertheless worry that it would bring 300 million opportunists out of the woodwork, all claiming some harm against the United States government, there are viable means of preventing a norm of redress from being overly broad, and while still allowing the state to be a state.¹¹⁶

3.5 Conclusion

If the United States were to institute a norm of redress, routinely paying reparations whenever it became clear that its policies and practices have harmed individuals unjustly, this may have the happy result of encouraging the government to anticipate that an injustice today may be costly later on, and exercise self-restraint.¹¹⁷ Even if a norm of redress does not have deterrent power, from the standpoint of meaningful accountability, reparations are still owed, as accountability vindicates individual rights and shows that they have value. In the case of eugenical sterilization, it seems clear enough that a person’s freedom to determine what happens to her body, a basic right on most accounts, is at issue. Later on, I will discuss more complex

¹¹⁴ Boris Bittker, *The Case for Black Reparations* (Boston: Beacon Hill Press, 2003), 21.

¹¹⁵ P.S. Atiyah, *The Damages Lottery* (Oxford: Hart Publishing, 1997); quoted in Harlow, *State Liability*, 22.

¹¹⁶ See a discussion of this relative to FTCA claims in Jack W. Massey, “A Proposal to Narrow the Assault and Battery Exception to the Federal Tort Claims Act,” *Texas Law Review* 82 (2003-2004) 1621-1652, 1634: “Although the legislative history of the exception is sparse, it is clear that Congress intended to make the United States invulnerable against intentional tort claims. Immunity saves the government from becoming the ultimate deep-pocketed defendant in a host of lawsuits.”

¹¹⁷ Levmore, “Changes, Anticipations, and Reparations.”

harms. But the framework that I have laid out here—authorization, protection, systemization, execution, enablement, and norm- and belief-formation—helps shed light on how a liberal democratic government comes to carry out any injustice that is deeply at odds with its commitments.

As mentioned the prior chapter, of all the states that enacted sterilization laws, North Carolina has been the only one to pay reparations to individuals who were sterilized. In 2011, Karen Beck, the granddaughter of a sterilization victim, testified before a task force charged with determining an appropriate method of paying redress to sterilization victims. “Can the state fix this problem? Can it go back and mend the bodies they broke and restore all those stolen legacies? No, it can’t,” Beck reasoned. “But I’ll tell you what it can do. It can say it’s sorry in a way that’s meaningful. It can breach the walls of shame and guilt it erected and it can make restitution.”¹¹⁸ As Dr. Laura Gerald, the chair of the task force, explains the state’s interest in reparative justice: reparations send “a clear message that we in North Carolina are a people who pay for our mistakes,” opening up “another chapter in the history of Eugenics in North Carolina—a chapter that starts with a tangible acknowledgement that the state acted in error and blatant disregard to its citizens.”¹¹⁹

On structural accounts of injustice, there are plausible arguments for taxpayers to take responsibility for injustice and pay reparations. Since the set of all taxpayers has a great deal of overlap with the set of all members of society, the state is a reasonable proxy for society, the actual responsible collective agent. But on a political account like mine, taxpayers should pay

¹¹⁸ *Preliminary Report of the Governor’s Task Force to Determine the Method of Compensation for Victims of North Carolina’s Eugenics Board*, D-19.

¹¹⁹ *Ibid.*, I-3.

primarily because taxation is how the state gets its money, and because the state is responsible for redressing its own wrongs. Indeed, the politics of redress are highly sensitive to these sorts of distinctions. Korean comfort women forced to serve as Japanese military prostitutes during World War II have refused reparations from the privately-funded National/Asian Women's Fund because they money did not come from the Japanese government.¹²⁰ The privileged nature of political authority, legitimized by its presumptive benefits to those over whom authority is exercised, gives state-sponsored injustice its singular nature and scope. A norm of redress may not ever prevent the injustice of the state, but at the very least, it would convey a sense of self-awareness that many liberal democracies today lack.

¹²⁰ C. Sarah Soh, "Japan's National/Asian Women's Fund for 'Comfort Women,'" *Pacific Affairs* 76 (2003): 209-233; Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Boston: Beacon Press, 1998), 105; Debra Satz, "Countering the Wrongs of the Past: The Role of Compensation," in *NOMOS LI: Transitional Justice*, ed. Melissa Williams (New York: New York University Press, 2012): 129-150, 135-136.

Historical State-Sponsored Injustice

At this point, it becomes necessary to complicate matters by adding in the passage of time. Many of the objections raised by critics of reparative justice arise from the assumption that all reparations claims refer to injustices that happened a long time ago. Many philosophical defenses of reparations also make this assumption, and aim to put to rest time-related objections. One line of questioning has to do with the idea that defenses of reparations are based on an anachronism. What to make of the fact that reparations claims for historical injustices refer to acts that, in Daniel Butt's words, "were typically not illegal by the laws of the day, nor even necessarily considered to be morally wrong at the time"?¹ Indeed, that "it may be unfair to blame society, in hindsight, for practices that were legal at the time and widely perceived as morally permissible" is a prominent worry in popular reparations discourse.² And so, it can be asked, does not the logic of reparations programs rely on holding earlier generations to present-day legal and moral standards? How do reparations make sense in light of the fact that laws and conventional moral beliefs change over time? Should today's members of the politically dominant class feel guilt for their predecessors' deeds and mindsets? What does a norm of redress mean for legal systems when it comes to state-sponsored injustices which, like eugenical sterilization, were formerly conducted by means of law?

A second set of questions focuses primarily on issues pertaining to intergenerational justice. It is reasonable to assume, for example, that a broken treaty leading to a series of

¹ Daniel Butt, *Rectifying International Injustice: Principles of Rectification and Compensation Between Nations* (Oxford: Oxford University Press, 2009), 5.

² Kim Forde-Mazrui, "Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations," *California Law Review* 92 (2004): 683-753, 711.

relocations has ultimately resulted in an entirely different group of present-day persons than if the treaty had been observed.³ How can we speak of restituting present-day tribal members for the injustices experienced by their ancestors when in fact, if it were not for these injustices, they would not have been born?⁴ Moreover, lines of descent do not always result in clear-cut divisions between victims and perpetrators. What about multiple waves of immigration that have taken place in America since colonial era land removal and slavery? What about present-day individuals whose ancestry traces back to multiple groups?

I have already stated my conviction that some theorists get so caught up in passage of time-related difficulties, particularly those pertaining to intergenerational justice, that the political dimension of historical injustice gets lost. I have argued for a shift in reparations discourse and scholarship from a paradigm of *historical* injustice to that of *state-sponsored* injustice. If thinking through the historical dimensions of slavery, Indian land removal, etc., is the priority, the focus becomes historical perpetrators, who their descendants are, and why it is valid for present-day citizens to be a proxy for these descendants as reparations payees.

Challenges surrounding family lines seem to be the most pressing, and the significance of reparations being sought from the state gets lost in the philosophical technicalities of the duties of justice between generations. Moreover, scholars interested in understanding reparations for *historical* injustice may exclude reparations programs where living parties receive redress for firsthand injuries—e.g., Japanese American internment reparations and Holocaust reparations—

³ See, e.g., George Sher, "Compensation and Transworld Personal Identity," *Monist* 62 (1979): 378-391; and "Ancient Wrongs and Modern Rights," *Philosophy & Public Affairs* 10 (1981): 3-17; Jeremy Waldron, "Superseding Historic Injustice," *Ethics* 103 (1992): 4-28; and "Redressing Historic Injustice," *University of Toronto Law Journal* 52 (2002): 135-160; Janna Thompson, *Taking Responsibility for the Past: Reparation and Historical Injustice* (Malden, MA: Polity Press, 2002); Lukas H. Meyer, "Reparations and Symbolic Restitution," *Journal of Social Philosophy* 37 (2006): 406-422.

⁴ Jeremy Waldron, "Superseding Historic Injustice," 12; "Redressing Historic Injustice," 145.

from their inquiries.⁵ My aim, however, is not to completely ignore the passage of time. It is rather to relegate the issue from the center stage to the sidelines, with particular attention to time-related difficulties that emerge when historical *state-sponsored* injustice is the basis of inquiry. The importance of questions that are often raised but infrequently investigated, *Does reparative justice involve a legal anachronism? What does it mean for the state to be on the hook for old laws?*, become obvious in this light.

In this chapter, I first respond to the anachronism challenge as it pertains to both laws and societal moral beliefs, continuing the efforts of the previous chapter in spelling out the relationship between the two. I then turn to the idea that liberal democracies are set up to cultivate progress. A shift in majority moral beliefs spurs along the annulment of unjust laws, and annulling unjust laws furthers the shift in majority moral beliefs. Progress is not always linear, and it may have a way of disguising new modes of state-sponsored injustice, but generally speaking, this legal-moral trajectory demonstrates one kind of responsiveness of liberal democracies to claims made by individuals and groups. This responsiveness does not usually apply to claims for redress in the aftermath of state-sponsored injustice, however. If the effects of state-sponsored injustice endure, then later generations of state officials may undertake reparative justice precisely because their predecessors did not. Next, I tackle some of the metaphysical issues surrounding the duties of justice between generations, and show how they are resolved on an accountability-based theory of reparations. Finally, I turn to the relationship between present-day citizens and past injustices. An accountability-based theory of reparations does not ignore immoral belief systems, interpersonal prejudice, discrimination, and cruelty

⁵ Jeff Spinner-Halev, *Enduring Injustice* (Cambridge: Cambridge University Press, 2012), 10.

within a society. Quite the contrary, it is largely based on the idea that a system of law and the political authority of the state are uniquely capable of exacerbating injustice with societal roots.

4.1 Retroactivity, Reparations, and the Law

There is an ancient debate about who should rule: should it be men or laws? The great advantage of the rule of law is its stability. Citizens know what the law is, and can be confident in their decision to comply with the law. Citizens can moreover arrange their expectations around the law, trusting that even though laws may change, lawmakers care deeply about stability, and will be solicitous about potential changes to the law that seem rash. In modern times, as the state has assumed an increasing number of administrative functions, laying out highly technical regulations in areas like the environment, consumer protection, and public health, it is almost expected that large corporations will hire teams of lawyers to make sure that business decisions are fully informed by what the law does and does not allow. Laws that fluctuate capriciously would seem to go against our basic notions of fairness.

The previous chapter concluded with the argument that a general willingness to pay reparations can be considered a form of political risk management. Specifically, the political risk is the abuse of power from behind the shield of law. A well-managed state would incorporate a norm of redress into its institutional structure, anticipating that the abuse of political power is forever a possibility. However, that many state-sponsored injustices were conducted through law creates a potential snag in the argument, since it means that the injustices were legal. That the state cannot be on the hook for practices that were legal is a perennial concern in reparations debates.⁶ It was a central point at the 2001 United Nations World Conference Against Racism,

⁶ This point has been raised many times in the reparations scholarship—see, e.g., Boris Bittker, *The Case for Black Reparations* (Boston: Beacon Hill Press, 2003), 136 *et passim*; Forde-Mazrui, “Taking Conservatives Seriously,” 711; Henry J. Richardson III, “Between Law and Justice: Professor Bittker’s Case for Black Reparations,” *Indiana*

Racial Discrimination, Xenophobia, and Related Intolerance during a heated debate about what Western countries that had participated in the slave trade owe to African and Caribbean countries today.⁷ UK leaders argued precisely that their country did not owe redress since slavery had been legal.⁸ Faced with opposition in this vein, some reparations scholars argue that it is inappropriate to be too concerned with legalistic considerations: “American society has a moral, rather than legal, obligation” to redress injustice, as the argument goes.⁹ Though this statement may be true, it should not be played as a trump card. Current legal paradigms sometimes present obstacles to our normative claims, and when they do, it is necessary to examine why these legal paradigms exist, and whether they can be dispensed with without this threatening the system of law as a whole. For the accountability-based theory of reparations to convincingly make the case for a norm of redress, it must be shown to be compatible with liberal democratic legal systems.

When an unjust law is revoked or nullified after some time, this a form of a legal transition. Legal transitions do not always starkly implicate questions of justice and injustice; more often than not, they raise regulatory issues. Consider a classic hypothetical from the legal transition scholarship. A new law is passed requiring that pharmaceutical companies adhere to

Law Journal 50 (1975): 517-540, 521; Alfred Brophy, “Some Conceptual and Legal Problems in Reparations for Slavery,” *NYU Annual Survey of American Law* 58 (2003): 497-556, 516; Keith N. Hylton, “Slavery and Tort Law,” *Boston University Law Review* 84 (2004): 1209-1268, 1213; Rhoda E. Howard-Hassmann, “Getting to Reparations: Japanese Americans and African Americans,” *Social Forces* 83 (2004): 823-840, 829-830, 832; Dinah Shelton, *Remedies in International Human Rights Law* (Oxford: Oxford University Press, 2005), 459-463; and Amy J. Sepinwall, “Responsibility for Historical Injustices: Reconceiving the Case for Reparations,” *Journal of Law and Politics* 22 (2006): 183-229, 211.

⁷ Butt, *Rectifying International Injustice*, 4. Says one lawyer: “Reparation may be awarded only for what was internationally unlawful when it was done, and slavery and the slave trade were not internationally unlawful at the time the colonial powers engaged in them.” Stephen Castle, “Caribbean Nations to Seek Reparations, Putting Price on Damage of Slavery,” *New York Times*, October 20, 2013, <http://www.nytimes.com/2013/10/21/world/americas/caribbean-nations-to-seek-reparations-putting-price-on-damage-of-slavery.html>.

⁸ Butt, *Rectifying International Injustice*, 4.

⁹ See Forde-Mazrui, “Taking Conservatives Seriously,” 738. See also Catherine Lu, “Colonialism as Structural Injustice: Historical Responsibility and Contemporary Redress,” *Journal of Political Philosophy* 19 (2011): 261-281, 265-266; and the anonymous “Bridging the Color Line,” *Harvard Law Review* 115 (2001-2002): 1689-1712.

more stringent regulations concerning a particular set of products. The pharmaceutical companies that manufacture these products will no longer be able to sell goods that they have already made that do not meet the new regulations. In addition, they will have to spend a great deal of money on manufacturing products that meet these regulations—human capital resources will have to be devoted to studying and implementing the regulations. Should the government compensate the pharmaceutical companies for whom it is extremely costly to comply with the new law? What kind of grandfathering clauses might help companies defray costs?

Within legal scholarship, there have been various debates as to how to deal with those whom Saul Levmore calls “new losers”—that is, individuals or corporations suffering an economic loss due to a new law or set of regulations.¹⁰ Some have argued that it is unfair to make new losers bear the cost of a new law on their own, a position often referred to as the “conventional” view.¹¹ Proponents of the conventional view typically advocate legal transitions that promote values like reliance and certainty, deriving from what is sometimes called the irretroactivity of law.¹² In the context of taxation, for instance, there is an irretroactivity argument for a new law to be accompanied by an implementation schedule that allows firms and individuals a period of time to adjust their economic behavior to the new taxation pattern. Or, the government may simply compensate the new losers created by the tax law’s enactment. Occasionally the conventional view lets new losers to bear the costs associated with a new legal mandate, but this is reserved for judicial situations where it is claimed that “adjudication clarifies

¹⁰ Saul Levmore, “Changes, Anticipations, and Reparations,” *Columbia Law Review* 99 (1999): 1657-1700, 1661.

¹¹ David M. Hasen, “Legal Transitions and the Problem of Reliance,” *Columbia Journal of Tax Law* 1 (2010): 120-173, 125. The conventional view is the view of Blackstone: “[A]s a matter of justice laws should not be enforced before subjects have an opportunity to become acquainted with them.” Elmer Smead, “The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence,” *Minnesota Law Review* 20 (1935-1936): 775-797, 777.

¹² Levmore, “Changes, Anticipations, and Reparations,” 1658.

what the law already is; as a consequence, no unfair change to the rules arises when a new interpretation is announced.”¹³

However, more recent accounts have emphasized that on the conventional view, potential new losers are disincentivized from voluntarily exercising good behavior that may eventually be mandated by law, since they have strong economic reasons to wait for the legislature to enact new laws or regulations so that they can claim unfairness, and lobby for compensation. There is a strong argument, therefore, for what Levmore calls an “anticipation-oriented” approach to legal transitions that incentivizes companies to voluntarily undertake reforms that promote individual wellbeing.¹⁴ Since companies have an informational advantage—that is, since they know their industries well and know which kinds of laws and regulations would ultimately benefit the public—by not offering compensation to losers, governments can incentivize companies to anticipate common good-oriented changes in the law.¹⁵ Going back to the original example, suppose that scientists develop a cheap pharmaceutical technology that is extremely risky and less effective than the existing technology, but highly profitable based on its low production costs. Firms calculate that, based on current regulatory trends, they can sell the product utilizing this technology for five years before new regulations will be implemented making the technology illegal—at which point the firm can lobby for the legislature to compensate them for their losses in manufacturing units of the product that can no longer be sold to consumers. Is it profitable for firms to go forward with the product? The answer is surely yes. But the new technology is only good for the firm, no one else. By making companies swallow the costs of the

¹³ Hasen, “Legal Transitions,” 126.

¹⁴ Levmore, “Changes, Anticipations, and Reparations,” 1663.

¹⁵ *Ibid.*; Louis Kaplow, “An Economic Analysis of Legal Transitions,” *Harvard Law Review* 99 (1986): 509-617, 531.

unsold units of the product and refusing requests for compensation, this incentivizes them to make decisions that are ultimately better for the public.¹⁶ Since it is more efficient for firms to plan their behavior in view of an anticipated new law than for governments to compensate them as part of a transition package and distribute this cost to taxpayers, new laws are not unfair, as Levmore argues.¹⁷

Historical injustice raises many retroactivity considerations about fairness. For instance, it used to be commonplace for emancipation laws to include some form of compensation to slaveowners for the economic harm cost of freeing of slaves. In the colonies of the British Empire, emancipation legislation typically included payments to slaveowners and—bizarre as it now seems to compensate slaveowners for emancipation with further years of slavery—a four to six year period of “slave apprenticeship.”¹⁸ The formal payments made by the government were substantial. It has been estimated that in the year 1833, 40 percent of Britain’s expenditures went to compensating slaveowners, an amount equivalent to 21 billion in today’s dollars.¹⁹ Almost every other modern emancipation scheme followed the British system, with slaveowners receiving payments in cash and years of mandatory labor by former slaves serving as apprentices.²⁰ Cuba, Brazil, the United States (except Washington D.C.), and Haiti are the only

¹⁶ Levmore, “Changes, Anticipations, and Reparations,” 1662.

¹⁷ *Ibid.*, 1667. An anticipation-oriented approach fundamentally changes the meaning of retroactivity, since in the legislative context, the new law does not clarify the old law, but supplants it. *Ibid.*, 1665.

¹⁸ See, e.g., Stanley Engerman, “Emancipation Schemes: Different Ways of Ending Slavery,” in *Slave Systems: Ancient and Modern*, ed. Enrico Dal Lago and Constantina Katsari (Cambridge: Cambridge University Press, 2008), 269-271.

¹⁹ Castle, “Caribbean Nations to Seek Reparations.”

²⁰ Engerman, “Emancipation Schemes,” 269-271.

historical examples that fit the model of uncompensated emancipation.²¹ And in Haiti, emancipation was a result of a slave rebellion, but free Haitians were eventually made to pay a large indemnity to France, resulting in a lengthy French occupation and the amassing of great indebtedness—events that call into question the idea that Haiti is a true historical example of uncompensated emancipation.

The conventional view of irretroactivity provides the argument as to why it would have been just to compensate slaveowners for the monetary cost of emancipation. They invested capital in buying slaves; why should slaveowners have to bear the cost of emancipation laws that essentially negate their capital investments? Moreover, compensation may have been strategically useful in persuading on-the-fence slaveowners who were convinced that emancipation was morally required, but knew that the money that had been spent on the buying of slaves would then be lost, to support emancipation legislation.²² However, the anticipation-oriented approach suggests that the prospect of compensation would have discouraged slaveowners from voluntarily manumitting their slaves. If a policy that frees slaves is good, then the earlier the voluntary manumission of slaves by slaveowners takes place, the better. The conventional view, on the contrary, theorizes that there should be carrots for moral foot-dragging.

²¹ Ibid., 268. The District of Columbia Emancipation Act of 1862, General Records of the United States Government; Record Group 11; National Archives, http://www.archives.gov/exhibits/featured_documents/dc_emancipation_act/transcription.html, provided for the abolition of slavery in Washington D.C. and set aside \$1 million as a reparations fund for slaveowners and for the salaries of reparations commissioners; up to \$300 was given to slaveowners for each newly freed slave.

²² “Even a desirable change in policy may be opposed by those who will lose from it... Compensating losers buys off opponents,” as Kaplow, “An Economic Analysis of Legal Transitions,” 571, writes. But compensation is not the only way to a smooth legal transition; Kaplow suggests logrolling as a more economically efficient means of convincing would-be losers to get on board with a socially beneficial piece of legislation. Ibid.

When it comes to the question of compensating or not compensating slaveowners, analyzing legal transition norms on rational choice behavior leads to conclusions that are better able to withstand the scrutiny of skeptics than claims like “The sovereign should not compensate slaveowners for the same reason that it should not compensate a robber whose court sentence requires him to relinquish the possession that he has stolen,” to borrow the words of Condorcet.²³ Taking a rational choice perspective, owning slaves was a business decision. Running a business comes with many risks, and one of these risks has to do with the effect of external societal or governmental forces on the flow of capital.²⁴ The whole point of a business is to make profits, and if profitability is best served by not voluntarily recalling a product that appears unsafe for consumers, or not manumitting slaves, because waiting for the government to enact new regulatory legislation may come with a lucrative compensation provision, then this is a case of market forces acting counter to the common good. And so, when it comes to an unjust set of laws like those protecting slavery, it seems accurate to say, with Levmore, that governments can correct the market by refusing to offer retroactive compensation to new losers.

In the context of historical injustice, however, monetary reparations refer to payments not to new losers, but to new winners. Why should a government compensate those who are benefitted by a new law? Levmore’s response rests on the assumption that the mark of a good law is the sentiment that “we are disappointed we did not find it earlier.” “[T]he more new law is in fact good law,” he writes, “the more this good law would have been yet better if enacted or

²³ Marquis de Condorcet, *Réflexions sur l’esclavage des nègres* (Neufchatel: La Société Typographique, 1781), 22. My translation. Elizabeth Anderson’s essay, “The Social Epistemology of Morality: Learning from the Forgotten History of the Abolition of Slavery,” in *The Epistemic Life of Groups: Essays in Collective Epistemology*, ed. Miranda Fricker and Michael Brady (Oxford: Oxford University Press, forthcoming), discusses Condorcet’s position.

²⁴ Kaplow, “An Economic Analysis of Legal Transitions,” 522-523, 529-531, 535.

conformed to earlier.”²⁵ And so, the government may reasonably be considered retroactively culpable, like a pesticide-making corporation that acted within its legal right to sell products that were dangerous to the public, “for things ranging from new food and drug regulation to judicial decisions reversed on appeal, overruled by statute, or otherwise altered by future decision makers.”²⁶ The crux of the argument, then, is that it is possible to “encourage better lawmaking by *associating change with payments for delay*” on the part of the state.²⁷ Take the example of same-sex marriage in the United States. Levmore is suggesting that if overturning the Defense of Marriage Act was a good idea in 2013, it would have been even better to do it in 2012, or in 2011, or in 2010, and so forth. If Congress knew that every time it squandered an opportunity to pass a bill overturning DOMA, this added hundreds of millions of dollars or more to what the U.S. government would eventually have to pay out as redress for injuries caused by denying equal treatment to same-sex couples, then it would have been encouraged to quickly pass this common good-oriented piece of legislation. The idea that it is always better for good laws to be enacted earlier is, of course, not uncontroversial. Justice Ruth Bader Ginsberg has stated that the Supreme Court’s decision in *Roe v. Wade* “moved too far, too fast.”²⁸ Similar concerns were raised by Justice Alito concerning same-sex marriage.²⁹ The implication of such a position, of course, is perhaps that the government should not be blamed for the bad effects of a policy before it is legally countermanded, since there is a “right” time for a change in policy to occur.

²⁵ Levmore, “Changes, Anticipations, and Reparations,” 1659.

²⁶ *Ibid.*, 1674.

²⁷ *Ibid.*, 1682.

²⁸ Geoffrey Stone, “Justice Ginsberg, *Roe v. Wade* and Same-Sex Marriage,” *Huffington Post*, May 12, 2013, http://www.huffingtonpost.com/geoffrey-r-stone/justice-ginsburg-roe-v-wa_b_3264307.html.

²⁹ *United States v. Windsor*, 570 U.S. ____ (2013) (Alito, S., dissenting.)

This idea may seem noxious to some. As Charles Ogletree has reproachfully pointed out time and again, when the Supreme Court used the term “with all deliberate speed” in *Brown v. Board of Education*, “deliberate” meant “slowly”—desegregation should take place, but at pace that is appropriate for American society, which was to say, at a sluggish pace.³⁰ Nevertheless, it is not obvious that speeding up the passage of common good-oriented laws works as a self-standing argument for paying reparations to the new winners of progressive legal transitions.

An even more pressing difficulty, however, is the possibility that reparations may actually delay desirable social change. In the case of Japanese American internment, as Levmore points out, these new winners received redress even though the possibility thereof did little to expedite positive change, given that the awards were distributed decades after the end of World War II.³¹ In fact, as Levmore admits, from a rational choice perspective, if “payments could be expected to come quickly after a decision to end internment policy, then such a decision might be delayed because the inclination of a government or interest group to avoid making payments might well dominate the added incentive of the poorly treated group to argue yet more strongly for change.”³² It looks, then, that a rational choice analysis of legal transitions is not sufficient to explain why historical injustices ought to be monetarily redressed. But it does show at minimum that the idea of law is not destabilized by conceiving of it dynamically, as something that changes and evolves over time. In the best case, there is reason to think that a conception of law wherein former slaves are provided redress rather than former slaveowners gives rise to a system of incentives that promotes the common good.

³⁰ Charles J. Ogletree Jr. discusses the matter at length in *All Deliberate Speed: Reflections on the First Half Century of Brown v. Board of Education* (New York: W. W. Norton & Co., 2004), 11.

³¹ Levmore, “Changes, Anticipations, and Reparations,” 1687.

³² *Ibid.*

4.2 Institutional Hypocrisy vs. Institutional Benightedness

Thus far it has been argued that it is coherent from the point of view of law to call state power to account for policies and practices that used to be legal. Another passage of time-related difficulty has to do with the idea that reparations claimants are basing their demands on today's morals. For many historians, "presentism," that is, judging past events by present standards, is a cardinal sin. Should historical state-sponsored injustice be assessed according to current morality, or the standards of the day? Or to ask a more fundamental question, what allows us to make a distinction between past and present belief systems in the first place?

For it to make sense to speak of some set of majority moral beliefs that were common at one time but are now considered immoral, some sort of moral learning needs to take place.³³ It is possible to distinguish between two kinds of moral learning. The first has to do with overcoming practices that are blatantly at odds with the spirit or letter of the law. Following Dennis Thompson, these practices are marked by "institutional hypocrisy."³⁴ Overcoming institutional hypocrisy is a kind of moral learning because members of society become more attune to the disparity between word and deed, and are willing to have this disparity reconciled with a piece of legislation or policy change. A second kind of moral learning has to do with actually making a new moral discovery. This occurs when a policy or practice seems innocuous to the politically dominant class, or in certain situations, even progressive and democratic, but turns out to be detrimental to some of society's members. Call this "institutional benightedness." Overcoming

³³ As Anderson, "Social Epistemology," points out, there can be moral mistakes as well, and sometimes it may not be immediately clear to the dominant group when learning and when mistakes are taking place. The example of the American eugenics movement from the previous chapter fits in with Anderson's observation nicely.

³⁴ Dennis F. Thompson, "Democratic Secrecy," *Political Science Quarterly* 114 (1999): 181-193, 191.

institutional benightedness is possible when new, more enlightened moral insights supplant old ideas undergirding policies that are revealed to be unjust.³⁵

In many real world cases, the moral wrong embedded in a political practice marked by institutional benightedness is not realized by the holders of political power and those whose interests they tend to represent—a class that historically includes most moral philosophers—until long after the practice desists. Social change is often spurred along by attacking the hypocritical elements of a political practice, since the moral concepts and categories relevant to the objectionable practice already exist and just need to be applied. Once social change occurs, the effects of institutional benightedness come into view, and members of society are more willing to accept new moral concepts and categories that have been developed to articulate the ways in which unenlightened practices of the past, and the moral beliefs protecting these practices, fail to withstand scrutiny. Of course, the parties harmed by the politically dominant class's benightedness do not need a new set of moral concepts and categories to protest its policies or to articulate the injuries that result. But it is precisely a characteristic of institutional benightedness for the dominant class to fail to register these complaints.

Most injustices that are the basis of reparations claims are a combination of institutional hypocrisy and institutional benightedness—the former and latter are so intricately intertwined in practice that it is often difficult to tell which aspects of a practice belong to which category. A practical illustration may be useful to show how they work together.

³⁵ Michelle M. Moody-Adams, in “Culture, Responsibility, and Affected Ignorance,” *Ethics* 104 (1994): 291-309, similarly discusses the status of “culturally induced moral blindness.” Chester Calhoun uses the language of “moral ignorance” in analyzing individual moral responsibility for conforming to gender norms harmful to women in “Responsibility and Reproach,” *Ethics* 99 (1989): 389-406. See also Tracy Isaacs, “Cultural Context and Moral Responsibility,” *Ethics* 107 (1997): 670-684, a response to Moody-Adams and Calhoun. Finally, see Miranda Fricker’s discussion of “hermeneutical injustice” in *Epistemic Injustice: Power and the Ethics of Knowing* (Oxford: Oxford University Press, 2007), 147-175, the paradigmatic example of which being a woman who undergoes sexual harassment at a point in time before even she herself possess the relevant concepts to articulate this experience.

“Kill the Indian, save the man” was, quite famously, the motto of U.S. Colonel Richard Henry Pratt, the founder of Carlisle Indian School. As Duncan Campbell Scott, a Canadian bureaucrat and leading proponent of assimilationist policies, stated: “I want to get rid of the Indian problem.... Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic, and there is no Indian question, and no Indian Department.”³⁶ And so it was that on both sides of the International Boundary, beginning in the mid-nineteenth century, boarding schools were set up with the goal of assimilating an entire generation of indigenous children into Anglo-European Christian norms.³⁷

The underlying sentiment from which the boarding school system sprung is a revealing case study in institutional benightedness. Assimilating indigenous peoples into Western cultural mores was hardly a practice that took place behind closed doors. Individuals like Scott and Pratt who took part in the process of “civilizing the Natives” did so with pride and moral conviction, which was sometimes even progressive for its time. This is illustrated in the following excerpt from Pratt’s memoir, in which the colonel recounts a conversation he had with a fellow army officer about the imminent passage of the Fourteenth and Fifteenth Amendments to the U.S. Constitution:

We talked of these high purposes and the Declaration of Independence, which affirmed that “all men are created equal with certain inalienable rights,” etc., and then contrasted these declarations and the proposed amendment with the fact that the Indian scouts, who were enlisted to perform the very highest functions of citizens, even giving their lives if need be to enforce these American purposes, were imprisoned on reservations throughout the country and were thus barred from these guaranteed opportunities which they only needed in order to develop,

³⁶ Quoted in John S. Milloy, *A National Crime: The Canadian Government and the Residential School System 1879-1986* (Winnipeg: University of Manitoba Press, 1999), 46.

³⁷ The Canadian term is usually “residential schools”; the American term is “boarding schools.”

become equal, and able to compete as citizens in all the opportunities of our American life.³⁸

Pratt then goes on to discuss “the Negro situation” and segregated army units, and his view that the amended U.S. Constitution would be incompatible with the latter. What Pratt was articulating is what he perceived as the institutional hypocrisy grounding the American racial order, something that he believed assimilation would resolve. “Kill the Indian, save the man” is frequently used as a decontextualized epigram so as to make Pratt sound like an out-and-out racist, but the story of Carlisle Indian School, the institution that Pratt founded and that served as the model for the boarding school system as a whole, is complicated by Pratt’s intentions. His memoir suggests an awareness that Indian peoples may not have wanted to lose their cultures, and that Native children did not like having their hair cut or being made to wear military dress, but Pratt saw such measures as necessary.³⁹ He seemed to genuinely believe that providing a Christian education that could integrate Indian children into mainstream social life was the only reasonable solution to the manifold issues Indian communities faced.⁴⁰ The boarding school system, however, was a failure in all important respects.⁴¹

³⁸ Richard Henry Pratt, *Battlefield and Classroom: An Autobiography*, ed. Robert M. Utley (Norman, OK: University of Oklahoma Press, 2004), 7. This is, of course, the possibility that Pratt was not sincere, and these are the musings of an old man wishing to justify his life’s work to his opponents and critics.

³⁹ “All immigrants were accepted and naturalized into our citizenship...and thus had a full chance to become assimilated with our people and our industries. Why not the Indian?” Pratt, *Battlefield and Classroom*, 214. See also *Ibid.*, 221-223, 232, 237. Cf. Milloy, *National Crime*, 296: “By the mid-1980s, it was widely recognized that the residential school experience in the north and in the south, like smallpox and tuberculosis in earlier decades, had decimated and continued to decimate communities. The schools were, with the agents and agencies of economic and political marginalization, part of the contagion of colonialism.”

⁴⁰ Forcing parents against their will to be separated from their children proved to be quite cruel and damaging, though the reasoning behind this, and behind situating boarding schools far away from reservation communities, was straightforwardly tactical. If children were close to their parents, children too easily would be able to run away from home. If students were able to return to the parents over the summer, moreover, the work of the boarding school instructors would be undone. See Andrea Smith, “Boarding School Abuses, Human Rights, and Reparations,” *Social Justice* 31 (2004): 89-102, 89.

⁴¹ See, e.g., Deborah Chansonneuve, *Addictive Behaviors Among Aboriginal People in Canada* (Ottawa: Aboriginal Healing Foundation, 2007); Lindsay Glauner, “The Need for Accountability and Reparation: 1830-1976, The United

These days, whites tend to believe that cultures of non-European origin have intrinsic value. Or, failing that, they are at least respectful of the desire of tribal groups living in the Americas to preserve their cultural heritage. This respect may be extremely superficial, at its height of expression when the purchase of a piece of indigenous art or jewelry is accompanied by the question, “Was this made by an actual Métis artisan?” Nevertheless, it is surely taboo for a white person to seriously propose that the problems facing First Nations peoples or American Indians today would be solved by aggressive assimilation tactics on the part of the government. “Kill the Indian, save the man” is quoted precisely because it is a shockingly candid expression of a belief that is no longer socially acceptable to hold or articulate. The vocabulary of multiculturalism and pluralism has both developed as a result of and contributed to the maintenance of the systemic changes in the moral comportment of Anglo-Europeans towards cultures other than their own. It is largely because of this vocabulary, in fact, that it is possible for the members of today’s politically dominant class to understand and articulate the ways in which forced cultural assimilation was a morally benighted practice.

When all is said and done, should Pratt be blamed for his benightedness? Perhaps. But there may be more to be learned in deeming him a nineteenth century white man who took a strong interest in his Native counterparts while simultaneously championing an educational philosophy that had extremely detrimental effects. It would have been very prescient for a white person living in North America during Pratt’s day to be able to articulate why assimilationist tactics were problematic. Indeed, just as the majority of yesteryear’s whites were myopic about assimilationist boarding schools doing more harm than good in the long term, the present

States Government’s Role in the Promotion, Implementation, and Execution of the Crime of Genocide Against Native Americans,” *DePaul Law Review* 51 (2001-2002): 911-961, 955-957; Caroline Tait, *Fetal Alcohol Syndrome Among Aboriginal People in Canada: Review and Analysis of the Intergenerational Links to Residential Schools* (Ottawa: Aboriginal Healing Foundation, 2003); and Smith, “Boarding School Abuses.”

generation, our generation, cannot easily forecast the effects of the injustices that we are committing. When it comes to institutional benightedness, a retrospective vantage point is often required for the members of the politically dominant class to appreciate what was wrong about the moral beliefs of their predecessors.

However, not all of the harms caused by the boarding schools can be explained away in terms of a benighted educational philosophy. Many of these harms are more closely linked to institutional hypocrisy.⁴² Nothing that Pratt envisioned rationalized the fact that the boarding schools following the Carlisle model were severely underfunded and curricularly deficient, and that malnutrition and disease occurred at rates much higher than that of the population at large.⁴³ Being told that “The best thing for us would be to die out,” and being taunted by teachers with names like “fat squaw” and “dirty Indian,” were not uncommon for boarding school students.⁴⁴ Sexual abuse was widespread, as was physical abuse.⁴⁵ (While mild paddling and other forms of corporal punishment were customary for non-Native students who attended Christian schools,

⁴² Smith, “Boarding School Abuses,” 90, writes of late nineteenth century debates whose content was: “We must either butcher them or civilize them, and what we do we must do quickly.” Thus Natives faced “this stern alternative: extermination or civilization.” Smith argues that the “rational for choosing cultural rather than physical genocide was often economic... [it was] concluded that it would cost millions of dollars to kill an Indian in warfare, whereas it cost only \$1,200 to school an Indian child for eight years. Secretary of the Interior Henry Teller argued that it would cost \$22 million to wage war against Indians over a 10-year period, but would cost less than one-quarter of that amount to educate 30,000 children for a year.” For Smith, this calculus explains the horrific conditions of Indian schools.

⁴³ It was typical for students to do manual labor, from which their teachers often directly profited, in lieu of taking lessons. Smith, “Boarding School Abuses,” 91; Agnes Grant, *No End of Grief: Indian Residential Schools in Canada* (Winnipeg: Pemmican Publishers, 1996), 111-140.

⁴⁴ Maureen McEvoy and Judith Daniluk, “Wounds to the Soul: The Experience of Aboriginal Women Survivors of Abuse,” *Canadian Psychology* 36 (1995): 221-235, 227.

⁴⁵ McEvoy and Daniluk, “Wounds to the Soul”; J. R. Miller, *Shingwauk’s Vision: A History of Native Residential Schools* (Toronto: University of Toronto Press, 1996), 317-343; Grant, *No End of Grief*, 221-244; Milloy, *National Crime*, 296-305.

this was usually not considered nor experienced as physical abuse.⁴⁶) There are numerous documented cases of suicide, and cases have been uncovered of students having been beaten to death by their teachers.⁴⁷ The question, then, arises: how to assess the missionaries who leveraged such abuses upon boarding school students? This question brings the difference between institutional benightedness and institutional hypocrisy into full relief. No one would think that it is fundamental to the mission of an assimilationist educational philosophy for a teacher to abuse his or her students. The harm of physical and sexual abuse is much less abstract than the harm of forced cultural assimilation. If there are any viable candidates for trans-historical principles, it would seem that not harming another person's body has to be one of them, and because the abuse of students by their teachers is so flagrantly at odds with any educational philosophy worthy of the name, it seems clear that these abuses are best considered forms of institutional hypocrisy rather than institutional benightedness.

It was claimed at the beginning of this section that institutional hypocrisy and institutional benightedness are often inextricably tangled together in practice. And indeed, one author writes that many former boarding school students "cannot separate out their experiences of sexual and physical abuse from the overall purpose of institutions intended to eliminate their culture and identity."⁴⁸ Yet the reparations settlement that the Canadian government eventually issued to boarding school survivors is a rare case in which some attempt has been made to distinguish between the harms resulting from each category. The 2006 case *In re Residential*

⁴⁶ Glauner, "Need for Accountability and Reparation," 952-954. Dr. Charles R. Brasfield coined the term "residential school syndrome" and outlined a medical diagnostic tool. Brasfield, "Residential School Syndrome," *British Columbia Medical Journal* 43 (2001), 78-81.

⁴⁷ See Elizabeth Furniss, *Victims of Benevolence: The Dark Legacy of the Williams Lake Residential School* (Vancouver: Arsenal Pump Press, 2002), 62-66, 92-93.

⁴⁸ Jennifer Llewellyn, "Dealing with the Legacy of Native Residential School Abuse in Canada: Litigation, ADR, and Restorative Justice," *University of Toronto Law Review* 52 (2002): 253-300, 284.

Schools Class Action Litigation settled 12,000 individual cases, along with several uncoordinated class action lawsuits filed against the Canadian government, on behalf of all the living former students of the schools.⁴⁹ Its terms were as follows. For students who attended schools that fell under the auspices of the Canadian government (not those that were privately run or controlled by religious organizations) the government agreed to:

1. Set aside \$1.9 billion for individual reparations payments to former residential school students: \$10,000 for the first year of school attended, and \$3,000 for each additional year after that.
2. Provide \$5,000 to \$275,000 to former students who suffered sexual or physical abuses “that caused serious psychological effects...or more money if they can show a loss of income.”
3. Contribute \$125 million to healing programs, \$60 million to “research, document, and preserve the experiences of the survivors,” and finally, \$20 million to fund commemoration projects at the national, province, and community levels.⁵⁰

Moreover, Canadian Prime Minister Stephen Harper delivered an apology to former residential school students, and a highly visible Truth and Reconciliation Commission was set up with funds from the settlement for the purposes of truth-telling and documentation. Parallel redress efforts have not been undertaken in the United States.

Assimilationist boarding schools were, again, characterized by both institutional hypocrisy and benightedness. Some readers will no doubt object to my putting the schools in the benighted category; others are likely to object to the existence of the category at all, arguing that all historical injustices fit the definition of institutional hypocrisy.⁵¹ The category of institutional benightedness is, however, useful for illustrating the difference in how the present generation

⁴⁹ Llewellyn, “Dealing with the Legacy,” 263, discusses the initial logjam created by the lawsuits.

⁵⁰ “Summary Notice,” website of the *Indian Residential Schools Settlement Agreement*, May 8, 2006, http://www.residentialschoolsettlement.ca/summary_notice.pdf.

⁵¹ Moody-Adams does not quite subscribe to this view, but see her discussion of “affected ignorance,” i.e., “choosing not to know whether some practice in which one participates might be wrong.” Moody-Adams, “Culture, Responsibility, and Affected Ignorance,” 296.

perceives the injustices of the past as compared to how these injustices were perceived in their own day. This in itself can explain the phenomenon that some refer to in writing about the totalizing nature of the colonial mentality: one way of coping is for oppressed persons to adopt the beliefs of the politically dominant class, rationalizing their own experience of oppression, or else go further and identify with the interests of the politically dominant class, becoming actively complicit as victim-perpetrators.⁵² It is worth further pointing out as well that even though I have selected an extreme case of the good intentions of Colonel Pratt bringing about great injustice, there is also willful benightedness, with a public morality making use of benevolent-sounding liberal democratic language to mask institutional hypocrisy. The word “benighted” was chosen because it suggests moral ignorance rather than moral innocence.

When institutional benightedness in any of its forms is present, this helps to explain why reparations claims do not always emerge immediately in the aftermath of a period of state-sponsored injustice, or if they do, why the majority at the time is often adamantly opposed to paying redress. The moral learning that time helps bring about explains why present-day members of the politically dominant class are able to appreciate what was so wrong with the injustices of earlier periods. This suggests that today’s politically dominant class should be open to reparations claims for historical state-sponsored wrongdoing precisely because their predecessors were not.

4.3 Liberal Democracy and Progress

Often as state-sponsored injustice takes place, it is not seen as unjust by the politically dominant group, but rather is rationalized as a practical, necessary measure that serves the

⁵² See Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge: Cambridge University Press, 2004), esp. 100-114; Catherine Lu, “Colonialism as Structural Injustice,” 270.

group's interests and goals. Many injustices are not generally labeled as such until well after their conclusion. But unjust policies and practices can have long-lasting effects. The presence of the effects of past injustice is worrying from a liberal democratic standpoint; an accountability shortfall is capable of becoming a permanent feature of the sociopolitical landscape. The stubborn patterns of disadvantage experienced by some of society's members as a result of past injustice are at odds with basic liberal democratic commitments. If the effects of past injustice linger, reparations claimants are reasonable to want meaningful accountability on the basis of these commitments. Though critics object, arguing that disadvantaged groups in the present are the beneficiaries of historical progress, not the victims of historical injustice, it is perfectly coherent to applaud progress while acknowledging the inherent limitations of the mechanisms by which progress takes place. Legal transitions that reflect moral learning on the part of the politically dominant class are not accompanied by meaningful reparative justice.

What are the mechanisms of liberal democratic progress? To begin with, in a liberal democracy, citizens are entitled to question the legitimacy of the state's policies and practices based on their perception that liberal democratic commitments are not heeded. Social progress emerges from a space for contestation created by various formal features of the political process, as well as by informal liberal and democratic norms. This space for contestation is characterized by free speech, free press, free association, the toleration of peaceful civil disobedience, various facets of the democratic process—e.g., petitions, ballot initiatives, regular elections, and term limits—and a democratic political culture that worries about the tyranny of the majority and pays homage to the notion of “free and equal.” At least when an injustice is formally authorized by law, the agents of sociopolitical change within liberal democracies tend to be social movements

that make multifaceted use of the liberal democratic space for contestation.⁵³ Charles Tilly has characterized the period leading up to the American Revolutionary War as a social movement: many of the Founders wanted to preserve the sort of salutary contentious politics that made the founding of the American Republic possible, and were mindful of preserving the political spirit of the Revolutionary period in designing the Constitution.⁵⁴ Whereas authoritarian regimes try to preserve and consolidate state power by stamping out dissent, liberal democracies give their citizens periodic opportunities to oust the representatives of government with regular elections, and provide facets by which contentious politics can be channeled towards legal changes that reflect evolving popular beliefs, stabilizing the equilibrium between state and body politic—a government that adapts is not going to be overthrown, as the logic goes. Thus in a profound sense, the institutional design of liberal democracy largely aims at fostering the sort of progress that contentious political mobilization brings about.

However, not all groups that mobilize around some minority interest will necessarily be successful.⁵⁵ The term “contentious politics” descriptively captures just how difficult it is to sway public opinion in favor of a minority position, and to translate this position into policy. A group that feels that the state’s policies and practices are unjust can make its voice heard, and attempt to convince others of the rectitude of its claim, but if the claim is of any consequence, it

⁵³ A standard definition of a social movement is a group of people “making collective claims on authorities” who “form special-purpose associations or named coalitions, hold public meetings, communicate their programs to available media, stage processions, rallies, or demonstrations, and through all these activities make concerted public displays of worthiness, unity, numbers, and commitment.” Charles Tilly, *Social Movements, 1768-2004* (Boulder, CO: Paradigm Publishers, 2004), 29.

⁵⁴ *Ibid.*, 16-37.

⁵⁵ A group that organizes around some minority interest is not the same as a group of interested minorities. Whites played a big role in the abolition movement. See James Brewer Stewart, *Holy Warriors: The Abolitionists and American Slavery* (New York: Farrar, Straus and Giroux, 1976). For pushback against the characterization of abolitionism as a white-led movement, see Benjamin Quarles, *Black Abolitionists* (New York: Oxford University Press, 1969). See also Anderson’s essay, “Social Epistemology,” for a discussion of how the abolition movement could have been better served had whites been more inclusive of enslaved persons and free blacks.

will be met with opposition. If a group garners enough support and eventually succeeds in getting the unjust policy stricken from the law, or in getting a new policy passed that supplants the old policy, it almost always does so by waging a tough political battle. Moreover, the politically dominant class is not necessarily putting aside its selfish interests in order to affirm a minority group's fundamental rights; progress is often spurred along by its economic interests, as well as considerations of expediency. As John Stuart Mill observed in 1861:

All persons are deemed to have a right to equality of treatment, except when some recognised social expediency requires the reverse. And hence all social inequalities which have ceased to be considered expedient, assume the character not of simple inexpediency, but of injustice, and appear so tyrannical, that people are apt to wonder how they ever could have been tolerated; forgetful that they themselves perhaps tolerate other inequalities under an equally mistaken notion of expediency, the correction of which would make that which they approve seem quite as monstrous as what they have at last learnt to condemn. The entire history of social improvement has been a series of transitions, by which one custom or institution after another, from being a supposed primary necessity of social existence, has passed into the rank of an universally stigmatized injustice and tyranny.⁵⁶

And so, given the contentious nature of contentious politics, and the fact that many minority rights claims are not seriously entertained until persuasive arguments are made that honoring liberal democratic commitments are in the politically dominant class's self-interest—which Derrick Bell has termed the “interest convergence thesis”⁵⁷—it should hardly be surprising that policy discussions surrounding major legal transitions are not accompanied by a meaningful, deliberate attempt to repair the effects of the injustice. And in many cases, there are no attempts at repair at all.⁵⁸

⁵⁶ J. S. Mill, “Utilitarianism,” in *On Liberty and Other Essays*, ed. John Gray (Oxford: Oxford University Press, 1991), 200.

⁵⁷ Derrick A. Bell Jr., “Brown v. Board of Education and the Interest-Convergence Dilemma,” *Harvard Law Review* 93 (1980): 518-533.

⁵⁸ There may seem to be a major exception to the characterization of major legal transitions as not being accompanied by redress, quota-based affirmative action following the Civil Rights Movement, which I discuss at

Following a major legal transition that results from a social movement—sometimes called a “social transformation”—why are reparative justice efforts either small or nonexistent?⁵⁹ The first explanation, which relates back to Levmore’s rational choice analysis, has to do with political capital. It is not without a large expenditure of political capital that those pushing to end an unjust practice are able to do so. Asking the politically dominant class to go beyond and immediately make good on a demand of large-scale redress is in most cases unfeasible because this would require political capital that the group has already used up.

The second explanation extends the logic of Bell’s interest convergence thesis. According to Bell (as well as Mill), social transformations only occur because the politically dominant class no longer sees the unjust policy or practice as in its self-interest. Similarly, for the politically dominant class to undertake the difficult and expensive work of large-scale redress, it would have to be convinced that large-scale redress is in its interest. Perhaps it is, and the politically dominant class does not realize it. Or perhaps there actually are no self-serving, instrumental reasons why large-scale redress would be beneficial to the politically dominant class—here there are moral reasons, but these moral reasons nonetheless run counter to what the class sees as its socioeconomic and political interests. Regardless as to whether the former or the latter is true, interest convergence is a largely matter of perception, and in the aftermath of a major social

greater length in Chapter 7. However, an important feature of affirmative action, though I do consider it to have been a form of reparations for political injustice against blacks, is that it was not accompanied by the government’s taking responsibility. Employers were blamed for discriminating against blacks, and charged with coming up with their own affirmative action programs. It would have been more coherent and palatable to Americans had employers been asked to implement quota-based affirmative action as the appropriately tailored response to state-sponsored injustice, and more palatable still if this was accompanied by an apology from the federal government. But the theory that I lay out in this section helps to shed light on why this did not happen.

⁵⁹ Luther P. Gerlach and Virginia H. Hine, *People, Power, Change: Movements of Social Transformation* (Indianapolis: Bobbs-Merrill Co., 1970).

transformation, meaningful reparative justice inevitably appears as too costly for it to be in the dominant group's interest to undertake.

The final explanation has to do with institutional benightedness—which may or may not be willful, depending on the particular case. Prior to the reform of an unjust political practice, this practice draws its strength from the fact that the politically dominant group either does not consider it unjust, or does not take seriously the welfare of the group whom the activity adversely affects. Since new moral paradigms tend to supplant old ones at glacial speed, as social change occurs and directly after the fact, it is still actively contested as to whether the activity in question is in fact unjust. It is not until many generations later that an overwhelming majority of a given population, born and socialized into a milieu in which the fruits of the reform-oriented social movement are taken as moral axioms, sees it as condemnable to, for instance, enslave another human being. Accordingly, unjust practices are bound to seem most galling in retrospect. At a given historical moment, it might seem to be generous for a group of powerful political actors simply to end an unjust practice; it is not until a new moral paradigm supersedes the old one that the gravity of the injustice is appreciated.

However, not all reparative justice efforts are delayed: not all reparations claims emerge in the context of a major societal-wide legal transition. When institutional hypocrisy strongly predominates, it is more likely that reparations will be possible within a few years of the injustice's coming to an end. For example, the Tuskegee syphilis study, which began in 1932 and was conducted by the U.S. Public Health Service, was exposed in 1972 to much public outrage. The ghastly human subjects experiments of the Nazis were well-known, and many were shocked that human beings could be made into research subjects without their knowledge or consent in a

country that stood for freedom.⁶⁰ Popular magazines published pieces sympathetic to the plight of the “human guinea pigs,” charging racism.⁶¹ The federal government’s paying reparations in 1974 was not only the right thing to do, but wise politically.⁶² (Still, an official apology was not offered until 1997.⁶³)

But when an injustice is rationalized by a benighted moral paradigm on the part of the politically dominant group, or else by some purpose whose pressing importance the majority has convinced itself of, then the passage of time may render an injustice historical without reparations ever being paid. When injustices become historical, contrary to the ideas of reparations critics, it is not as if reparations seekers suddenly wake up one morning and decide to press a claim based on some long-ago matter, making opportunistic use of the past to serve present political ends. Scholarship about black reparations often emphasizes the continuity of reparations activism since the post-Emancipation era.⁶⁴ If an original set of targets of state-sponsored injustice die and no effects are felt, then descendants tend not to feel as if they have inherited their parents’ or grandparents’ fight. But if effects persist, and the descendants are able

⁶⁰ James H. Jones, *Bad Blood: The Tuskegee Syphilis Experiment* (New York: The Free Press, 1993), 11-12.

⁶¹ See, e.g., Jack Slater, “Condemned to Die for Science,” *Ebony*, November 1972, 177-190; Randal H. Harper, “Rights of Syphilis Study 600 Violated,” *Atlanta Daily World*, May 15, 1973; “Syphilis Study used Coercion, Inquiry Told,” *Los Angeles Times*, February 24, 1973; Vernon Jarrett, “Syphilis Study’s Empty Discovery,” *Chicago Tribune*, August 17, 1973.

⁶² Jones, *Bad Blood*, 217.

⁶³ “Clinton Apologizes to Tuskegee Experiment Victims,” *CNN*, May 16, 1997, <http://www.cnn.com/ALLPOLITICS/1997/05/16/tuskegee.apology>.

⁶⁴ Tuneen E. Chisolm, “Sweep around Your Own Front Door: Examining the Argument for Legislative African American Reparations,” *University of Pennsylvania Law Review* 147 (1999): 677-727, 683-687; Joe Feagin, *Racist America: Roots, Current Realities, and Future Reparations* (New York: Routledge, 2001), 264-265; Martha Biondi, “The Rise of the Reparations Movement,” *Radical History Review* 87 (2003): 5-18; Rodney D. Coates, “If a Tree Falls in the Wilderness: Reparations, Academic Silences, and Social Justice,” *Social Forces* 83 (2004): 841-864; Mary Frances Berry, *My Face is Black is True: Callie House and the Struggle for Ex-Slave Reparations* (New York: Alfred A. Knopf, 2005); Alfred Brophy, *Reparations Pro & Con* (Oxford: Oxford University Press, 2006): 23-40; Roy L. Brooks, *Atonement and Forgiveness: A New Model for Black Reparations* (Berkeley: University of California Press, 2006), 6-10.

to draw a causal line between the injustice and a set of harms that they can identify, then they are reasonable to press a claim against the state for accountability and repair. When it comes to historical state-sponsored injustice, it may seem that present-day taxpayers do not have to pay because they are not culpable. However, it is precisely the privileged temporal vantage point that comes with moral learning that makes it possible for them to grasp the moral magnitude of historical wrongdoing.

4.4 Metaphysical Issues in Intergenerational Justice

Thus far I have tried to show that reparative justice involves neither a legal nor a moral anachronism. It is time to move on to the set of issues involving metaphysical challenges to reparations for historical injustice. Some of these issues are connected to philosophical analyses of intergenerational justice broadly speaking. They have a prominent place in the philosophical literature on reparations, and are occasionally raised in public debate. They are not, however, particularly problematic for real world redress efforts, at least not on the accountability-based theory of reparations. A first concern is about the impact of historical injustice on the identity of present persons claiming to be owed reparations. If it had not occurred, a different set of persons, and not the ones who currently exist, would have been born. A person claiming reparations thus owes the fact of her particularized existence to the very injustice on which her reparations claim rests. This is a version of the classic “non-identity” problem. A second concern has to do with the idea that historical injustices do not straightforwardly track family lines of descent. Is the reparations claim of a person who is half-black, half-white annulled by virtue of her mixed raciality? Third, what about the large immigrant population in a country like the United States? Do immigrants, as taxpayers, owe reparations for injustices against blacks or tribal groups that their ancestors had no part in perpetrating?

The second and third issues become less problematic once we take into consideration the assumptions that were presented as the basis of the theoretical account. The present analysis rejects the compensatory understanding of reparations that many authors take for granted. These authors make a distinction between “beneficiaries” and “victims,” sometimes invoking the legal concept of “unjust enrichment.” On these arguments, it is being the beneficiary of injustice that grounds a duty of repair.⁶⁵ As Glen Pettigrove analogizes, if the children of Flambeau, the world famous art thief, inherit a stolen Rembrandt, then are made aware that the painting was stolen, they become responsible for returning it to its proper owners.⁶⁶ If they fail? “It is their failure to rectify the unjust situation that constitutes their guilt,” Pettigrove writes.⁶⁷ Roy Brooks discusses a parable of a white poker player who cheats a black poker player for four hundred years, then stops. The black player asks the white player what he is going to do with all of his ill-gotten chips: “‘Well,’ says the white player, somewhat bewildered by the question, ‘I’m going to keep them for the next generation of white players, of course.’”⁶⁸ Robert Goodin advocates that present-day liberal democratic citizens “disgorge the fruits of historical wrongdoing” through the mechanism of redistributive taxation on the basis of the idea that we are all unjustly enriched in

⁶⁵ Authors making arguments in this vein tend to focus on African Americans, and include Bernard R. Boxill, “The Morality of Reparation,” *Social Theory and Practice* 2 (1972): 113-123; Richard F. America, “Unjust Enrichment and Restitution: Defining and Measuring Current Benefits from Past Wrongs—Estimation and Policy Implications,” *New York Law School Journal of Human Rights* 5 (1987-1988):413-423; Randall Robinson, *The Debt: What America Owes to Blacks* (New York: Plume, 2001); Margalynne Armstrong, “Reparations Litigation: What About Unjust Enrichment?” *Oregon Law Review* 81 (2002): 771-782; Glen Pettigrove, “Apology, Reparations, and the Question of Inherited Guilt,” *Public Affairs Quarterly* 17 (2003): 319-348; and Dennis Klimchuck, “Unjust Enrichment and Reparations for Slavery,” *Boston University Law Review* 84 (2004): 1257-1275. See also Feagin, *Racist America*, who makes an unjust enrichment argument, but emphasizes present-day white privilege and racism.

⁶⁶ Pettigrove, “Apology, Reparations, and the Question of Inherited Guilt.”

⁶⁷ *Ibid.*, 338.

⁶⁸ Brooks, *Atonement and Forgiveness*, 36. Note that Brooks is not committed to correcting historically-derived unjust enrichment argument as the main goal of reparations. “[A]tonement should be the sine qua non of redressing past injustices. Atonement is essential when, as here, monetary amounts can only be symbolic. A deep apology fortifies the symbolism, writes Brooks. *Ibid.*, 112.

some way by the injustice of the past.⁶⁹ The concept of unjust enrichment no doubt works for slavery. But eugenical sterilization laws, internment, and the existence of an assimilationist boarding school system do not straightforwardly result in material gains for one group at the other's expense. An accountability-based theory of reparations, with its focus on state-sponsored injustice past and present, rather than historical injustice per se, and its concern with unaccountable political power, is able to make sense of a broad range of injustices for which reparations are claimed in real world practice, including slavery. And in the case of slavery, though analogies based on the sons and daughters of Flambeau and interracial games of poker lasting multiple centuries are intuitively appealing, objections about recent immigrants and mixed raciality expose their weaknesses.

Accordingly, whereas discussions of historical injustice are frequently framed in terms of “beneficiaries” and “victims,” historical *state-sponsored* injustice can be understood in terms of “taxpayers,” who must take financial responsibility for the undertakings of their state, and “claimants,” who want to hold state power to account because they experience the present-day effects of historical state-sponsored wrongdoing. This formulation works well with commonsense intuitions about fairness in reparative justice even in cases that may seem to fit the historical unjust enrichment model. For instance, if a tribal group has some sort of cultural or spiritual connection to a geographical area that no monetary amount can approximate, group members may claim that land repatriation is required from the standpoint of reparative justice. Immediate eminent domain seizure, with compensation to current private landowners, may make sense if historical unjust enrichment is what grounds the reparations claim: these private landowners are the beneficiaries of injustice, end of story. But if they have inherited something

⁶⁹ Robert E. Goodin, “Disgorging the Fruits of Historical Wrongdoing,” *American Political Science Review* 107 (2013): 478-491.

that was not theirs to inherit, why should they be compensated at all?⁷⁰ The accountability-based theory of reparations, however, insists on compensation. The onus of repair for the historical abuse of political power should not be placed on an arbitrary group of present-day individuals just because they live on the land, or for that matter, on any group of individuals for any reason if that can be avoided. The state might set up a program to repatriate the land to the tribal group parcel by parcel as each current landowner dies, with would-be inheritors receiving just compensation from the taxpayer dole. There is still a burden if the would-be inheritors prefer having the land to compensation, but it is clear that this is fairer, and that the burden is more evenly spread, than with immediate seizure—especially if the repatriation program were publicized and the would-be inheritors had plenty of time to prepare themselves for the outcome.⁷¹ There is a similarity between this example and quota-based affirmative action. Though a form of reparative justice, and almost certainly justified given the fact that historical political injustices against African Americans resulted in a racially stratified culture of work in the post-segregation era, a common issue brought up in public debate during affirmative action’s heyday was that the unjust enrichment argument did not work, and that present-day whites were made to shoulder the burden of historical wrongdoing that they had no part in.⁷² “Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our

⁷⁰ Waldron provides two answers to this that do not rely on the accountability-based theory of reparations. First, we might think that an unjustly inherited parcel of land rests within the current land-owner’s “structure of expectations.” Second, it might be a generous assumption to think that the tribal group would have used the land rationally and retained it, therefore it is not completely certain that the inheritance is in fact unjust. See Waldron, “Superseding Historic Injustice.”

⁷¹ Compare Renée Hill, “Compensatory Justice: Over Time and Between Groups,” *Journal of Political Philosophy* 10 (2002): 392-415, 414-415.

⁷² Cf. Forde-Mazrui, “Taking Conservatives Seriously,” 723. See also James Rachels, “What People Deserve,” in *Justice and Economic Distribution*, ed. John Arthur and William H. Shaw (Englewood Cliffs, NJ: Prentice Hall, 1991), 162: Some whites are more qualified “only because they have not had to contend with the obstacles faced by their African-American competitors.”

Constitution there can be no such thing as either a creditor or a debtor race,” as Supreme Court Justice Antonin Scalia wrote in a 1995 affirmative action case.⁷³ “In the eyes of government, we are just one race here. It is American.”⁷⁴ Those who think that color-consciousness is a better route to racial justice than colorblindness may be reviled by Justice Scalia’s logic. But as I will try to show in Chapter 7, quota-based affirmative action is better served by the accountability-based theory of reparations, with the rationale of everyone doing their part to redress a historical trajectory of political injustice, than unjust enrichment, with the idea of marginal white job candidates having to lose out due to their being the beneficiaries of injustice.

Since it is not unjust enrichment that grounds reparations claims, it makes sense that those belonging to the claimant class are included, along with all taxpayers, as among the payees. Japanese American internment reparations came from a discretionary fund in the federal budget that Japanese American internment survivors paid into as taxpayers. Had tax forms during the years in which Japanese American internment reparations were disbursed included a provision wherein only whites were financially responsible for reparations, and all other races exempt, the most obvious interpretation of this would be that reparations are penance for some, and the just deserts of others.⁷⁵ But reparative justice does not demand that present day whites pay for the historical crimes of their ancestors. It demands that citizens pay for the abuses of their government. Insofar as Japanese Americans are both private individuals and citizens, there is no

⁷³ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (Scalia, concurring in part and concurring in the judgment).

⁷⁴ *Ibid.*

⁷⁵ For more on *citizens* taking responsibility for injustice in the reparative justice context, see Thomas McCarthy, “Vergangenheitsbewältigung in the USA: On the Politics of the Memory of Slavery,” *Political Theory* 30 (2002): 623-648, and “Coming to Terms with Our Past, Part II: On the Morality and Politics of Reparations for Slavery,” *Political Theory* 32 (2004): 750-772; Robert K. Fullinwider, “The Case for Reparations,” *Philosophy & Public Policy* 20 (2000): 1-8; Paul M. Hughes, “Rectification and Reparation: What Does Citizen Responsibility Require?” *Journal of Social Philosophy* 35 (2004): 244-255.

contradiction in having them both contribute through the mechanism of taxation to monetary reparations programs and receive payments from these same programs.⁷⁶ Similar arguments can be made for counting recent immigrants as among the payees: in moving to a country, immigrants are assuming an identity of “citizen,” which comes with extant duties such as paying taxes and obeying laws. No one complains that, in paying taxes that are used to pay off the national debt, recent immigrants are unjustly made to take responsibility for the spending decisions of previous generations of legislators. Even if these immigrants are not the direct beneficiaries of past programs funded through deficit spending, because they assume the identity of citizen, paying off the deficit is considered to be a legitimate use of their taxpayer dollars.⁷⁷ In liberal democracies, there is a wide range of state-sponsored activities that benefit some, but not all, citizens, and yet are financed by taxpayers: veteran’s agencies, state-financed mental institutions, research funds for diseases that afflict only a small portion of the population, public defenders, public schools—the list could go on and on. Monetary reparations are best understood as but one item on this long list.⁷⁸

⁷⁶ Thomas Hobbes, *Leviathan*, ed. Edwin Curley (Indianapolis: Hackett Publishing, 1994), Ch. XXIII: “And whereas every man or assembly that hath sovereignty, representeth two persons, or (as the more common phrase is) has two capacities, on natural, and another politic...” Of course, there also may be practical reasons for Japanese Americans to pay. See Avia Pasternak, “Limiting States’ Corporate Responsibility,” *Journal of Political Philosophy* 21 (2013): 361-381, 379. But for reasons that go beyond practicality, having members of the reparations recipient group contribute as taxpayers helps reinforce that unjust enrichment and a simplistic “beneficiary/victim” binary is not what grounds the reparations claim. Here Pasternak’s defense of “equal distribution” over “proportional distribution” is relevant. Pasternak, “Sharing the Costs of Political Injustice,” *Politics, Philosophy, and Economics* 10 (2010): 188-210.

⁷⁷ David Miller traces the idea of legally inheriting both the benefits and burdens of citizenship to Roman law and English common law. Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007), 148-151. See also Farid Abdel-Nour, “National Responsibility,” *Political Theory* 31 (2003): 693-719, 713, whose argument is not based on inheriting the institutions and duties of citizenship, but on being proud of and sympathizing with accomplishments of the past: “Where there is national pride, there is national responsibility.” Pettigrove, “Apology, Reparations, and the Question of Inherited Guilt,” 333; McCarthy, “Vergangenheitsbewältigung,” 636; and “Bridging the Color Line,” also make this point.

⁷⁸ See Robert Westley, “Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?” *Boston College Third World Law Journal* 40 (1998-1999): 429-476, 445.

However, the fact that reparations claims refer to injustices perpetrated by the state, rather than a set of societal actors, and that reparations payments come from taxpayers, not beneficiaries, does not change the fact that the injustice has intervened in the conjugal patterns resulting in the particularized set of persons who are making a reparations claim. Of course, a reparations award might also impact conjugal patterns. One might cheekily ask the non-identity problem-obsessed reparations critic, are we to say that reparations are unfair to the unborn who are slated to be conceived in a possible world in which the foregoing do not materialize? But let us take the non-identity problem seriously. To borrow an argument developed by Elizabeth Harman, an individual can be better off (by virtue of existing) than she would be than in a counterfactual situation in which Event X did not occur, and simultaneously, be harmed by X.⁷⁹ Suppose that a woman is struck with a strange disease where, if she conceives in the next two months, her child will be blind, but after that, her condition will disappear. She deliberately conceives before the two month window has passed, and her child is born without sight. We might say that the child is ultimately better off—since if his mother had waited, a different person, and not he, would have been born—even though he is harmed by his mother’s decision to conceive within the two-month window. One of the great contingencies of the human experience has to do with the fact of existence itself, and as Harman’s take on the non-identity problem indicates, it is a natural human reaction to lament the circumstances of one’s birth if harm can be traced to those circumstances, while simultaneously acknowledging that the fact of one’s particularized existence depends entirely on the timing of conception, which unavoidably coincides with the harm. And so, even though the particular persons making a reparations claim

⁷⁹ Elizabeth Harman, “Can We Harm and Benefit in Creating?” *Philosophical Perspectives* 18 (2004): 89-113, 99. I thank Eric Beerbohm for directing me to Harman’s take on the non-identity problem.

are lucky to exist, this does not nullify the fact that they experience harm, and that the harm has a historical genesis.

Let us turn to a final issue. It has been argued that an accountability-based theory of reparations is able to accommodate the passage of time, with its changing laws and morals, and a variety of knotty metaphysical issues as well. But when it comes to taxpayer-citizens taking financial responsibility for the abuses of their government past and present, what is moral status of citizens in relation to these abuses?

4.5 The Moral Status of Citizens: Who Has Dirty Hands?

In 2005, Premier Danny Williams of Newfoundland and Labrador issued an apology to the Inuit citizens of the province. The Newfoundland Government had closed two Inuit communities, Nutak and Hebron, in the late 1950s. A promise had been made not to break up families, but this was ignored as officials marshalled individuals onto boats going to Nain, Makkovik, North West River, and Hopedale, remote archipelagic communities along the Newfoundland coast. Nain and North West River, the northernmost and southernmost of the communities, are over 500 miles apart.⁸⁰ Williams' words to the Inuit in 2005 were as follows:

Newfoundlanders and Labradorians value a society of equality and justice. The Government of Newfoundland and Labrador, on behalf of the citizens of the province, recognizes that, in the past, it made mistakes in its treatment of the Inuit of Labrador. It is willing to learn from the past and to find ways to heal the negative impact that historical decisions and actions continue to have for certain Labrador Inuit today...The Government of Newfoundland and Labrador, on behalf of the citizens of the province, apologizes to the Inuit of Nutak and Hebron for the way in which the decision to close those communities was made and for the difficulties experienced by them and their descendants as a result of the closures. What happened at Nutak and Hebron serves as an example of the need

⁸⁰ See Ken Jararuse, "Going Home to Hebron: A Survivor's Tale," *Nunatsiaq News Online*, October 15, 1999, http://www.nunatsiaqonline.ca/archives/nunavut991030/nvt91008_19.html; Randy Boswell, "Newfoundland to Apologize for Relocating Inuit in 1950s," *National Post*, September 3, 2003. ProQuest.

for governments to respect and carefully consider the needs and aspirations of the people affected by its decisions.⁸¹

It is worth dwelling on the text of the apology a bit. Williams twice mentions “the Government of Newfoundland and Labrador, on behalf of the citizens of the province,” a phrase which seems to attribute a sort of collective responsibility to the people of Newfoundland and Labrador as whole for past injustice. This is in spite of the fact that many Newfoundlanders and Labradoreans on whose behalf Williams apologizes were born after the communities were closed. By the time of the apology, moreover, former residents of Nutak and Hebron had been granted citizenship, suggesting that Williams was apologizing to the Nutak and Hebron Inuit on behalf of a group that included the Inuit themselves. Finally, white Canadians who were alive as the communities were being broken up could hardly be considered responsible in a first-order sense for what happened. The decision to close the communities did not emerge from the democratic process. Closures were carried out by state officials, and historical records suggest that non-Inuit Newfoundlanders and Labradoreans knew little, if anything, about the fate of Nutak and Hebron.⁸²

How should we understand the moral responsibility of citizens for the historical abuses of their state? When the state is held to account by reparations claimants, are citizens accountable by proxy?⁸³ If so, which ones? On one hand, some scholars of historical injustice work out a theory of collective moral responsibility in explaining why it is appropriate to have present-day

⁸¹ “Government of Newfoundland and Labrador Apologizes to Relocates,” News Releases, Government of Newfoundland and Labrador, January 22, 2005, <http://www.releases.gov.nl.ca/releases/2005/exec/0122n03.htm>.

⁸² Peter Evans, “Abandoned and Ousted by the State: The Relocations from Nutak and Hebron, 1956-1959,” in *Settlement, Subsistence, and Change Among the Labrador Inuit: The Nunatsiavummiut Experience*, ed. David C. Natcher, Lawrence Felt, and Andrea Procter (Winnipeg: University of Manitoba Press, 2012), 85-120.

⁸³ See Charles Griswold, *Forgiveness: A Philosophical Exploration* (Cambridge: Cambridge University Press, 2007), esp. 139-140. Cf. Mathias Thaler, “Just Pretending: Political Apologies for Historical Injustice and Vice’s Tribute to Virtue,” *Critical Review of International Social and Political Philosophy* 15 (2012): 259-278, 264-266.

citizens monetarily redress past injustice through their tax dollars. And yet, on the other hand, in public discourse concerning historical injustice, “My hands aren’t dirty,” is a common instinctive reaction. “The notion of collective guilt for what people did 220-plus years ago, that this generation should pay a debt for that generation, is an idea whose time has gone,” as the late U.S. Congressman Henry Hyde put it. “I never owned a slave. I never oppressed anybody. I don’t know that I should have to pay for someone who did own slaves generations before I was born.”⁸⁴ The dirty hands objection not only emerges in debates concerning monetary redress, but also concerning political apologies. When Prime Minister Tony Blair issued a formal acknowledgement of Britain’s responsibility in the Irish potato famine, a British news anchor, Jeremy Paxman, quipped, “You should apologize for things that you have done, that you recognize that perhaps you shouldn’t have done or regret. But apologizing for things that your great, great, great, great-grandfather or grandmother did, seems to me a complete exercise in moral vacuousness.”⁸⁵

There is a certain amount of truth to the idea that it is disingenuous to apologize for something that you played no part in. But on the collective moral responsibility argument, though not causally responsible in a first-order sense for past injustice, citizens can nevertheless be complicit in all injustices past and present. As Robert Sparrow claims, “Because existing injustices suffered by indigenous Australians are essentially continuous with the racist history of the invasion of the Australian continent and dispossession of the Australian Aboriginal peoples, we [non-Aboriginals] may be held responsible for wrongs committed in the course of that

⁸⁴ Quoted in John Arthur, *Race, Equality, and the Burdens of History* (Cambridge: Cambridge University Press, 2007), 210; and in Feagin, *Racist America*, 21.

⁸⁵ Nicholas Watt, “Jeremy Paxman: Wrong to Criticise Tony Blair over Irish Potato Famine,” *Guardian*, December 21, 2012, <http://www.guardian.co.uk/politics/wintour-and-watt/2012/feb/21/tonyblair-jeremy-paxman>. American spellings used.

history.”⁸⁶ Janna Thompson articulates a similar sentiment: “The present day members of our group bear collective responsibility for the wrongs that we have committed together.”⁸⁷ Citizens, or perhaps citizens belonging to the politically dominant class, on this account are members of a trans-historical collective who share in guilt for trans-historical injustice. Sparrow and Thompson are not saying that Representative Hyde owned slaves or that Jeremy Paxman played a role in causing the Irish potato famine, but rather, that both participate in an oppressive system that is continuous in time, and that they are therefore appropriately implicated when state representatives apologize on behalf of the people, or when they share in the burden of monetary redress as taxpayers.⁸⁸

Sparrow and Thompson have a point. Indeed, Thompson’s analysis begins with lines that should ring true for any person who has spent time thinking seriously and critically about race:

Suppose that for many generations, the members of our group have regarded it as their entitlement as members of a “superior race” to keep the members of a minority in subjugation. The ability to do that has long been the source of group identity and pride, and each generation has handed on the task of suppression to its successors. It is our group’s valued tradition...⁸⁹

However, though there are many subtle and not-so-subtle ways in which racial discrimination manifests itself in the present, it is still the case that in liberal democracies today, the majority of injustices are less violent and radically oppressive than injustices of the past. In the United

⁸⁶ Robert Sparrow, “History and Collective Responsibility,” *Australasian Journal of Philosophy* 78 (2000): 346-359, 346.

⁸⁷ Janna Thompson, “Collective Responsibility for Historic Injustices,” *Midwest Studies in Philosophy* 30 (2006): 154-167, 156.

⁸⁸ For what it’s worth, the collective responsibility arguments made by Sparrow and Thompson derive from the intergenerational justice context: they want to put to rest some of the issues raised in the previous section about the duties of justice between generations. Societal injustice rather than state-sponsored injustice, and the distinction between victims and perpetrator-beneficiaries rather than claimants and taxpayer-citizens, form the basis of their accounts. I reject this model, but this does not mean that there is no room for the complicity of citizens in state-sponsored injustice.

⁸⁹ Thompson, “Collective Responsibility,” 156.

States, the decline in violence against blacks is illustrated vividly by the number of lynchings of African Americans that took place between the years 1890 and 1970. In the 1890s, 1,111 lynchings occurred. The number dropped to 791 in the 1900s, and to 568 in the 1910s. Each ensuing decade saw a similar decline; 438 lynching deaths occurred between the years 1920 and 1970 in total. In the 1960s, there was only one documented lynching death.⁹⁰ It is certainly true that racial violence is still an issue. Recent protests in the United States concerning unaccountable police brutality against blacks evoke the sort of historical continuity that Sparrow and Thompson are interested in understanding. But the idea that some or all present-day citizens bear collective responsibility for the wrongs that we, the past and present members of a trans-historical community, are all complicit in needs to be sensitive to the idea that if someone had offered Representative Hyde the chance to participate in a lynching in his lifetime, or to own a slave, he would have likely reacted with horror. Most members of his generation were socialized into moral beliefs like, “Practices such as lynching and slavery are racist and loathsome.” Had he been born 100 years earlier, he probably would have been socialized into a different set of moral beliefs that ignored or rationalized these practices—and had he been born earlier than that, he might have owned slaves. Trans-historical collective moral responsibility arguments tend to overlook the moral learning that takes place from generation to generation.⁹¹

⁹⁰ Margaret Werner Cahalan, *Historical Corrections Statistics in the United States, 1850-1984*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ – 102529, December, 1986: 10-11 (Tables 2-1 and 2-2). Between the 1880s and the 1890s, the number of African American lynching deaths went up from 534 to 1,111, a statistic that correlates with the expansion of the Klu Klux Klan.

⁹¹ Stephan Thernstrom and Abigail Thernstrom, *America in Black and White: One Nation, Indivisible* (New York: Simon & Schuster, 1997), 26, 299, go too far. “Past and present, one and the same? An odd denial of historical change, if you ask us,” the Thernstroms write. According to the Thernstroms, blacks should focus on the racial progress that has been made in the United States. Of Representative John Conyers Jr., they write: “First elected in 1964, he has been a militant voice for racial justice who demands that the United States pay reparations to all descendants of slaves. The *Congressional Quarterly’s* 1996 *Politics in America* described him as ‘sarcastic and abrasive,’ seemingly ‘less interested in becoming a power broker than in being the liberal voice of protest.’” Representative Conyers is not interested in politics-as-usual and uses his position to speak up for underrepresented African Americans? The ad hominem attack that wasn’t!

If there is nevertheless a sense in which it is meaningful to speak of a “valued tradition” of white racial privilege and superiority, how to do this while acknowledging moral learning? Desmond King and Rogers Smith get it right, I believe, in discussing the historical competition between a “white supremacist” racial order and an “egalitarian transformative” racial order; the latter accounts for moral learning that has robbed white supremacy of some of its potency.⁹² But to the extent that reparations advocates minimize moral learning of an egalitarian transformative nature with claims about trans-historical white guilt, they probably do an injustice to their own cause. A person whose instinctual reaction to reparative justice is, “I never owned a slave. I never oppressed anybody,” is not likely to say, “Ah, okay, I see!” when confronted with expressive musings about undiminished white supremacy. When it comes to historical state-sponsored injustice, we should strive to discuss, as accurately and as honestly as possible:

1. The particular *state policies and practices* that caused the injustice.
2. The extent to which the *actions* of an earlier generation of whites/the politically dominant group made them complicit in the injustice.
3. The extent to which the *beliefs and attitudes* of an earlier generation of whites/the politically dominant group made them complicit in the injustice.
4. The extent to which present-day whites/members of the politically dominant group harbor *versions of the beliefs and attitudes* that facilitated earlier modes of injustice.⁹³

⁹² Desmond S. King and Rogers M. Smith, “Racial Orders in American Political Development,” *American Political Science Review* 99 (2005): 75-92.

⁹³ For a rich discussion of how present-day citizens can be complicit in present-day state-sponsored injustice, see Eric Beerbohm’s theory of “democratic complicity” in *In Our Name: The Ethics of Democracy* (Princeton, NJ: Princeton University Press, 2012), Ch. 9.

Finally, versions of the beliefs and attitudes that facilitated earlier modes of injustice may render reparations for historical state-sponsored injustice politically unpopular, so to this list, another item can be added:

5. The extent to which the present-day beliefs and attitudes of whites/the politically dominant class *inhibit reparative justice efforts*.

Reparationists should not shy away from discussions about relative degrees of complicity when it comes to these distinctions. It *is* worse for citizens to play a leading role in an injustice in which the state's crime is looking the other way—e.g., lynching—than to harbor discriminatory beliefs. Today's discriminatory beliefs *are* less toxic than those of yesteryear's whites thanks to the moral learning that has taken place. As comedian Chris Rock observes, what we have witnessed over the course of American history is not black progress, but rather, white progress: “The advantage that my children have is that my children are encountering the nicest white people that America has ever produced. Let's hope America keeps producing nicer white people.”⁹⁴

Political apologies, however, do not lend themselves as neatly to the distinctions outlined above. There is a certain art to them, and a certain custom.⁹⁵ It is characteristic of political apologies to try to show consensus and solidarity—we, the government and the people, are coming together to make an apology that is long overdue, and so on. The language of “on behalf of the people” might be a product of political apology writers wanting to illustrate unanimity in the underlying sentiment of the apology. However, the majority of state-sponsored injustices are

⁹⁴ Frank Rich, “In Conversation with Chris Rock,” *Vulture*, November 30, 2014, <http://www.vulture.com/2014/11/chris-rock-frank-rich-in-conversation.html>.

⁹⁵ Griswold, *Forgiveness*, 145.

not like lynching, with an actively complicit white population.⁹⁶ Often the complicity of the members of the politically dominant class comes in their prioritizing their own interests to those of other groups, and viewing other groups through a prejudicial lens, in thinking about political issues.⁹⁷ Japanese American internment, for example, was clearly carried out by state officials, but had broad popular support. (To see how this amounts to complicity, we might imagine a counterfactual history in which whites participated in nationwide protests of internment, fostering a strong anti-internment public mood.) But even if a deed is kept quiet and the public does not weigh in, which was the case with the closures of Nutak and Hebron, a chauvinistic climate is fertile for state-sponsored injustice. An apology that puts the state and society on the same level, however, may wrongly imply that the state's only fault historically is that its political officials shared in a biased moral temperament, and that the state is apologizing out of compassion rather than as a responsible agent. And so, we can find fault with the apology to the Nutak and Hebron Inuit for being "on behalf of the citizens of the province." Similarly, the Congressional apology for Japanese American internment was "on behalf of the people of the United States for the evacuation, relocation, and internment of such citizens and permanent resident aliens," using the passive voice in describing how "a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II."⁹⁸ "The failure of political leadership" was cited as

⁹⁶ When I use the term "actively complicit," I mean something like what Beerbohm refers to with his "participatory principle" wherein "X is liable for intentionally participating in political injustice." Beerbohm, *In Our Name*, 232. Beerbohm does not think that the participatory principle is the viable basis of a general theory about the responsibility of (present-day) citizens for the injustice of their state; nor do I think this.

⁹⁷ Supporting state-sponsored injustice through one's political attitudes comes in degrees. See Beerbohm's discussion of the spectrum of jointly intended injustice, delegated injustice, intrapersonal complicity, and public opinion. *Ibid.*, 242-246. A good discussion of these themes also appears in Christian List and Philip Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (Oxford: Oxford University Press, 2011): 163-169.

⁹⁸ H. Res. 442, 100th Cong. (1988).

a reason that internment took place, along with “racial prejudice” and “wartime hysteria”—but a failure of leadership is a rather obscure way of saying that internment happened “by order of the President.”⁹⁹ Merely compassionate language is less than satisfactory if the idea is that state power is being held to account.¹⁰⁰

However, there is a place for the language of “the government and citizens” if there is an actively complicit class of private citizens within society. The toleration of the practice of lynching is a clear-cut example. It is rightly considered a state-sponsored injustice because Congress had every opportunity to pass anti-lynching legislation, and because lynchers were almost never charged with murder, two factors crucial in the maintenance of a lynching culture. But a lynching culture would not have existed without the lynchers. And so, in this particular case, the Senate’s apology could very well have gone with the convention, using the language of apologizing “along with the people” or “on behalf of the people.” Or better still, it could have explicitly discussed the active role of white citizens in conducting and attending lynchings. But it did not do this: the Senate unequivocally assumed responsibility for the thousands of lynching deaths that took place.¹⁰¹

Comparing the Senate lynching apology to the apologies for Japanese American internment and the closures of Nutak and Hebron, the lesson seems to be that in practice, writers of political apologies act rather arbitrarily in deciding whether to invoke “the people” or not, even though a principled approach based on greater or lesser societal complicity would seem

⁹⁹ Ibid.; Greg Robinson emphasizes political injustice, as well as President Roosevelt’s personal racial biases, in Robinson, *By Order of the President: FDR and the Internment of Japanese Americans* (Cambridge, MA: Harvard University Press, 2001).

¹⁰⁰ See Chandran Kukathas, “Responsibility for Past Injustice: How to Shift the Burden,” *Politics, Philosophy, and Economics* 2 (2003): 165-190, 185, for an argument that is almost the exact opposite of the one I am making, where “holding the state responsible for all past injustice... diminishes the significance of past injustice.”

¹⁰¹ S. Res. 29, 109th Cong. (2005). See also Griswold, *Forgiveness*, 161-162.

fairly straightforward and intuitive. Of course, there is still a time problem with the convention, and in referring to “the people” in an apology, no distinction is made between past persons and present persons. But remember, the logic of recent immigrants and persons who are a part of a group receiving reparations being, as taxpayers, reparations payees is that there is some sort of “citizen” identity that all share in. For a political apology for historical injustice using the language of “the people” to make sense, it must be the case that this collective of abstract “citizens” is being invoked. Otherwise, indeed, the only persons who would count as being among “the people” would those who were complicit, carrying out immoral deeds under the protection of the law, or supporting injustice through their beliefs. This is probably not an implication that political officials would want in apologizing to marginalized groups for state-sponsored injustice. And so, “the people” of political apologies should remain abstract, a gesture at the idea that some members of society were or are complicit in injustice in various ways, and no more.

The Canadian government’s 2008 apology for its assimilationist school system is an example of a political apology for historical state-sponsored injustice in which responsibility is handled well. Prime Minister Stephen Harper consistently used the language of “the Government of Canada,” detailing its role in administering the schools, and using phrases like, “the burden is properly ours as a Government, and as a country.”¹⁰² Harper’s apology unveils a Truth and Reconciliation Commission as “a positive step in forging a new relationship between Aboriginal peoples and other Canadians, a relationship based on the knowledge of our shared history, a respect for each other and a desire to move forward together”—language that distinguishes the

¹⁰² Prime Minister Harper, “Statement of Apology – to Former Students of Indian Residential Schools,” Ottawa, Ontario, June 11, 2008, https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/rqpi_apo_pdf_1322167347706_eng.pdf.

recipients of the apology from members of society whose attitudes towards Aboriginal Canadians (however benighted) were or are injustice-enabling.¹⁰³ The historical assumption that “Aboriginal cultures and spiritual beliefs were inferior and unequal” is brought up, referencing the belief system of the politically dominant class.¹⁰⁴ The particular ways in which some private citizens belonging to this class were actively complicit appear in the apology as well; Harper describes the managerial role played by the members of religious organizations in federally-funded schools.¹⁰⁵ The line “on behalf of the Government of Canada and all Canadians, I stand before you... to apologize to Aboriginal peoples for Canada’s role in the Indian Residential Schools system,” conveys solidarity in the apology’s sentiment, and in the written form, the apology is signed, “On behalf of the Government of Canada, The Right Honourable Stephen Harper, Prime Minister of Canada.”¹⁰⁶

To summarize thus far, in the majority of cases of state-sponsored injustice, most of the members of the politically dominant class are complicit to the extent that they harbor beliefs and attitudes that lead holders of political power to prioritize their interests to those of other groups, with a relatively smaller number of private individuals actively complicit. When it comes to the majority of cases of historical state-sponsored injustice, the actively complicit individuals are dead, and moral learning has taken place, moderating earlier belief systems. The trans-historical collective moral responsibility argument, moreover, is somewhat misleading for suggesting that the present-day members of the politically dominant class hold a previous generation’s beliefs if in fact they do not. But as a final issue, we can ask, should we blame the previous generation for

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid. For a more thorough look at the components of a satisfactory apology, see Griswold, *Forgiveness*, 145-146.

their benighted and/or hypocritical belief systems? Should we blame ourselves for ours? How can anyone be responsible for their beliefs if they just so happen to be born into a certain time, place, and physical body, and are likely to be socialized into whatever views are in the air based on these factors?

Thus far I have made claims that may make it seem as if I am letting members of society off the hook for belief systems that facilitate injustice conducted by state officials. I have painted a picture of endogenous laws and morals, with unjust beliefs rationalizing unjust laws, and unjust laws rationalizing unjust beliefs. I have spoken of moral learning that occurs as a result of social movements aimed at a transformative legal change, with subsequent generations conditioned into the moral fruits of these hard-won battles. Altogether, this may give the impression of human beings as moral automatons, unthinkingly socialized into the belief systems of their day, with group interests largely determining the range of differences in beliefs. And it is true that on some level, I do subscribe to this view. We are not quite moral automatons, but larger sociopolitical forces play a significant role in what we think and how we act. But it is nevertheless coherent to think that in some deep sense, we are morally responsible for which attitudes and beliefs we adopt within our given sociopolitical context, and moreover, that it is possible at any point in time to anticipate the judgments of future generations.¹⁰⁷ The attitude encapsulated in the question, “Which beliefs and actions of mine will be on the wrong side of history?” is useful for keeping the politically dominant class open to claims made by other groups on the basis of liberal democratic commitments, whether they are working to root out or hold the state

¹⁰⁷ For more on responsibility for our attitudes, see Angela M. Smith, “Responsibility for Attitudes: Activity and Passivity in Mental Life,” *Ethics* 115 (2005): 236-271, esp. 267-268, where there is a relevant discussion of how someone can come to be responsible for having racist attitudes if she was “raised this way.”

accountable for unjust laws and practices.¹⁰⁸ Though it has its drawbacks, perhaps the wisdom of trans-historical collective moral responsibility is that it rails against the kind of moral complacency that has, in the past, facilitated injustice. But a better approach is encapsulated in Martin Luther King Jr.'s idea of "the arc of the moral universe."¹⁰⁹ (It is long, but "it bends towards justice.") There is probably no metaphysical sense in which this is true, but people can, if they want to, forge out a political life for themselves that makes King's expression resonate. In this light, probably the best we can do is to try to understand the belief systems of previous generations in view of understanding our own, seeing how past beliefs allowed the politically dominant class to rationalize injustice, and how the perceived interests of the politically dominant class led the state to abuse its power. At the same time, our harshest judgments should be reserved for present unjust beliefs and actions, even if they are less patently malevolent than the historical beliefs and actions of the dominant group.¹¹⁰ Tuning one's beliefs to the curvature of the moral universe's long arc does not require supererogatory, saintly morality, just empathy and an awareness as to whose interests tend to be served by political power.

4.6 Conclusion

By way of conclusion, let us consider an example of an injustice from our own time, and speculate a bit about how reparative justice considerations might play out in the future. Today many Americans appreciate that climate change is a manmade phenomenon of colossal magnitude. It is unlikely that we will be able to continue to live the way we live: we will have to

¹⁰⁸ See Anderson, "Social Epistemology"; Susan Wolf, "Sanity and the Metaphysics of Responsibility," in *Ethical Theory: An Anthology*, ed. Russ Shafer-Landau (Malden, MA: Wiley-Blackwell, 2013), 330-339, 338.

¹⁰⁹ Martin Luther King Jr., "Law, Love, and Civil Disobedience (1961)," in *Testament of Hope: The Essential Writings and Speeches of Martin Luther King Jr.*, ed. James M. Washington (New York: HarperCollins, 1991), 43-53, 52.

¹¹⁰ Moody-Adams, "Culture, Responsibility, and Affected Ignorance," 298, 302-303.

find more sustainable modes of existence, or destroy Earth. Though many Americans believe this, there are sadly few who make an effort to minimize their carbon footprints, and fewer still who devote their lives to fighting for climate justice. At the same time, large swaths of the American population deny global warming altogether. Suppose, however, that through climate policy and the development of new green technologies, we manage to avoid a global environmental disaster. Future generations have few of the moral faults of their predecessors with regard to climate injustice. How might a global warming-related reparations demand look to them? Would we want them to take reparative responsibility for the harms of climate change?¹¹¹

We do not even need to invent a hypothetical to test this question. Kivalina, Alaska is a coastline Iñupiat village of 400 people. As tides rise, the land on which the village sits is literally disappearing.¹¹² It is obvious to the people of Kivalina that they will have to move: engineers forecast that by 2025, the town will be uninhabitable.¹¹³ The question is, who will pay the cost of relocation? President Obama has proposed allocating \$50.4 million to help Native communities facing climate change-related issues; to relocate the village of Kivalina alone, twice this amount would be needed.¹¹⁴ So what will happen? The best case scenario is that the money will be found to move the people of Kivalina, along with others in their position. Grimmer possibilities also present themselves: indifference and inertia might result in no outside help. The Kivalina Iñupiat

¹¹¹ Simon Caney grapples with some of these questions in “Environmental Degradation, Reparations, and the Moral Significance of History,” *Journal of Social Philosophy* 37 (2006): 464-482.

¹¹² Stephen Sackur, “The Alaskan Village Set to Disappear Under Water in a Decade,” *BBC News*, July 29, 2013, <http://www.bbc.com/news/magazine-23346370>; Chris Mooney, “The Remote Alaskan Village that Needs to be Relocated due to Climate Change,” *Washington Post*, February 24, 2015, <http://www.washingtonpost.com/news/energy-environment/wp/2015/02/24/the-remote-alaskan-village-that-needs-to-be-relocated-due-to-climate-change>.

¹¹³ Sackur, “Alaskan Village Set to Disappear.”

¹¹⁴ Mooney, “Remote Alaskan Village.”

might have to move themselves (but where? how?), or they might languish. Regardless of what happens, climate change will be extremely disruptive of the Iñupiat way of life. It has already proven to be so: the Kivalina Iñupiat live traditionally and sustain themselves by whaling, something which is quickly becoming unviable. Moreover, whatever they will endure, one thing is almost certain. Reparations to the Kivalina Iñupiat for climate change will not be paid—not by this generation, at least. Global warming is currently too contentious for there to be the political will for reform, let alone for the American government to take meaningful responsibility and be accountable to the people harmed most acutely by it. But if one already sees environmental issues as matters of great moral importance, it is possible to understand how we might wish tomorrow’s political leaders to apologize to the people of Kivalina, and provide redress for the impact of global warming on their lives. We may prefer, of course, that these measures were politically possible now. Assuming that they are not, however, it seems unlikely that we would want future generations to be “free from past injustice,” to use Nahshon Perez’s phrase.¹¹⁵

If global warming reparations were to be paid to climate change refugees, who would they be from, the government or the people? On whose behalf would an apology be offered? It seems clear that the duty to help the Kivalina Iñupiat relocate falls on the federal government and the state of Alaska, and that if the residents of Kivalina are given no aid, then the duty of redress is theirs as well.¹¹⁶ As Colleen Swan, the council leader of Kivalina, stated angrily in an

¹¹⁵ Nahshon Perez, *Freedom From Past Injustice: A Critical Evaluation of Claims for Intergenerational Reparations* (Edinburgh: Edinburgh University Press, 2012).

¹¹⁶ A variety of frameworks could justify this claim: a consequentialist might say that the government is best equipped to relocate Kivalina; a Rawlsian might say that a natural duty of justice to not let the people of Kivalina die is distributed to the government; and a social contract theorist might say that special ties exist between the people of Kivalina and other Americans such that there is a duty to use the government to rescue the people of Kivalina. Colleen Swan is making an argument that invokes authors like David Miller and Daniel Butt, such that the causal role of the government in climate change (Miller) and/or the benefits thereof (Butt) creates the duty of aid. See Miller, *National Responsibility*, 6-13, 18-24; Daniel Butt, “On Benefiting from Injustice,” *Canadian Journal of Philosophy* 37 (2007): 129-152.

interview: “If we’re still here in 10 years’ time we either wait for the flood and die, or just walk away and go someplace else. The U.S. government imposed this Western lifestyle on us, gave us their burdens and now they expect us to pick everything up and move it ourselves. What kind of government does that?”¹¹⁷ However, even if funding for relocation is allocated by the government now, it makes sense to think of reparative justice in state-centered terms later. Like slavery or Jim Crow segregation, climate change responsibility is both a matter of the actions of members of society, and government policies that coopt and legitimize the preferences and pathologies of the politically dominant group, directing taxpayer resources to unjust environmental ends. Most Americans today are complicit in climate change.¹¹⁸ But by the time reparations to the Kivalina Inupiat are a realistic political possibility, members of the present generation will be dead and gone. Our progeny will have to have taken up new ways of living, adopting new beliefs about sustainability—they are not likely to be angels, but there is much room for them to improve upon our failings. These future persons ought to judge us as complicit in climate injustice, and to judge themselves to the extent that they still harbor the vestiges of our beliefs. However, it would be strange to say that reparations should be from them for what we believed and did. Reparations would come from the American government, for the injustices it has done in trying to benefit the majority of us, and for the peerless power it wields in determining that a nation will go down a certain path.¹¹⁹

¹¹⁷ Carol Kuruvilla, “Climate Change Will Cause Alaskan Village to Vanish under Water within 10 Years,” *New York Daily News*, July 30, 2013, <http://www.nydailynews.com/news/national/alaskan-village-vanish-water-decade-scientists-article-1.1412920>.

¹¹⁸ See Avram Hiller, “Climate Change and Individual Responsibility,” *Monist* 94 (2011): 349-368; Melany Banks, “Individual Responsibility for Climate Change,” *Southern Journal of Philosophy* 51 (2013): 42-66.

¹¹⁹ In the philosophical literature, the collective responsibility of citizens vs. the responsibility of governments for global warming is an important subject. For an account like the one I am endorsing here, see Steve Vanderheiden, *Atmospheric Justice: A Political Theory of Climate Change* (Oxford: Oxford University Press, 2008), esp. Ch. 5.

Chapter 5

Injustice: A Reappraisal

There was nothing lacking in this great, rich country... And yet, this great and powerful nation must go across two thousand miles of sea and take from the poor Hawaiians their little spots in the broad Pacific, must covet our islands of Hawaii Nei and extinguish the nationality of my poor people, many of whom have now not a foot of land which can be called their own. And for what? In order that another race-problem should be injected into the social and political perplexities with which the United States in the great experiment of popular government is already struggling?

- Queen Lili'uokalani, 1898 ¹

In 1947, two ships docked in Texas City carrying large quantities of ammonium nitrate detonated and began a rapidly spreading conflagration, killing 468 individuals, injuring 3,500, and wiping out many homes and businesses. As the chemicals were coming from government-owned plants, having been used to produce explosives for the war, Texas City residents sued the federal government for damages. The lawsuit was unsuccessful, but Congress passed special legislation awarding payments.² In 2002, the Space Shuttle *Columbia* disintegrated as it crossed into Earth's atmosphere at the conclusion of its mission, killing all seven astronauts who were on board. NASA paid \$26.6 million to the families of the astronauts in an out-of-court settlement.³ In 2005, Hurricane Katrina devastated the Louisiana-Mississippi coastline, resulting in close to 2,000 fatalities, many more injuries, and widespread property damage. Thousands of lawsuits against the government were initiated, alleging the Army Corps of Engineers' negligence in

¹ Liliuokalani, *Hawaii's Story By Hawaii's Queen* (Honolulu: Mutual Publishing, 1990), 310. Quoted in Susan Lehua Fernandez, *Drink the Bitter Waters: On the Social Conditions of Native Hawaiians* (Honolulu: 'Ohi'a Publishing, 2010), 1.

² Hugh W. Stephens, *The Texas City Disaster, 1947* (Austin: University of Texas Press, 1997).

³ Jim Leusner, "NASA Paid \$26.6M to Columbia Families," *Orlando Sentinel*, April 15, 2007, http://articles.orlandosentinel.com/2007-04-15/news/NASA15_1_astronauts-columbia-families-shuttle-columbia.

having constructed faulty levees. A consolidated case, *In re Katrina Canal Breaches Litigation*, was eventually settled.⁴ In each of these three instances, have reparations been sought?

Not every harm for which the state bears some form of responsibility is an injustice. In Chapter 3, the reader was asked to assume there to be some plausible set of criteria for understanding injustice, and to think through the mechanisms of state-sponsored injustice while bracketing the question of what state-sponsored injustice is. It is finally time to ask, what is the difference between injustice and other sorts of harm-causing events in which the government is morally implicated as a responsible agent? What is the harm of injustice and how does it differ from other kinds of harm? Every time the government makes payments to persons for reason of their having experienced an injury due to a state policy, practice, or action, is the government paying reparations?

The aim of this chapter is to more clearly define state-sponsored injustice, and to elaborate on the harm of state-sponsored injustice. In the first section, I argue that the Texas City Disaster, the Columbia Disaster, and Hurricane Katrina are tragedies rather than state-sponsored injustices. Though there are similarities between the processes of seeking compensation from the government for a tragedy and seeking reparations for a state-sponsored injustice, the meaning and normative rationale underlying each are different. From there, I distinguish between cases of injustice in which there are no present-day individuals who experience harm, harms that primarily affect individuals, “symptomatic” harms that affect individuals *qua* members of groups, and harms that affect groups as a whole. The distinctions are important for sorting out whether reparations should be paid to individuals, a group, or both. Finally, a distinction is made

⁴ Mark Schleifstein, “Hurricane Katrina, Rita Settlement Letters Mailed Out, Thousands Could See Small Share of \$20M,” *New Orleans Times-Picayune*, November 7, 2014, http://www.nola.com/environment/index.ssf/2014/11/thousands_in_new_orleans_st_be.html.

between simple and complex group harms, the latter of which helps to shed light on the nature of harm when it comes to the legacy of state-sponsored injustice against African Americans.

5.1 Tragedy, Injustice, and Resentment

There is a whole field in moral philosophy that might well be termed “Responsibility Studies.” How can we tell when someone is responsible for something? Does someone have to intend a wrong to be responsible for it? Does someone have to be aware of it? In situations that involve “many hands,” how do we parse out responsibility among individuals who each made different contributions to the thing that brought about the harm? Such questions can guide an analysis of responsibility for horrific events like the Texas City Disaster, the loss of the Columbia, and the levee breaches during Hurricane Katrina.

These types of questions can also be used to analyze another set of cases. In 1893, Queen Lili‘uokalani, the Hawaiian monarch, was deposed by John L. Stevens, U.S. minister to Hawaii, and a group of fellow conspirators. “The Hawaiian pear is now fully ripe and this is the golden hour for the United States to pluck it,” as Stevens wrote in a letter to Washington.⁵ President Grover Cleveland disapproved of the queen’s ousting and commissioned an investigation, but after the queen’s overthrow was found to indeed be illegal, Cleveland did little beyond depriving Stevens of his title. After five years of uncertainty and a change of guard at the White House, Congress voted to make the annexation official, and President McKinley signed the resolution into law.⁶

⁵ Linda S. Parker, *Native American Estate: The Struggle Over Indian and Hawaiian Lands* (Honolulu: University of Hawaii Press, 1996), 130.

⁶ *Ibid.*, 131.

From around 1953 to 1966, in the thick of the Cold War, the CIA believed that the United States needed to win a worldwide espionage race to defeat communism. An important part of its strategy involved new drug technologies: truth serums, substances to create “Manchurian candidates” with controllable minds, substances that could erase memories or induce madness should an enemy spy fall into American hands, and so on. This led to over a decade of human subjects experiments under the top-secret Project MKULTRA—on CIA officials themselves, armed forces members, prisoners, individuals in mental institutions, and even random civilians, like an unwitting night club singer.⁷ LSD experiments were by far the most common, but the CIA also experimented on human subjects using mescaline and various forms of mushrooms. Some of the experiments seemed to have innocuous results, some of them ruined individuals’ lives, and a few caused death.⁸

Up until 1990, federal agencies and museums housed large collections of sacred tribal objects and exhumed American Indian human remains for study and display. They did so without the consent of the tribes to which the contents of the collections were connected.⁹ In spite of there being strict laws (and moral taboos) against grave robbing and tampering with corpses in

⁷ A number of unreliable books have been written on Project MKULTRA. Many of the classified documents about the program were destroyed, and conspiracy theories have abounded. My information comes from the LSD experimentation court cases discussed in Chapter 6, the Senate hearings on MKULTRA, and books by John Marks and Jonathan Moreno. See “Project MKULTRA, The CIA’s Program of Research in Behavioral Modification,” *Joint Hearing before the Select Committee on Intelligence and the Subcommittee on Health and Scientific Research of the Committee on Human Resources*, 95th Cong., 1st sess., August 3, 1977 (Washington, D.C.: U.S. Government Printing Office, 1977); John Marks, *The Search For the “Manchurian Candidate”: The CIA and Mind Control* (New York: Times Books, 1979); and two books by Jonathan D. Moreno, *Undue Risk: Secret State Experiments on Humans* (New York: Routledge, 2001), esp. 189-200, and *Mind Wars: Brain Science and the Military in the 21st Century* (New York: Bellevue Literary Press, 2012).

⁸ Harold Blauer died while a mescaline test subject, and as a direct result of a dose whose administration he was actively resisting; he was at a mental institution for what was supposed to be a brief stay and did not know about his being an MKULTRA research subject. See *Barrett v. United States*, No. 76 Civ. 381 (SDNY, May 5, 1987).

⁹ Kathleen S. Fine-Dare, *Grave Injustice: The American Indian Movement and NAGPRA* (Lincoln: University of Nebraska Press, 2002).

the United States, archeologists would exhume entire Native cemeteries with impunity, and sometimes with funding from the National Science Foundation.¹⁰

How do the Texas City Disaster, the loss of the Columbia, and the Katrina levee breaches differ from the annexation of Hawaii, the MKULTRA experiments, and the use of Native human remains and objects? In both sets of cases, the government might have an obligation to make up for the harm done on the basis of its responsibility. However, in spite of this similarity, there is an important difference between the two sets of cases: the role of injustice.

Let us look at the first set of cases. We often use the language of injustice to speak of terrible events. It makes sense to do so. To have suffered a great loss inevitably seems needless and unfair. Nor are any of the three examples unpreventable fluke occurrences. In the case of the Texas City Disaster, more cautious regulatory measures by government officials could have prevented the *S.S. Grandcamp* from catching fire; better on-the-ground decisions could have stopped the fire from spreading to a second ship.¹¹ In the case of the Columbia, it was known that foam had broken off upon launch, and some have argued that there should have been a rescue mission rather than NASA's allowing the shuttle to reenter Earth's atmosphere.¹² In the case of Hurricane Katrina, teams of engineers testified before Congress that the levees were poorly designed and shoddily built, and that much human and property loss could have been avoided with a better flood-control system.¹³ But though each of these cases speak to the

¹⁰ Ibid., 77, 97-100.

¹¹ See the analysis in Stephens, *Texas City Disaster*, esp. 18-41.

¹² See "Was a Rescue Possible" in Philip Chien, *Columbia, Final Voyage: The Last Flight of NASA's First Space Shuttle* (New York: Copernicus Books, 2006), 408-411.

¹³ Eli Kintisch, "Hurricane Katrina: Levees Came Up Short, Researchers Tell Congress," *Science* 310 (2005): 953-955.

government's responsibility for what happened, the government bears responsibility for a tragedy, not for its having done injustice.

What does it mean for something to be a tragedy? As Judith Shklar defines the classical understanding, "In a truly tragic situation, there are no good choices, none.... The tragic world is in the hands of gods who play with us as they choose, often wantonly, though we are still in command of some of our actions."¹⁴ I do not quite mean this when I use the term "tragedy" or "tragic." That the vast losses in the Texas City Disaster, Columbia, and Katrina might have been prevented meant that there *were* choices. Indeed, as Shklar points out, tragedy in the classical sense is extremely uncommon.¹⁵ Shklar herself prefers the terminology of "misfortune" and "injustice," and attempts to work out the distinction between the two. How is someone whose world is shattered by the 1755 Lisbon Earthquake different from an African American individual living in the Jim Crow South?¹⁶ Which person experiences injustice, and which person misfortune? Shklar contends that it does not matter: "On the border between misfortune and injustice we must deal with the victim the best we can, without asking on which side her case falls."¹⁷ Driving Shklar's understanding of the difference between misfortune and injustice seems to be a worry about "passive injustice"—that is, callous indifference, doing nothing. Indeed, if those who can help stand by and do nothing, I agree with Shklar that there is ultimately no difference between misfortune and injustice. But what if public officials do everything right? Shklar does not ask this question. In the case of the Columbia, however, the Federal Emergency

¹⁴ Judith N. Shklar, *The Faces of Injustice* (New Haven: Yale University Press, 1990), 70.

¹⁵ *Ibid.*, 71.

¹⁶ *Ibid.*, 115.

¹⁷ *Ibid.*, 55.

Management Agency (FEMA) promptly organized a massive recovery effort to find the bodies of the astronauts.¹⁸ Documents pertaining to Columbia's voyage were immediately released, a detailed investigation was conducted, and a self-critical report was released by the investigation board.¹⁹ NASA officials brought in each family so that they could express their grief over their lost loved one, and worked with each to determine a compensation amount that would be fair.²⁰ When it comes to the Columbia, then, we are not trying to analyze the callous indifference of officials to the suffering of victims; we are trying to define the nature of the event that led to their suffering. Is the Columbia Disaster a misfortune? The terminology of "tragedy" is attractive, and preferable I believe, because it *does* feel like the gods are playing with us mortals when such an unexpected and startling event occurs. We tend to rationalize a misfortune by saying that it is part of life.²¹ But with a tragedy, it does not feel like it should be part of life. Everyone truly wishes that it would not have happened, and only feels bad about the fact that it did.

One of the reasons why Shklar may be reluctant to distinguish between misfortune and injustice surely has to do with what she calls the "irreducibly subjective component" of experiencing injury and loss.²² I do, however, think it possible to do justice to Shklar's "victim's perspective" while trying to determine what is distinct about injustice.²³ There is a long tradition of analyzing moral states in terms of the moral emotions and sentiments they elicit. Many

¹⁸ Chien, *Columbia*, 372-382.

¹⁹ *Ibid.*, 343-344. The report is the *Columbia Accident Investigation Board Report*, Vols. 1-6 (Washington, D.C.: Government Printing Office, 2003), <http://www.nasa.gov/columbia/caib/html/start.html>.

²⁰ Leusner, "NASA Paid \$26.6M."

²¹ Laurence Thomas has a good discussion of ordinary misfortunes in "Moral Deference," in *Theorizing Multiculturalism*, ed. Cynthia Willett (Malden, MA: Blackwell Publishers, 1998), 359-381.

²² Shklar, *Faces of Injustice*, 37.

²³ *Ibid.*, 70 *et passim*.

authors, particular those writing in the sentimentalist tradition, consider proportionate or justified resentment as the appropriate response to wrongdoing. Charles Griswold follows Bishop Joseph Butler in describing resentment as:

a species of moral hatred that is ‘deliberate’ rather than sudden, is aroused by the perception of what we take to be an unwarranted injury, embodies a judgment about the fairness of an action or of an intention to do that action, is provoked by moral and not natural evil, is aimed at the action’s author, and is a reactive as well as retributive passion that instinctively seeks to exact a due measure of punishment. It also seeks to protest the wrongness of the (intended) action.²⁴

This description allows us to get closer to understanding what injustice is: injustice incites moral indignation and resentment on the part of the wronged person. At the same time, it allows ample room for a given individual’s subjective experience of injustice. This does not mean, however, that just because an individual experiences injustice subjectively, her reactive attitude is exempt from third-party analysis or reproach. Jean Hampton stresses the difference between spite (the Nietzschean notion of *ressentiment*) and justified resentment.²⁵ Spite is irrational and a vice. But resentment, to use Butler’s words, is “a weapon put into our hands by nature, against injury, injustice and cruelty.”²⁶ Whereas the moral emotion of *ressentiment* is characterized by the sense of powerlessness and self-pity, persons who feel resentment have enough confidence in their own moral value to be intolerant of a wrong.²⁷ Channeled correctly and in proper proportion to an

²⁴ Charles Griswold, *Forgiveness: A Philosophical Exploration* (Cambridge: Cambridge University Press, 2007), 39.

²⁵ Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* (Cambridge: Cambridge University Press, 1988), 76-78. (Hampton’s essay.)

²⁶ Joseph Butler, “Sermon VIII: Upon Resentment and Forgiveness of Injuries,” in *Fifteen Sermons Preached at the Rolls Chapel* (London: Joseph Rickerby, 1836), 137-149, 144. See also Griswold, *Forgiveness*, 19-37; Michael Frazer, *Enlightenment of Sympathy: Justice and the Moral Sentiments in the Eighteenth Century and Today* (Oxford: Oxford University Press, 2010), 37-39.

²⁷ Of course, a committed Nietzschean would surely find the attempt to carve out a difference between resentment and *ressentiment* preposterous. Nevertheless, for someone who is not a Nietzschean, reflecting on everyday moral experience suggests that there is a difference between the two emotions.

offense, resentment helps to form and uphold the moral order, allowing us to comprehend wrongs as such, and affirming moral worth.²⁸

Would it be appropriate for the persons who experienced personal loss as a result of the Texas City Disaster, the Columbia, Disaster, or the Katrina levee breaches to feel resentment towards the U.S. government? Butler makes a distinction between the instinct of sudden anger, and considered, deliberate resentment.²⁹ Sudden anger is a natural and human response to a tragedy. If there was carelessness, this may moreover temporarily inflame resentment. But as Butler reasons, resentment persists in proportion to “the degree of the evil designed or premeditated.”³⁰ The resentment of carelessness will dissipate on Butler’s theory, since no evil has been intended: the “natural object or occasion of settled resentment” is an “injury, as distinct from pain or loss.”³¹ After a tragedy, if the government does everything that is in its power to do to help out and there is no passive injustice, it would not be morally appropriate to feel further resentment as if government officials had conspired to have caused harm. This is an insight that Shklar illustrates in describing the 1942 Cocoanut Grove fire in Boston, in which a dropped match at a nightclub resulted in 500 deaths, and the witchhunt-like zeal with which newspaper writers sought to place blame on the “fire and police department, the mayor, and the entire city government.”³² The passion for blaming is morally wrong in this case, as clearly, the fire was an

²⁸ One need not interpret Butler to arrive at the link between resentment and injustice. See R. Jay Wallace, “The Argument from Resentment,” *Proceedings of the Aristotelian Society* 107 (2007): 295-318, esp. 300. Wallace considers resentment a distinctly “moralizing response, in a way that feelings such as frustration, irritation and annoyance are not.”

²⁹ Butler, “Sermon VIII,” 139.

³⁰ *Ibid.*, 143.

³¹ *Ibid.*, 143-144.

³² Shklar, *Faces of Injustice*, 60-61.

accident. But interestingly, Shklar points out that the survivors and the families and friends of the deceased were not as obsessed with assigning blame for the fire.³³ If they were, we might judge them to have acted wrongly: the fire was a tragic calamity, not an injustice.

But when it comes to injustice, if Butler is correct, feeling moral indignation towards the responsible party is justifiable. Shklar is interested in understanding the “impulse to blame the government” for its passive injustice in not doing more to help those who suffer. In most cases of state-sponsored injustice, however, the government is actively committing a wrong against individuals.³⁴ Whether or not a wrong or an injury is intended is an open question, since often state-sponsored injustice is justified by a crude means-end rationality that stubbornly refuses to see an injury.³⁵ (Recall the discussion of “institutional benightedness” in the previous chapter.) But regardless of the intentions behind wrongdoing, we can define state-sponsored injustice as consisting of either a willful policy or practice that immorally disregards individual interests, or a morally censurable act of omission.³⁶ Either way, a person is reasonable to feel resentment. How individual interests are being immorally disregarded, of course, may vary from case to case, and different moral frameworks may provide different ways of understanding the wrong. The American annexation of Hawaii breached well-established principles of international law, grounded in the rights of a people to self-determination. The CIA’s LSD experiments reveals a

³³ Ibid., 61.

³⁴ Ibid., 65.

³⁵ See Ibid., 70-82, for Shklar’s discussion of necessity.

³⁶ I use the term “interests” rather than the language of moral rights to accommodate the role of moral learning, and because it is simply easier to defend the idea that a tribe has an *interest* in not having a sacred mask displayed as an artifact in a museum than it is to defend the idea that individuals have a moral *right* to not have their material culture used in this way.

clear-cut case of “human guinea pigs” being used merely as a means.³⁷ Some have claimed that the case of Native human remains being kept by museums is difficult to understand from the standpoint of the dominant morality and its rationalistic “imperial archeology,”³⁸ but in fact, the moral logic could not be any simpler. In 1970, an American Indian student group at the University of Minnesota submitted a grant proposal to the National Science Foundation to exhume a historic Boston cemetery in order to study the bodies.³⁹ In other words, do unto others.

With each of these cases of injustice, it is fitting and morally appropriate to feel resentment toward the United States government as the moral *respondeat superior* if it has refused to be accountable for the injustice and a harm is felt. However, though resentment may indeed be justified and experienced in its proper proportion, it is nevertheless an unproductive moral state. Resentment has a way of just sitting there, weighing on a person. A reparations claim, however, is a constructive channeling of resentment. The claimant is not content to let resentment encumber her, and senses that calling state power to account gives her resentment a direction and an end point. Though the unjust thing that happened will still have happened, that the wrongdoer was accountable naturally reduces resentment, because accountability reduces the total amount of injustice that there is. It is simply not as bad when a wrongdoer does something and then is meaningfully accountable to the person who was wronged as it is when the wrongdoer does something and never answers for it. Some, notably Bishop Butler, have argued

³⁷ As Justice Brennan stated in his partial dissent in the only MKULTRA case that went to the Supreme Court, “The subject of experimentation who has not volunteered is treated as an object, a sample... Soldiers ought not be asked to defend a Constitution indifferent to their essential human dignity. I dissent.” *United States v. Stanley*, 483 U.S. 669, 708 (1987) (Brennan, concurring in part and dissenting in part).

³⁸ See James Riding In, “Without Ethics and Morality: A Historical Overview of Imperial Archeology and American Indians,” *Arizona State Law Journal* 24 (1992): 11-34.

³⁹ Fine-Dare, *Grave Injustice*, 77.

that forgiveness is the forswearing of resentment: the reparative justice process need not involve forgiveness.⁴⁰ But for the majority of reparations recipients, the fact of the government's taking meaningful responsibility and paying redress naturally makes it possible to let go of resentment and move on.

5.2 On Wrongful Harms and Wrongfully Harming: What is Owed?

In situations where a tragedy has taken place, it is possible for the government to have duties that are similar to those in situations where there has been state-sponsored injustice. In Chapter 2, four different ways in which a government might be responsible for injustice were discussed. Injustice might be authorized by the government or its officials. The government might fail to prevent abuses carried out by state employees. It might fail to prevent egregious wrongdoing by members of society. Finally, it might fail to do a duty that falls on it, either due to its causal role in what happened, or by virtue of its having the capacity for aid and remediation and the fact of its being the government. If there is causal responsibility for what happened, the reason for the state's having duties is straightforward. A party can very easily be responsible for having caused *wrongful harm or loss* even if it did not do so *wrongfully*.⁴¹ For example, perhaps more prophetic NASA engineers could have predicted that the Columbia would have problems upon reentry, recommending a rescue mission. In the official NASA report on the Columbia, the agency took responsibility for its not having retired the 22-year-old space shuttle. However, the decisions made by NASA do not amount to morally wrong actions, even though the deaths of the

⁴⁰ Butler, "Sermon VIII." See Griswold, *Forgiveness*, 19-37, for a discussion.

⁴¹ This is a common distinction in the theories of civil and criminal law. See Jules Coleman's discussion of "wrongfulness" in *Risks and Wrongs* (Oxford: Oxford University Press, 2002), 329-360.

astronauts were wrongful.⁴² But when there is wrongful harm or loss *simpliciter*, such as an extremely improbable terrorist attack, or if natural forces overwhelm a government's efforts to anticipate and prevent harm, the government usually has duties just because it is the government.⁴³

What duties might a government have if there has been wrongful harm? Depending on the situation, it might be incumbent on state officials to organize a rescue effort, arrange for medical care for the sick and wounded, help rebuild an infrastructure, get to the truth of what happened, prosecute wrongdoers, and so on. If there is causal responsibility, the duty to compensate those who are harmed may fall on the government as well. The language of compensation is useful for distinguishing between the practice of issuing monetary payments in situations of wrongful loss, and monetary reparations for state-sponsored injustice—though surely compensation does not make a person who lost a loved one “whole” in the way it does for minor car accidents.⁴⁴ A wrongful harm or loss requires compensation from the causally responsible party even in the absence of moral blameworthiness; this is the foundation of much of civil law. Though I shall not choose among them here, a variety of theoretical approaches have

⁴² George Sher has a helpful discussion of this point in *Who Knew: Responsibility without Awareness* (Oxford: Oxford University Press, 2009). He begins with the reasonable person standard in law, and develops a theory where a person is responsible for something that they did not know would happen if they are reasonably responsible for their ignorance. But Columbia's reentry failure was so improbable that moral wrongdoing cannot be attributed to it. See discussion in Chien, *Columbia*, 390-398, 408-411.

⁴³ In our daily political life, we just say “Rescue the suffering people!” and do not typically reflect on why this might be the case, but the reasons surely go deeper than “can implies ought.” Social contract theory provides one plausible answer: a society that individuals would consent to is the kind of society that helps individuals who suffer from a devastating, unforeseen event regardless of who or what caused the loss.

⁴⁴ See Coleman's discussion of Hal and Carla in *Risks and Wrongs*, 341: “By rendering compensation, however, Hal does not right the wrong he has done her; he merely compensates her for it. In doing so, he respects her claim to repair against him. Should he fail to compensate her, which is her right, then he would have doubly wronged her.” See also Onora O'Neill, “Rights to Compensation,” *Social Philosophy & Policy* 5 (1987): 72-87, 80.

been advanced to justify the duty of compensation in torts, including corrective justice,⁴⁵ deterrence,⁴⁶ insurance for appropriately spreading burdens,⁴⁷ civil recourse,⁴⁸ and even punishment theory.⁴⁹ In the case of a wrongful death, most of these approaches assume that there are practical reasons to compensate the family for the economic harms it suffers: funerals costs at the very least, and also the earnings that the family expected over the course of a person's lifetime. In other cases, compensable harms consist of things like health-related injuries, property loss or damage, lost wages, and sometimes (controversially) emotional distress whose cost is to be assumed by the causally responsible party.

In the three tragedies that we have been examining, the government was shielded from legal liability due to sovereign immunity.⁵⁰ Nevertheless, the government acted in accordance with its duty in paying compensation to the Columbia astronauts' families and to the victims of the Texas City Disaster.⁵¹ The government may not be the one to owe compensation if there is a

⁴⁵ E.g., Coleman, *Risks and Wrongs*.

⁴⁶ E.g., Guido Calabresi, "Optimal Deterrence and Accidents," *Yale Law Journal* 84 (1975): 656-671.

⁴⁷ E.g., Philip J. Cook and Daniel A. Graham, "The Demand for Insurance and Protection: The Case of Irreplaceable Commodities," *Quarterly Journal of Economics* 91 (1977): 143-156.

⁴⁸ E.g., Benjamin Zipursky, "Civil Recourse, Not Corrective Justice," *Georgetown Law Journal* 91 (2002): 695-756.

⁴⁹ E.g., Ronen Perry, "The Role of Retributive Justice in the Common Law of Torts: A Descriptive Theory," *Tennessee Law Review* 73 (2005): 177-236.

⁵⁰ See *Dalehite et al. v. United States*, 346 U.S. 15 (1953), for the Texas City Disaster and sovereign immunity, and Chapter 6 for a discussion. For the Columbia Disaster, it was very obvious that the government never would have been found liable due to sovereign immunity—see, e.g., Andrew W. Murnane and Daniel Inkelas, "Liability Issues Associated with the Space Shuttle Columbia Disaster: CRS Report for Congress," *CRS Web*, February 12, 2003, <http://fas.org/spp/civil/crs/RS21426.pdf>—thus there was no point in the families even suing. NASA fortunately preempted a frustrating legal battle by settling immediately. The *In re Katrina Canal Breaches Consolidated Litigation* has a complicated legal history of twists, turns, and outright reversals, but see, e.g., the 2008 decision, *In re Katrina Canal Breaches*, 533 F. Supp. 2d 615 (E.D. La. 2008). The government eventually settled, as I discuss later in this chapter.

⁵¹ The Texas City Disaster compensation legislation is S. 1077, 84th Cong. (1955). See Leusner, "NASA Paid \$26.6M," for the Columbia settlement.

more logical party than the government to pay it. But it does owe the victims the use of the courts to obtain compensation, and if it does not, if it protects the person or persons who committed the wrong, then it becomes a party to wrongdoing of a second-order sort. The case of the Omagh terrorist attack was used in Chapter 2 to show that even though the government did not cause the injustice, it is possible for the aftermath of an event to be handled so poorly, for the government to so completely butcher its duties to the victims, that there is state-sponsored injustice for which accountability is owed on top of the private wrongdoers' original injustice. It is thus fitting that even though the terrorists were eventually found liable for damages, the Omagh City Council organized and contributed to a fund for building a memorial.⁵² However, even if the response to the Omagh bombing had been satisfactory, it is understandable for the family members of the deceased to push for a memorial in the case of a tragedy, since memorials are a way of publicly affirming the wrongfulness of the losses. There are memorials for the Texas City Disaster, the Columbia Disaster, and Hurricane Katrina.

So far, I have painted what I hope is a simple and clear picture. Injustice is characterized by moral wrongdoing, and the person who is injured is justified in feeling resentment in proportion to the offense and their experience of harm. Tragedies do not involve moral wrongdoing, though there might be accidental wrongdoing and the government's causal responsibility. With a tragedy, moreover, everybody feels terrible about what happened. But injustice is often chalked up to necessity and rationalized. It is not usually accompanied by the sorrow that accompanies tragedy, at least not on the part of the government bodies or officials responsible for it, and often not on the part of the politically dominant class. But now let us

⁵² See Chapter 2; "Omagh Remembers," from website of the Omagh District Council, last accessed January 27, 2015, http://www.omagh.gov.uk/district_of_omagh/omagh_remembers; "Omagh Bomb: Colm Murphy and Seamus Daly Found Liable at Retrial," *BBC News*, March 20, 2013, <http://www.bbc.com/news/uk-northern-ireland-21858904>.

complicate things a bit and admit that, depending on one's moral frame, drawing the line between a tragedy and an injustice may seem arbitrary: one may not see the end which was being served when the tragedy took place as justified. Space programs are sometimes compared to the myth of Icarus; the Columbia Disaster is what happens when nations hubristically seek greatness through technological mastery. The Texas City Disaster only occurred because the government had been manufacturing ammonium nitrate for wartime usage, an end that a pacifist would no doubt condemn. In the case of Hurricane Katrina, it is not a matter of ends, but judgment: many have censured the U.S. government for having acted with extreme carelessness in not devoting greater resources to building higher levee walls, and in subjecting the citizens of the greater New Orleans area to risk.

Charles Perrow, however, has famously argued that there are such things as "normal accidents." Using the example of the Three Mile Island nuclear accident, Perrow's position is that certain accidents "emerge from the characteristics of systems themselves. They cannot be prevented. They are unanticipated. It is not feasible to train, design, or build in such a way as to anticipate all eventualities in complex systems where the parts are tightly coupled."⁵³ The normal accident, then, is one extreme of a continuum. The end is justified, and it occurred not because of any form of negligence, but as a catastrophic, unpreventable result of systemic failure. None of the examples we have been examining quite fit the blamelessness characterizing a normal accident. Few cases do. However, we tend to think that there are certain activities and projects that governments may justifiably undertake, even if they involve making choices, tradeoffs, and

⁵³ Charles Perrow, "Normal Accident at Three Mile Island," *Society* 18 (1981): 17-26, 17.

taking risks. (Extreme risk aversion would come with its own set of tradeoffs.⁵⁴) It is quite natural to place blame if something goes wrong while never feeling grateful at the government's having discerningly made a difficult or risky choice if there are no apparent bad results. Most of the time, things do not go wrong, and we live our lives blissfully unaware of the complex decision-making processes behind things' functioning without a catastrophe. One of the many tragic aspects of a tragedy is that it might have been justified for the government to calculate the costs and benefits and proceed as it did, since it lacked advance knowledge of the repercussions of its calculations.

Alas, there are times when risks and tradeoffs are calculated in a way that amounts to a moral wrong. I have used the example of the Columbia Disaster throughout, but we can also look at case of the 1986 explosion of the space shuttle *Challenger* as representing quite a different moral situation. The morning of the scheduled liftoff was much colder than anticipated, and engineers told the NASA authorities that the "O-rings," the rubber joints used to seal off the rocket fuel boosters, had exhibited damage, and were prone to failure in such weather. Nevertheless, these warnings were ignored, and seven astronauts died that day as a result. A Congressional commission was appointed to write a report, the truth about NASA's having negligently disregarded the warnings came out, and payments were made to the families of the deceased astronauts.⁵⁵ Is this redress for state-sponsored injustice, or compensation for a tragedy? Hard questions. Clearly, everyone felt terrible about what happened. It would have been appallingly insensitive of the NASA officials to have persisted in their belief that the risk of an

⁵⁴ See Adrian Vermeule's discussion of "precautionary constitutionalism" in *The Constitution of Risk* (Cambridge: Cambridge University Press, 2014), 27-51.

⁵⁵ *Investigation of the Challenger Accident: Report of the Committee on Science and Technology*, House of Representatives, 99th Cong., 2nd sess., October 29, 1986, <http://www.gpo.gov/fdsys/pkg/GPO-CRPT-99hrpt1016/pdf/GPO-CRPT-99hrpt1016.pdf>.

O-ring failure was worth not changing the launch date after the disaster occurred, and surely, the people who made the call felt as awful as anybody feels when they are causally responsible for accidental death. At the same time, the families of the astronauts who died would have been justified in feeling resentment. Morally, the actions of the NASA officials who chose to proceed with the launch were not good: the officials did not take the engineers' repeated warnings seriously, and arrogant confidence led them to continue according to the plan.⁵⁶ All this was not yet known on the night of the disaster when President Reagan addressed the American people. The celebrated oration is remembered precisely because the president (daringly!) did not apologize: "There will be more shuttle flights and more shuttle crews and, yes, more volunteers, more civilians, more teachers in space. Nothing ends here; our hopes and our journeys continue," he told the nation.⁵⁷ But knowing what we know now, the flaw of this famous speech was that it did not contain the words, "I am sorry."

Cases like the Challenger may suggest that it is not so important to create a binary between tragedy and injustice, between wrongful harms *tout court* and wrongfully harming. Recall Shklar: we must just deal with the victim the best we can. But dealing with a wrongful harm appropriately requires determining whether there has been injustice, since persons harmed as a result of injustice are owed accountability for the moral wrong. And so, even if a binary is too simple for the complex moral world we live in, it may make sense to visualize a continuum between a "normal accident" and injustice, with an episode like the Challenger Disaster falling squarely in the middle.

⁵⁶ For an excellent discussion of responsibility for the Challenger Disaster, co-written by one of the engineers who tried to stop the launch, see Russell P. Boisjoly, Ellen Foster Curtis and Eugene Mellican, "Roger Boisjoly and the Challenger Disaster," *Journal of Business Ethics* 8 (1989): 217-230.

⁵⁷ Ronald W. Reagan, "Explosion of the Space Shuttle Challenger: Address to the Nation," January 28, 1986, NASA History Office website, last accessed March 14, 2015, <http://history.nasa.gov/reagan12886.html>.

Even with a continuum like this, however, Hurricane Katrina is a case that defies easy categorization. First, there is the question of the levees. Days after the storm, the Army Corps of Engineers' official position appealed to the challenging nature of risk management in a political context: "[D]etermining the level of protection needed versus what Congress and the public are willing to pay for isn't often easy.... The costs of protection against extreme natural disasters are juggled with other public priorities. Environmental considerations are debated. Stakeholders from all levels of government and the private sector weigh in."⁵⁸ But independent reviewers eventually testified that a colossally bad engineering design led to the levee breaches.⁵⁹ Is this what behavioral economists call "hindsight bias," or should the Army engineers have known better? Were the flaws in the levee design shortcuts that saved money, or were the engineers just bad at their jobs? Is it even satisfactory to say that the former would have been better than the latter from a moral point of view? Second, there is FEMA's sluggish and inefficient response in general, and further matters having to do with race and class. The racial dimensions of the FEMA response are at this point well-known: the slow-moving rescue efforts in New Orleans's poorest neighborhoods; the crowded conditions at the Superdome; FEMA's sheer inability to get food and water to starving, dehydrated people; no busses; no helicopters; displaced families wandering to try to find food, supplies, and refuge; police officers opening fire on an unarmed black family trying to cross a bridge into a white neighborhood; police officers covering up their having fired on aforementioned unarmed black family; storm victims dying while doctors stood

⁵⁸ Brian Handwerk, "New Orleans Levees Not Built for Worst Case Events," *National Geographic*, September 2, 2005, http://news.nationalgeographic.com/news/2005/09/0902_050902_katrina_levees.html.

⁵⁹ Kintisch, "Hurricane Katrina."

by awaiting orders—this list could go on and on. With the exception of the Danziger Bridge killings, I take Camilla Stivers’s assessment to be more than fair when she writes:

Any one, two, or three of the foregoing incidents and statistics should be chalked up to isolated bureaupathology. Yet the vividness of the pattern suggests that something besides red tape or lack of initiative was involved. Why, on this occasion, did so many public servants decline to rely on their judgment when it is clear that, more often than not, under ordinary circumstances, they do just that?... [T]here are many plausible reasons for such behavior. But just as it was no accident that African Americans lived in the most vulnerable areas of New Orleans, so, too, did the dozens of documented examples of strict adherence to bureaucratic rules have a disproportionate impact on the residents of those areas.⁶⁰

On a normal accident/injustice continuum, the Katrina levee breaches may well be to the left of the Challenger Disaster. But the racialized response to Katrina is injustice, and an appropriate candidate for a reparations claim—though to my knowledge, one has not been aired. After years of meandering litigation concerning the government’s liability for the levee breaches, however, a settlement has finally been reached that allows thousands of eligible parties to receive between \$1 and \$463 for property damage, and up to \$1,020 in death benefits.⁶¹ Given the nature of the government’s responsibility, the amount that it has already spent on the recovery effort over the years, and the fact that insurance companies offer natural disaster protection, are these amounts appropriate, or should the government have paid more? Some of the people who will be receiving Katrina payments are African American: for them, is this enough? Why has there not been a reparations claim from black New Orleanians for the injustice of the government’s response to Hurricane Katrina? Hard questions, yet again.

⁶⁰ Camilla Stivers, “‘So Poor and so Black’: Hurricane Katrina, Public Administration, and the Issue of Race,” *Public Administration Review* 67 (2007): 48-56, 53. Peter Dreier has a good discussion of responsibility in Dreier, “Katrina and Power in America,” *Urban Affairs Review* 41 (2006): 528-549.

⁶¹ Schleifstein, “Hurricane Katrina, Rita Settlement Letters.”

So far we have been focusing on wrongful harms with and without the government's having acted wrongfully. It is worth pointing out that governments may be responsible for other non-wrongful acts that result in wrongful harm or loss. For example, a government may justifiably exercise eminent domain and take an individual's property. An individual experiences a wrongful loss because she is made to give up her property, which is why the government owes compensation. Cases covered by the Federal Tort Claims Act often concern accidental harm caused by negligence: the government pays compensation if found liable by the court, and in

Table 2. Wrongful Harms and Wrongful Actions: What is Owed?

		The state	
		Wrongful action	Non-wrongful action
The individual/group	Wrongful harm	<i>State-sponsored injustice:</i> Reparations, apology	<i>Tragedies, routine accidents, exercise of eminent domain:</i> Compensation
	Non-wrongful harm	—	<i>Punishing a wrongdoer; some political decisions in which there are winners and losers:</i> Nothing owed
	No harm	<i>Historical state-sponsored injustice whose impact time and subsequent circumstances have removed:</i> Nothing owed	<i>Other political decisions in which there are winners and losers:</i> Nothing owed

doing so, acts in accordance with its duty in situations of wrongful harm. (Note that in cases of wrongful harm without moral wrongdoing, the standard Nozickian definition of compensation—X is compensated for Y's action if X is no worse off receiving compensation than he would be had Y not done the action—works fairly well.⁶²) At the same time, there may be unrectified wrongdoing in which there is no harm. This is possible due to the passage of time: not all harmful effects of state-sponsored injustice are transmitted across generational lines, and if there

⁶² Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 57.

is no harm experienced by present-day individuals, then the government does not owe reparations. Nor is the government obliged to pay compensation for non-wrongful harms. Punishment is no doubt a harm, but if a wrongdoer did in fact commit the act for which she is being punished, then this is not a wrongful harm. Political decisions across all branches of government have the ability to cause harm and loss to individuals, groups, and businesses. But a democratic system is able to function because the winners and losers accept the final political decision wherever the chips fall. This is not injustice, and a government does not have a duty to compensate losers for their losses.⁶³ As mentioned in the previous chapter, businesses do sometimes lobby the government for compensation when financially burdensome regulatory decisions are made, but this by no means signifies that a government owes anything to companies for having implemented a new set of regulations as a matter of moral duty. These sorts of prerogatives are precisely what government discretion is for, and go a long way to explain the legal principle of sovereign immunity for discretionary government functions.

5.3 The Harm of Injustice

Not all unrectified state-sponsored injustices have harms. Even if experienced by individuals who are still alive today, it is nevertheless possible for injustice to not negatively impact the lives of any present-day individuals. State-sponsored injustice can leave a scar

⁶³ Robert E. Goodin has a discussion of this point in *Utilitarianism as Public Philosophy* (Cambridge: Cambridge University Press, 1995), 160-161. But Shklar considers the possibility that this is injustice: “Every social change, every new law, every forced alteration of public rules is unjust to someone... To redress one injustice is to create another. Every tax law seems and feels unjust to those who planned their lives on the basis of existing law. Every change in the admission rules to a university disappoints a group that had grown up expecting to be admitted.” *Faces of Injustice*, 120-121. On my argument—and ultimately on Shklar’s as well, so long as there is procedural justice—a person would be wrong to be resentful of an unbeneficial change in the tax code or affirmative action.

without leaving an open wound. Many individuals wear their scars with pride, and consider them an important part of their identity. But reparations are not owed for scars.⁶⁴

However, when there are open wounds, when injustices do cause harm in the present day, they can affect individuals or groups. Moreover, some harms may be experienced by particular individuals, but symptomatic of their group's experience. Diagnosing harm is important for determining whether reparations are owed, and whether they are owed to individuals or groups.

5.3.1 No Harm: Women

Why wouldn't a group demand reparations for state-sponsored injustice? Isn't it natural for all groups to want accountability for their having suffered the abuse of power at the hands of the state? Though historically the government has without doubt played an important role in gender inequality, my claim is that present-day women do not experience harm for reason of state-sponsored injustice.

Historically, inequalities between men and women were maintained through a system of coverture, the legal principle that the rights of married women were incorporated into the rights of their husbands. Most significantly, married women could not own property. Beginning in 1835, Married Women's Property Acts began to be passed by state legislatures—though obviously this was not of much use to black women unless they lived in Free states.⁶⁵ Coverture was curtailed further after the Civil War, and by 1900, the majority of states had laws allowing married women to write their own wills, have access to their husband's estates, have some

⁶⁴ As Ori Herstein writes in "Historic Justice and the Non-Identity Problem: The Limitations of the Subsequent-Wrong Solution and towards a New Solution," *Law and Philosophy* 27 (2008): 505-531, 508: "If an historic wrong no longer harms anyone, then while it is a tragic fact about history it is no longer a basis for claims."

⁶⁵ Joan Hoff, *Law, Gender, and Injustice: A Legal History of U.S. Women* (New York: New York University Press, 1991), 127.

control over their earnings, and giving “abandoned” women the power to make contracts and own property.⁶⁶ Divorce laws, laws concerning maternal custody rights, and inheritance laws were also liberalized during this time. However, women were not granted voting rights until the ratification of the Nineteenth Amendment in 1920. Protections against rape and other forms of violence against women did not acquire their modern form until the 1970s and 1980s, and the majority of states’ rape laws exempted marital rape until the 1990s.⁶⁷

There has not been a women’s reparations movement, something that is perhaps conspicuous in its absence. However, the circumstances of gender inequality matter greatly. Women do not live in gender-specific segregated communities, and when they reproduce, around half the time they give birth to men. As a matter of the law, white women had almost exclusive marital access to members of the dominant group for almost two hundred years of American history. These circumstances have greatly impacted the extent to which material inequalities travel along intergenerational lines, largely removing the harm of past injustice. Indeed, in the educational and economic spheres, women have made tremendous progress over the past half-century. Gender equality has come so far that we are at the point where we have debates about whether men are “finished.”⁶⁸

⁶⁶ Ibid., 128-129.

⁶⁷ See Emily J. Sack, “Battered Women and the State: The Struggle for the Future of Domestic Violence Policy,” *Wisconsin Law Review* (2004): 1657-1740; Catharine MacKinnon, “Disputing Male Sovereignty: On *United States v. Morrison*,” *Harvard Law Review* 114 (2000): 135-177, 142.

⁶⁸ I do mean that we literally have debates over whether men are finished. See “Are Men Finished?” *Intelligence Squared Debates*, September 26, 2011, <http://www.npr.org/2011/09/21/140666530/are-men-finished>. Though no doubt the women who currently benefit most from these gains are educated and economically stable, the outperformance of women over men in education bridges class lines. Thomas A. Diprete and Claudia Buchmann, *The Rise of Women: The Growing Gender Gap in Education and What It Means for American Schools* (New York: Russell Sage Foundation, 2013).

But in spite of the strides towards gender equality that have been made, one area where there might be a lingering harm has to do with violence against women. There is a backlog of around half a million untested rape kits in law enforcement facilities across the United States. There have been documented cases in which serial rapists have not been apprehended because a rape kit was never processed, allowing other occurrences of rape that would not have been likely had criminal justice stepped in.⁶⁹ Advocacy groups are currently working to persuade legislatures to allocate funding for unprocessed rape kit testing, and taking their claims to the courts.⁷⁰ It is hard to predict what will happen in the future, but the rape kit backlog reveals a present-day harm that fits the pattern of situations in which reparations claims tend to emerge.

5.3.2 Individuated harms: Project MKULTRA, the Hillsborough Disaster

There are many cases of individuals experiencing the harm of injustice *qua* individuals. Call these *individuated harms*. Project MKULTRA is a quintessential case: people were targeted at random, and had no connection to one another. Only in one instance did individuals who underwent LSD experimentation come together as a group to demand reparations: an unsuccessful reparations lawsuit was brought by former inmates who had undergone experimentation at the United States Penitentiary in Atlanta.⁷¹ In most cases, however, individual

⁶⁹ See, e.g., “Why So Many Rape Evidence Kits Go Unprocessed and Efforts to Reduce the Backlog Nationwide,” *Diane Rehm Show*, November 6, 2014, http://thedianerehmshow.org/shows/2014-11-06/why_so_many_rape_evidence_kits_go_unprocessed_and_efforts_to_reduce_the_backlog_nationwide.

⁷⁰ See website of “The Accountability Project,” last accessed December 27, 2014, <http://www.endthebacklog.org>; Jill E. Daly, “Gathering Dust on the Evidence Shelves of the United States-Rape Victims and Their Kits: Do Rape Victims Have Recourse Against State and Federal Criminal Justice Systems?” *Women’s Rights Law Reporter* 25 (2003): 17-35; Milli Kanani Hansen, “Testing Justice: Prospects for Constitutional Claims by Victims whose Rape Kits Remain Untested,” *Columbia Human Rights Law Review* 42 (2010): 943-992.

⁷¹ *Scott v. Casey*, 562 F. Supp. 475 (1983). To be fair, the inmates consented to participate in the study in exchange for \$3.00 per ingestion and a good recommendation to the parole board. Yet they were not aware that flashbacks and memory loss would result.

MKULTRA experimentees did not know any other MKULTRA experimentees. Some individuals never even found out that they were test subjects.

Nevertheless, an injustice may impact people who share in a group identity, yet who experience the harm as individuals. In such a case, it would be inappropriate to suggest that harm is felt by other members of the group to which individuals belong. Take the example of the 1989 Hillsborough Disaster, which occurred when a crowd crush in an unmanned tunnel of Sheffield's Hillsborough Stadium resulted in the deaths of 96 Liverpool soccer fans and 750 injuries.⁷² The Hillsborough Disaster is an injustice, and not just a tragic case of bad policing, due to the aftermath of the episode: the British government blamed the fans, calling the event a stampede, and refused to take responsibility for the injuries and deaths. No apologies were made until 2012 when it was revealed that there had been a deliberate cover-up of a series of extremely negligent actions by the police.⁷³ Certainly those who were injured and the families of those who lost their lives have a claim against the government. But it would be inappropriate for Liverpool fans who were not at the game to claim an injury by virtue of participating in Liverpool soccer fan culture. Individuated harms are felt by those who experience them firsthand: people who experience bodily injury or property loss, or families who lose a loved one.

In the case of an individuated harm, immediate family members may wish to claim reparations on behalf of a person who died, as they experience the harm of a loved one's wrongful death firsthand. But it would not be appropriate for remote descendants to do so, even if there was never accountability for the wrong, because individuated harms are not inheritable.

⁷² "How the Hillsborough Disaster Happened," *BBC News*, April 14, 2009, <http://news.bbc.co.uk/2/hi/uk/7992845.stm>.

⁷³ Owen Gibson, David Conn, and Haroon Siddique, "Hillsborough Disaster: David Cameron Apologises for 'Double Injustice'," *Guardian*, September 12, 2012, <http://www.theguardian.com/football/2012/sep/12/hillsborough-disaster-david-cameron-apologises>.

Jeremy Waldron uses the language of “supersession” when he talks about how the passage of time can change an unjust situation into a just situation.⁷⁴ Though I agree with the spirit of Waldron’s claim when it comes to individuated harms, it does not seem particularly meaningful to talk about whether the later set of circumstances is “just.” An injustice may have happened in the past, and be part of one’s family or community lore, while not harming any living person in a way that is morally worrying.

There are a number cases of state-sponsored injustice that result in individuated harms: for example, the practice of eugenical sterilization, some human radiation experiments that targeted individuals at random, and the 1970 Kent State shootings. Even though reparations claims against the state based on these injustices hit up against the same obstacles as other reparations claims, in these cases, there tends to be a strong moral intuition that reparations are owed. Harm is felt by persons who experience first-order injustice, and (to my knowledge) individuals do not claim reparations for individuated harms that their grandparents or great-grandparents experienced. Skepticism towards reparative justice tends to emerge when individuals claim reparations as members of groups.

5.3.3 *Symptomatic Harms: The Tuskegee Syphilis Study*

Like individuated harms, *symptomatic harms* affect particular people in a particular way. However, individuals also have a group affiliation without which they never would have been targeted. Their experience of state-sponsored injustice is part of a broader pattern of societal prejudice and societally-based injustice. Their group may also be prone to the experience of other

⁷⁴ Jeremy Waldron, “Superseding Historic Injustice,” *Ethics* 103 (1992): 4-28, 24.

injustices at the hand of the state. The harms to members of certain groups are experienced as symptomatic of the group's negative treatment.

What is a group? What makes a group likely to be singled out for ill-treatment? Liverpool fans are a group. So is the Liverpool team. So are political parties, businesses, civic associations, country clubs, alumni organizations, runner's clubs, and orchestras. But the members of these groups are not likely to be subject to injustice because of their group membership. Melissa Williams uses the following four criteria to distinguish "marginalized ascriptive groups" from other groups: (1) patterns of social and political disadvantage, (2) group membership is not experienced as voluntary, (3) group membership is not experienced as mutable, and (4) "negative meanings" are associated with the group based on broader societal perceptions.⁷⁵ There is inescapable circularity in defining marginalized ascriptive groups in this way, since (1) and (4) are equally effects and causes—this possibly goes for (2) and (3) as well. Nevertheless, it is a perfectly suitable definition for differentiating between ascriptive groups and non-ascriptive groups. When these traits are present, members of the group may be the targets of state-sponsored injustice solely on the basis of their group membership, and thus experience a

⁷⁵ Melissa Williams, *Voice, Trust, and Memory: Marginalized Groups and the Failings of Liberal Representation* (Princeton: Princeton University Press, 1998), 15-16. Note that the "involuntariness" criteria is somewhat controversial. Given the historical abuses of the "one drop black" rule, it is safe to say that racial identity should not be forced onto a person against his will. On Tommie Shelby's theory, group identification is voluntary, though perhaps not always conscious; group members "identify, both subjectively and publicly with each other or with the group as a whole." Shelby, *We Who Are Dark: The Philosophical Foundations of Black Solidarity* (Cambridge, MA: Harvard University Press, 2005), 68. Upon individuals' voluntarily identifying or not identifying with a group, however, it may be reasonable for groups to reject individuals' voluntary adoption of the group identity. As vividly described in Vine Deloria's *Custer Died For Your Sins: An Indian Manifesto* (Norman, OK: University of Oklahoma Press, 1988), Ch. 1, there is a long history of white Americans discovering an Indian great-great-grandmother in their family tree, and making opportunistic use of this discovery. Groups should thus be able to establish their own membership criteria. But this does not mean that outsiders should not be able to form judgments about the criteria that are used or analyze them from a philosophical perspective. As Sarah Song argues in "Majority Norms, Multiculturalism, and Gender Equality," *American Political Science Review* 99 (2005): 473-489, minority and majority norms overlap in important ways, providing an entry point for external evaluation.

symptomatic harm.⁷⁶ At the same time, members of the group who did not experience a firsthand harm may identify with those who did, and with the harm as well, because of their sense of “linked fate” with all members of the group.⁷⁷

The Tuskegee syphilis study is a paradigmatic case of a symptomatic harm.⁷⁸ Had the men who took part in the study been white, the syphilis experiments would not have been conducted on them; the participants were only targeted because of their race. Though the study clearly affects a very particular group of individuals and their families, there is nevertheless justification for the personal outrage felt by the African American community when the Tuskegee experiments were brought to light. As Jeff Spinner-Halev writes, “When Blacks see that it is only members of their group who are wrongly used for a medical experiment... they understandably do not trust the government to act in their best interests.”⁷⁹ A black man living in California between 1932 and 1972 may not have been a candidate for the study, but upon learning about what happened in Tuskegee, he may have felt validated in a belief that America is a dangerous place for those who look like him to live. Contrast this to the experience of the Liverpool fan who stayed home. Though there had been great negligence, nothing here suggests conduct that is symptomatic of the government’s treatment of soccer fans more generally; there is no sense in which the Liverpool fan ought to walk the street with added vigilance.⁸⁰ He may experience

⁷⁶ Women fit Williams’ criteria. On my account, the rape kit backlog is a symptomatic harm against particular women.

⁷⁷ For an overview on linked fate in political science, see Paula D. McClain, Jessica D. Johnson Carew, Eugene Walton, Jr., and Candis S. Watts, “Group Membership, Group Identity, and Group Consciousness: Measures of Racial Identity in American Politics?” *Annual Review of Political Science* 12 (2009): 471-485.

⁷⁸ James H. Jones, *Bad Blood: The Tuskegee Syphilis Experiment* (New York: The Free Press, 1993).

⁷⁹ Jeff Spinner-Halev, *Enduring Injustice* (Cambridge: Cambridge University Press, 2012), 76.

⁸⁰ See Thomas, “Moral Deference,” 369.

moral outrage and even resentment, and be more interested in the episode than he would be otherwise due to his being a Liverpool fan, but these are natural reactions to injustice in general. For the black Californian, however, because the treatment of the syphilis experimentees is symptomatic of larger patterns of discrimination and injustice against members of his race, he may be reasonable to feel that the Tuskegee syphilis study is an injustice against African Americans, and have this be the basis of his resentment. Should, then, an African American man living in California receive an apology and reparations? The answer is surely no. It would be misunderstanding of the particularized losses suffered by the study participants and their families to claim a moral parity with them when it comes to redressing symptomatic harms.⁸¹

5.3.4 (Simple) Group Harms: Boarding Schools, Native Cultural Objects and Human Remains

It is possible for *group harms* to accompany symptomatic harms, affecting some or all members of a particular group, including those who did not experience the injustice in a first-order sense. This is because there is an injustice against the group as a whole, channeled through individuals, that results in harm to the group. There can also be group harms *simpliciter*, unaccompanied by harm to particular individuals in their individual capacity. Group harms, unlike individuated harms, are in a certain sense inheritable.

First, consider the case of the Indian boarding school system from the previous chapter. Only particular individuals were made to attend boarding schools, and suffered a variety of abuses. Even those who were not physically or sexually abused experienced the harm of spending their childhood years apart from their families and undergoing an assimilationist

⁸¹ And indeed, reparations for the Tuskegee study went to the survivors and to the families of the deceased, taking the form of monetary payments and health benefits. See Carol Kaesuk Yoon, "Families Emerge as Silent Victims Of Tuskegee Syphilis Experiment," *New York Times*, May 12, 1997, <http://www.nytimes.com/1997/05/12/us/families-emerge-as-silent-victims-of-tuskegee-syphilis-experiment.html>.

education (e.g., the boarding school experience left some students incapable of communicating with their families, since they lost their ability to speak their parents' tongue). The goal of an assimilationist education was to remove the need for Native people to have distinct social and political units, and as a result of multiple generations of children's attending boarding schools, many Native groups lost their languages and valued cultural traditions. These harms are not comprehensible in the context of the isolated individual; they are harms to the group. As such, it makes sense that the Canadian government's reparations program contained not only monetary payments to individuals, but also, distinct redress measures for the group harm that resulted from the schools' assimilationist philosophy: healing programs, including a Truth and Reconciliation Commission, funds for historical research, and funds for commemoration projects.⁸² Suppose, however, that in the United States, the reparations claim for assimilationist boarding schools is not successful for another fifty years, and no former boarding school student is alive. Individual monetary payments are not appropriate redress measures for a group harm if no living persons experienced the first-order injustice.⁸³ The best way for the state to be meaningfully accountable to the claimants would be monetary reparations to the group as a whole, or specifically tailored reparative justice measures that address the nature of the mark that state-sponsored injustice has left on the group. Moreover, in the particular case of the boarding school system, though it may be one item on a longer list of injustices to which a particular tribe has been subject, it is enough of a distinct injustice to address it on its own, and it makes sense to treat all First Nations peoples/American Indians as a group for this purpose.

⁸² "Summary Notice," *Indian Residential Schools Settlement Agreement*, May 8, 2006, http://www.residentialschoolsettlement.ca/summary_notice.pdf.

⁸³ The argument that allows me to make this point appears in Chapter 2.

Second, there are group harms that are felt by groups, and only by groups. In the Native objects case, the items kept by museums and federal agencies do not belong to individuals any more than the Liberty Bell or Plymouth Rock belong to individuals. They are the material representations of a cultural heritage.⁸⁴ Items for religious practice are also the group's.⁸⁵ The argument might be made that the descendants of the deceased should determine what is to be done with disinterred human remains, but often this is difficult to ascertain, and for some Native groups, a culturally inappropriate understanding of the meaning of ancestors. Here again, the harm is felt by the group. Cases concerning Native human remains and sacred objects are moreover precisely situations where monetary reparations are insufficient, given the nature of the harm, since what is properly the tribe's can actually be given to it. In fact, the United States has undertaken an ambitious reparative justice program under the 1990 Native American Graves Protection and Repatriation Act (NAGPRA), which requires federal agencies and museums to inventory their collections, try to determine the cultural patrimony of each holding, notify tribes, and "expeditiously return" cultural objects and human remains if this is desired.⁸⁶ NAGPRA also awards money to tribes to assist with the costs of repatriation.

In each case, a distinct political policy or practice gives rise to a distinct group harm (an assimilationist boarding school system → the loss of language and culture; collecting Native

⁸⁴ Fine-Dare, *Grave Injustice*, 136, points out that in at least two identifiable cases, American Indians have been complicit in the trafficking of cultural objects, something that fits in well with Jon Elster's discussion of victim-perpetrators in *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge: Cambridge University Press, 2004), 100-114.

⁸⁵ Given the religious dimension, religious leaders or societies may be the appropriate representatives of a tribal group rather than the tribe's political leaders in the NAGPRA context. Fine-Dare, *Grave Injustice*, 130.

⁸⁶ 25 U.S.C. § 3001-3013. A rare case of a progressive legal transition and reparations in one legislative package, NAGPRA also criminalizes the sale of illegally acquired Native cultural objects and human remains. For more on NAGPRA, see Fine-Dare, *Grave Injustice*, 117-171.

objects and human remains without tribal consent → not possessing sacred objects and human remains). The same harm may affect multiple generations. Perverse though it may seem to suggest, in the boarding school case, if the government had been successful in completely assimilating all Native peoples, the harm would not last very long, since there would be no group whose members feel the harm of a lost culture. However, because the assimilationist mission was resisted and Native identities were retained, a later group may legitimately claim to have been harmed by the historical existence of the assimilationist schools. It is most meaningful to be accountable to group members who were the first-order targets of injustice, thus earlier redress is better than later redress. But if an original reparations claim is not successful, present-day persons belonging to a group that experiences the harm of historical state-sponsored injustice may still legitimately call state power to account.

However, what about cases in which there clearly seems to be a group harm, but where the link between harm and injustice is more complicated? What about when there are multiple state-sponsored injustices that we can identify, along with a host of harms? Let us turn to a final argument.

5.4 In Praise of Blaming the Government: On Complex Group Harms

In his book, *In Praise of Blame*, George Sher lays out a defense of blame which largely rests on a set of arguments that are similar to Bishop Butler's. Resentment is directed at a particular agent, that particular agent is being blamed for his moral violation, and the "urge to blame is bound up in a commitment to morality itself."⁸⁷ Further, Sher argues that a "future-oriented commitment to morality" does not make sense in the absence of blame: "an indifference

⁸⁷ George Sher, *In Praise of Blame* (Oxford: Oxford University Press, 2006), 122.

to past transgressions would have a perpetually unstable set of desires. If someone wanted people to do the right thing from now on but did not care whether they had done the right thing in the past, then what he cared about would be constantly changing.”⁸⁸

Shklar is interested in blame as well, and in particular the “impulse to blame the government.” In spite of Shklar’s recounting the story of Coconut Grove, in which blaming the government was disproportionate and wrong since the fire was accidental, she ultimately defends the idea of deeming state officials responsible for their unjust indifference to suffering, and for active injustice as well:

All public agents are alike in one respect: all have a wealth of excuses for the resentments they create. These are too familiar to be listed, but they are usually invocations of circumstances, unavoidable error, or just a shifting of blame. Necessity seems to fence them in on all sides when they are asked to face the injustices for which they are directly or passively responsible.⁸⁹

Shklar’s view of government officials strikes one as closely related to Camilla Stivers’s discussion of racially-tinged “bureaupathology” in the Hurricane Katrina rescue effort. She is interested in understanding why individuals who have the power and resources to alleviate suffering do not do so. For her and for Stivers, to blame the government is to blame particular people. Sher, too, is interested in understanding the interpersonal dimensions of harm and blame.

By contrast, my analysis in many important respects depersonalizes the actions of officials who act wrongly.⁹⁰ I am interested in understanding state-sponsored injustice as first and foremost a product of political systems, and in placing blame on the political machinery that allows unjust laws to remain on the books, or a culture of official wrongdoing to exist with

⁸⁸ Ibid., 135-136.

⁸⁹ Shklar, *Faces of Injustice*, 126.

⁹⁰ The exception, of course, is when state officials act as corrupt individuals, like the case of the white Florida police sergeant who made Trayvon Martin shooting targets, as discussed in Chapter 2.

impunity. In cases in which there is a *complex group harm*, though other parties are complicit—usually, many or all members of the dominant group at any given point in time—the government is the moral *respondeat superior*, as its role was necessary in the injustice’s having the impact that it did. My argument is twofold: first, there is factual accuracy in holding the government responsible for group harms that are more complex than a tribe’s sacred cultural object being kept in a government collection without the tribe’s consent, and second, that there is democratic value in blaming the government for injustice. To illustrate these ideas, let us look at black disadvantage in the United States. My claim is that the hardships experienced by African Americans who live in segregated, high poverty neighborhoods are deeply political.

The inequalities between blacks and whites are well-known, and well-documented by social scientists. They consist of wage,⁹¹ wealth,⁹² and mobility gaps.⁹³ There is unequal political representation,⁹⁴ and low levels of political trust among blacks.⁹⁵ There are physical and mental

⁹¹ Eric Grodsky and Devah Pager, “The Structure of Disadvantage: Individual and Occupational Determinants of the Black-White Wage Gap,” *American Sociological Review* 66 (2001): 542-567.

⁹² Melvin Oliver and Thomas M. Shapiro, *Black Wealth/White Wealth: A New Perspective on Racial Inequality* (New York: Routledge, 2006); Dalton Conley, *Being Black, Living in the Red: Race, Wealth, and Social Policy in America* (Berkeley: University of California Press, 1999).

⁹³ Tom Hertz, “Rags, Riches, and Race: Intergenerational Economic Mobility of Black and White Families in the United States,” in *Unequal Chances: Family Background and Economic Success*, ed. Samuel Bowles, Herbert Gintis, and Melissa Osborne Groves (Princeton: Princeton University Press, 2005), 165-191.

⁹⁴ Eric Ostermeier, “African-American US Representatives by the Numbers,” *Smart Politics* (blog), Humphrey School of Public Affairs, University of Minnesota, August 28, 2013, http://blog.lib.umn.edu/cspg/smartpolitics/2013/08/african-american_us_representa.php.

⁹⁵ Wendy M. Rahn and Thomas J. Rudolph, “A Tale of Political Trust in American Cities,” *Public Opinion Quarterly* 69 (2005): 530-560.

health inequalities,⁹⁶ and inequalities in mortality rates.⁹⁷ There are inequalities in high school graduation rates,⁹⁸ college matriculation and graduation rates,⁹⁹ and incarceration rates.¹⁰⁰

Though middle- and upper-class blacks are not doubt affected by these kinds of inequalities, their burden is carried by the poor, those whom William Julius Wilson calls “the truly disadvantaged.” As Glenn Loury writes, “One need only visit a courthouse, public hospital emergency room, or welfare office in any large American city to find compelling evidence that now, some seven score after the end of slavery, American society is still marred by the social disadvantage of African Americans.”¹⁰¹

Things have not gotten better for disadvantaged African Americans in recent decades, and black poverty’s segregated nature means that it is likely to continue on forever into the future. As Douglas Massey and Nancy Denton argue, the situation faced by inner city blacks is “unprecedented and entirely unique” as compared to other groups.¹⁰² Sociologists have long observed how immigrant groups have become upwardly mobile in America by “becoming white,” and how their patterns of residential segregation are voluntary and temporary. Urban

⁹⁶ Robert A. Hummer, “Black-White Differences in Health and Mortality: A Review and Conceptual Model,” *Sociological Quarterly* 37 (1996): 105-125; Lonnie R. Snowden, “Barriers to Effective Mental Health Services for African Americans,” *Mental Health Services Research* 3 (2001): 181-187.

⁹⁷ Hummer, “Black-White Differences in Health and Mortality.”

⁹⁸ James J. Heckman and Paul A. LaFontaine, “The American High School Graduation Rate: Trends and Levels,” *Review of Economics and Statistics* 92 (2010): 244–262.

⁹⁹ Douglas Massey, Camille Charles, Garvey Lundy, and Mary Fischer, *The Source of the River: The Social Origins of Freshmen at America’s Selective Colleges and Universities* (Princeton: Princeton University Press, 2003).

¹⁰⁰ Becky Pettit and Bruce Western, “Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration,” *American Sociological Review* 69 (2004): 151-169; Michelle Alexander, *The New Jim Crow: Mass Incarceration In The Age Of Colorblindness* (New York: The New Press, 2012).

¹⁰¹ Glenn C. Loury, *Anatomy of Racial Inequality* (Cambridge, MA: Harvard University Press, 2009), 10.

¹⁰² Douglas Massey and Nancy Denton, *American Apartheid: Segregation and the Making of the Underclass* (Cambridge, MA: Harvard University Press, 1998), 2.

Italian, Polish, and Irish ethnic enclaves were created by new Americans seeking out living quarters near those with whom they shared a language and culture.¹⁰³ These neighborhoods, though poor, “served as launching pads for later economic and residential assimilation,” as Paul Jargowsky puts it. “In contrast, black ghettos emerged as an enduring feature of the metropolitan landscape.”¹⁰⁴ Blacks are over twice as likely to be poor as whites, and the only group with higher poverty statistics is that of American Indians and Alaskan Natives.¹⁰⁵ It would seem that there is an explanation as to why these two (albeit dissimilar) groups experience disproportionate rates of disadvantage—namely, America’s past.

Of course, each wave of immigrants to the United States has faced xenophobia and significant discrimination. In a lengthy study dedicated to understanding why European immigrants have fared much better in America than blacks, Stanley Lieberon cites slum housing, sporadic employment, language barriers, and political exploitation as among the challenges that these immigrants historically faced.¹⁰⁶ However, they could readily intermarry

¹⁰³ Paul A. Jargowsky, *Poverty and Place: Ghettos, Barrios, and the American City* (New York: Russell Sage Foundation, 1997), 12-14: Very few neighborhoods are universally poor, i.e. have 90% of all residents living below the federal poverty line. Jargowsky argues that a 40% poverty rate is a good marker for a “high poverty neighborhood.”

¹⁰⁴ *Ibid.*, 13. See also Patrick Sharkey, *Stuck in Place: Urban Neighborhoods and the End of Progress towards Racial Equality* (Chicago: University of Chicago Press, 2013), 40-41.

¹⁰⁵ Suzanne Macartney, Alemayehu Bishaw, and Kayla Fontenot, *Poverty Rates for Selected Detailed Race and Hispanic Groups by State and Place: 2007–2011*, U.S. Census Publication ACSBR/11-17, February 2013, <http://www.census.gov/prod/2013pubs/acsbr11-17.pdf>. According to this data, the poverty rate for blacks is 25.8 percent, for American Indians and Alaskan Natives, 27 percent, and for whites, 11.6 percent. The rate across all groups is 14.3 percent.

¹⁰⁶ Stanley Lieberon, *A Piece of the Pie: Blacks and White Immigrants Since 1880* (Berkeley: University of California Press, 1980), 19. In addition to Lieberon’s book, the literature on black versus immigrant assimilation includes Theodore Hershberg et al., “A Tale of Three Cities: Blacks and Immigrants in Philadelphia: 1850-1880, 1930 and 1970,” *Annals of the American Academy of Political and Social Science* 441 (1979): 55-81; Noel Ignatiev, *How the Irish Became White* New York: Routledge, 1995); David O. Sears and Victoria Savalei, “The Political Color Line in America: Many ‘Peoples of Color’ or Black Exceptionalism?” *Political Psychology* 27 (2006): 895-924; Jennifer Lee and Frank D. Bean, *The Diversity Paradox: Immigration and the Color Line in Twenty-First Century America* (New York: Russell Sage Foundation, 2010).

with other European groups, and drop a surname that was ethnically stigmatizing. As compared to African Americans, there were fewer barriers to exiting inner city ethnic enclaves. Most crucially, argues Lieberman, European groups were historically “subject to the same laws as other whites; whereas for blacks their first obstacle was that the laws distinguished them from other segments of the American population.”¹⁰⁷ Anti-miscegenation laws, laws restricting movement, and legal devices that segregated neighborhoods and schools were not hurdles that European immigrants had to overcome.¹⁰⁸ It is true that Asian immigrants, particularly those of Chinese origin, faced significant state-sponsored, and not just societal discrimination, in the late 1800s and beyond. Both the House and Senate have passed legislation acknowledging and expressing regret for the Chinese Exclusion Act.¹⁰⁹ Mexican Americans, many of them citizens and legal residents, were “repatriated” to Mexico on an executive order during the Depression era to free up jobs for whites.¹¹⁰ But as Jennifer Lee and Frank Bean have argued, the trajectory of the 60 million first and second generation Asian and Latino immigrants who do currently reside in the United States is similar to that characterizing the European immigrant experience.¹¹¹

Middle class and well-off African Americans who support the idea of black reparations usually do so because of the injustice of the situation of the truly disadvantaged.¹¹² Reparations are not for them, but for the individuals who have not experienced mobility and are not likely to

¹⁰⁷ Ibid., 102.

¹⁰⁸ Ibid.

¹⁰⁹ S. Res. 201, 112th Cong. (2011-2012); H. Res. 683, 113th Cong. (2013-2014).

¹¹⁰ Eric L. Ray, “Mexican Repatriation and the Possibility for a Federal Cause of Action: A Comparative Analysis on Reparations,” *University of Miami Inter-American Law Review* 37 (2005): 171-196.

¹¹¹ Lee and Bean, *Diversity Paradox*. See also Sears and Savalei, “Political Color Line.”

¹¹² See Robert Westley, “Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?” *Boston College Third World Law Journal* 40 (1998-1999): 429-476.

in their lifetimes. As Patrick Sharkey writes, in spite of “the optimism of the period, the generation of African American children raised during the civil rights era has made virtually no advancement out the nation’s poorest neighborhoods.”¹¹³ As such, these individuals are “stuck in place.” There are good reasons to see the causal forces behind inner city black poverty as political.¹¹⁴ After slavery, instead of forty acres and a mule, freedom was accompanied by Black Codes.¹¹⁵ A Congress that was willing to “legislate racism,” and a Supreme Court that deferred to states instead of striking down laws that were greatly at odds with the spirit of the Constitution, protected discriminatory laws at local and state levels, and most former slaves became serfs who were free in name only.¹¹⁶ Segregation was not limited to the South. Northern states and cities had their own ways of replicating the Jim Crow social order, which were refined during the Great Migration, when black Southerners went North in mass numbers seeking better

¹¹³ Sharkey, *Stuck in Place*, 166.

¹¹⁴ Here I disagree with Wilson, *Truly Disadvantaged*, whose story of inner city poverty in the post-Civil Rights era emphasizes broader economic patterns feeding the intergenerational transmission of inequality. Though Wilson also mentions “historic discrimination” multiple times throughout the work, he does not seem to think there is anything “political” about historical discrimination. But I am in good company in emphasizing the political nature of black disadvantage; many social scientists and historians have responded to the apoliticism of Wilson’s account and highlighting the political dimensions of the racial histories of pre- and post-Civil Rights era America. See Massey and Denton, *American Apartheid*; Arnold Hirsch, *Making the Second Ghetto: Race and Housing in Chicago, 1940-1960* (Chicago: University of Chicago Press, 1998); and Ira Katznelson, *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America* (New York: W. & W. Norton and Company, 2005). See also Lieberman, *Piece of the Pie*; Sharkey, *Stuck in Place*, 58-62.

¹¹⁵ C. Vann Woodward, *The Strange Career of Jim Crow* (Oxford: Oxford University Press, [1955] 2002), 65, emphasizes that this did not take place immediately after Emancipation across all states, making the point that Jim Crow was not an inevitability, but rather, the product of deliberate choices: “[W]hen slavery was a live memory in the minds of both races, and when the memory of the hardships and bitterness of Reconstruction was still fresh, the race policies accepted and pursued in the South were sometimes milder than they became later... The effort to justify them as a consequence of Reconstruction and a necessity of the times is embarrassed by the fact that they did not originate in those times. And the belief that they are immutable and unchangeable is not supported by history.”

¹¹⁶ Thomas Adams Upchurch, *Legislating Racism: The Billion Dollar Congress and the Birth of Jim Crow* (Lexington, KY: University of Kentucky Press, 2004); Leon F. Litwack, *Been in the Storm So Long: The Aftermath of Slavery* (New York: Knopf, 1980), 337 *et passim*.

work and better lives.¹¹⁷ *Brown v. Board*, the Civil Rights Act, and affirmative action were all impactful in forming a new black middle class, but as these gains were taking place, new political devices were used to maintain inner city residential segregation and close off the suburbs to poor blacks who wanted to move there.¹¹⁸ For the most part, the truly disadvantaged stayed in central cities, which is where they remain today. On this account, there have been many state-sponsored injustices, and these injustices have built upon each other cumulatively over time.¹¹⁹ However, crucially, even if there had been no political injustice at all in the post-Civil Rights era, slavery and eighty years of segregation would still have had the ability to create a set of harms outlasting the formal duration of separate and unequal.¹²⁰ This is due to what empirical social scientists call the “intergenerational transmission” of inequality and disadvantage.¹²¹ If there are disadvantages that have resulted from the original injustice, they will be replicated over and over again due to the fact that parents raise their children, and often remain in the neighborhood or community where they themselves originate from, living in concentrated

¹¹⁷ See, e.g., Hirsch, *Making the Second Ghetto*; Davison M. Douglas, *Jim Crow Moves North: The Battle over Northern School Desegregation, 1865-1954* (New York: Cambridge University Press, 2005); Louis Lee Woods, II, “The Federal Home Loan Bank Board, Redlining, and the National Proliferation of Racial Lending Discrimination, 1921-1950,” *Journal of Urban History* 38 (2012): 1036-1059.

¹¹⁸ Massey and Denton, *American Apartheid*, 55-58, 186-189, emphasize highway programs and urban renewal.

¹¹⁹ A position like this is argued for in Heirstein, “Historic Injustice,” 515-517, though not in the context of any particular group.

¹²⁰ I follow Woodward, *Strange Career*, 71, in dating the beginning of segregation with the 1873 *Slaughter-House Cases*.

¹²¹ An entire field that spans economics and sociology has been devoted to analyzing why the intergenerational transmission of inequality takes place. For a good overview of the early scholarship, see M. Corcoran, “Rags to Rags: Poverty and Mobility in the United States,” *Annual Review of Sociology* 21 (1995): 237-267. For more recent work in this area, see the essays collected in *Unequal Chances: Family Background and Economic Success* and Sharkey’s 2013 book, *Stuck in Place*.

poverty with other members of the group subject to state-sponsored injustice.¹²² Factors like parental income and wealth, parental education level, the quality of available schools, and having had access to decent healthcare during one's childhood years all play a huge role in adult mobility in general, thus the children of those who are born and raised into concentrated poverty are likely to remain trapped in the same circumstances as their parents. This means, as Sharkey argues, that the families who occupied poor inner city neighborhoods as the Civil Rights era was coming an end are literally the *same families* who live there today.¹²³ And so, even in the absence of further political injustices in the second half of the twentieth century, circumstances prior to the Civil Rights era would still be the root cause of the situation of the truly disadvantaged, and the government would be responsible for the role that unequal laws have played.¹²⁴

The framework of state-sponsored injustice in Chapter 3 consisted of six categories: authorization, protection, systemization, execution, enablement, and norm- and belief-formation. The causal story (the first version, at least) is largely explained by the concept of "enablement": one set of state-sponsored injustices normalizes unjust beliefs and moral concepts such that a related set of state-sponsored injustices can readily replace the original set later on. However, there is another way to conceptualize the government's responsibility for the present-day harm to African Americans that can be pulled apart from the idea of a "chain of injustice."¹²⁵ Call this the normative explanation of the government's responsibility for black disadvantage, as it

¹²² And so, when members of an ascriptive group are *not* geographically segregated, the historically-transmitted effects of unjust state policies and practices are less harsh (e.g., women or LGBTQ individuals).

¹²³ Sharkey, *Stuck in Place*.

¹²⁴ Sher's theory in his book, *Who Knew?*, is that a person is responsible for outcomes that they did not know would take place if it is reasonable to consider them responsible for their ignorance. It does not seem problematic to translate this framework from the interpersonal context to the corporate agent context.

¹²⁵ Heirstein, "Historic Injustice."

emphasizes the concept of norm- and belief-formation. Race itself, and the idea of superior and inferior races, are political and legal constructs: a legal system “does more than just reflect social or scientific ideas about race; it also produces and reproduces them”; legal rules have “shaped physical appearances,” “created racial meanings that attach to physical features,” “established the material conditions which often code for race,” and “separated people according to race... fixing mutable racial lines in terms of relatively immutable geographic boundaries.”¹²⁶ Though the driver of the political formation of race was a desire to establish a racial hierarchy and consolidate white control, this had power well beyond the letter of race laws, exercising influence over those who never knowingly willed these ends.¹²⁷ Laws are unparalleled in their normative force, not just because individuals take their moral cues from the law, but because laws shape the social reality that we live in, the experiential baseline according to which people learn what is and is not normal in their own time and place.¹²⁸ If there are laws that discriminate against blacks in education and housing, forbid blacks and whites from marrying, and restrict or deny the black vote, then what results is not only the legal blueprint for separate societies based

¹²⁶ The first quote is from Peggy Pascoe, “Miscegenation Law, Court Cases, and Ideologies of ‘Race’ in Twentieth-Century America,” *Journal of American History* 83 (1996): 44-69, 47. The rest is from Ian Haney López, *White by Law: The Legal Construction of Race* (New York: New York University Press, 2006), 82-84. For more on these themes, see López, *White by Law*, esp. 78-108; A. Leon Higginbotham, *Shades of Freedom: Racial Politics and Presumptions of the American Legal Process* (Oxford: Oxford University Press, 1996); and Robert C. Lieberman, “Legacies of Slavery? Race and Historical Causation in American Political Development,” in *Race and American Political Development*, ed. Joseph Lowndes, Julie Novkov, and Dorian T. Warren (New York: Routledge, 2008), 206-233.

¹²⁷ This and other ideas about norms that appear here are standard in the law and norms literature, which I discuss in the notes of Chapter 3. For more on race and norms specifically, see Charles W. Mills, *The Racial Contract* (Ithaca: Cornell University Press, 1997); Lieberman, “Legacies of Slavery?”; and López, *White by Law*.

¹²⁸ Woodward, *Strange Career*, 102-106 makes this point: Woodward discusses William Graham Sumner’s idea that “legislation cannot make mores” but points out that blacks and whites rode in railway cars without separation or partition before Jim Crow cars became universal. “And the new seating arrangement came to seem as normal, unchangeable, and inevitable as the old ways. And so it was with the soda fountains, bars, waiting rooms, street cars, and circuses.” The power of law to form norms allowed for a situation where “the practices often anticipated and exceeded the laws.”

on race, but also, a set of conditions capable of producing an internalized sense among whites that their biases are legitimate and reasonable. Individuals born and socialized into a racially unequal world are led to believe, whether consciously or not, that there exists some sort of rationale for this: they may conclude that whites are biologically, culturally, or morally superior.

The normative force of law is so powerful that African Americans can even fall prey to it. The vacuity of “separate by equal” was demonstrated to the *Brown v. Board* Supreme Court Justices in part by Kenneth Clark’s doll experiments, in which it was shown that young black children preferred white dolls to black dolls, identical other than their skin color, and were quick to say that a black doll was “bad.”¹²⁹ Lest it be thought that this is only a product of *de jure* segregation, or that it only affects children, computerized implicit association tests have demonstrated the exact same finding in recent years. Black as well as white adults are likely to instinctually associate a picture of an African American person with the word “bad” and a white person with the word “good.”¹³⁰ On top of the causal story, then, we might understand the present-day harm to blacks as resulting from the enduring normative force of unjust race laws which, though no longer formally on the books, still exercise an influence over our beliefs and behavior to this day.¹³¹ Moreover, much of the burden of this normative dimension of state-sponsored injustice is carried by the black poor. Recent empirical studies show that for low-wage jobs, employers often “downwardly channel” African American male job applicants, offering a

¹²⁹ See the discussion in Charles J. Ogletree Jr., *All Deliberate Speed: Reflections on the First Half Century of Brown v. Board of Education* (New York: W. W. Norton & Company, 2004), 4-6. The study is Kenneth B. Clark and Mamie P. Clark, “Emotional Factors in Racial Identification and Preference in Negro Children,” *Journal of Negro Education* 19 (1950): 341-350.

¹³⁰ Leslie Ashburn-Nardo, Megan L. Knowles, and Margo J. Monteith, “Black Americans’ Implicit Racial Associations and their Implications for Intergroup Judgment,” *Social Cognition* 21 (2003): 61-87.

¹³¹ For a deeper philosophical look at these themes than what I provide here, see Elizabeth Anderson, *The Imperative of Integration* (Princeton: Princeton University Press, 2010), 44-66.

position as a busboy or a stocker even though the applicant responded to a posting for a restaurant server or a retail sales job.¹³² Individuals in a simulated juror situation are more likely to interpret ambiguous evidence as pointing towards a guilty verdict if shown a photo of a masked man with black skin robbing a convenience store than if the man has white skin.¹³³ In a computer simulation, both ordinary testers and trained police officers are quicker to shoot gun-bearing “criminals” who are black, and take longer to decide to not to shoot black “civilians” holding cell phones.¹³⁴ However, lest we make too much of the distinction between the causal and norm-based story, it is important to emphasize that the normative force that produces these sorts of biases largely works through the conditions whose existence was described by the causal story, and that the former and the latter are mutually reinforcing. It is not that people today have necessarily inherited unjust racial beliefs from earlier eras in a strict sense, but that they have formed their own racial ideas in observing the “order of things.”¹³⁵ Though we no longer have legal blueprints for separate societies based on race, that America is still marked by high levels of residential segregation, highly segregated schools, and disproportionate levels of

¹³² Devah Pager, Bruce Western, and Bart Bonikowski, “Discrimination in a Low-Wage Labor Market: A Field Experiment,” *American Sociological Review* 74 (2009): 777-799.

¹³³ Justin D. Levinson and Danielle Young, “Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence,” *West Virginia Law Review* 112 (2009-2010): 309-350.

¹³⁴ Joshua Correll et al., “Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot,” *Journal of Personality and Social Psychology* 92 (2007): 1006-1023.

¹³⁵ See Loury, *Anatomy of Racial Inequality*, 41. Loury himself points out the potential pitfalls of reparations, and yet when he writes about “what reparations for the crimes of slavery and Jim Crow should be all about,” he raises the kinds of issues that he discusses in *Anatomy of Racial Inequality*, and which I partially draw on in this section. It seems that Loury’s objection may be to the label “reparations”; he moreover worries that black reparations politics alienate non-white immigrant groups with whom African Americans should be forming a coalition. Glen C. Loury, “Transgenerational Justice—Compensatory Versus Interpretive Approaches,” in *Reparations: Interdisciplinary Inquiries*, ed. Jon Miller and Rahul Kumar (Oxford: Oxford University Press, 2007), 114-129, 106.

socioeconomic disadvantage among blacks provides observational data from which hasty conclusions are drawn about the way things are.¹³⁶

A complex group harm is created both by causal chains of unjust policies and political practices and the normative power that derives therefrom. Here, there are so many significant state-sponsored injustices that it does not make sense to try to isolate any one injustice and try to determine its effects on present-day individuals.¹³⁷ Take the toleration of lynching at the federal, state, and local levels.¹³⁸ Beyond the harms to individual victims and their families, the practice of lynching clearly harmed African Americans as a group. The omnipresent threat of the lynch mob allowed whites to exercise control over black movement, encouraged blacks to submit to unjust criminal verdicts and to stay away from the polls, and of course, served as a powerful warning to the African American male that he must not ever associate with white women. The toleration of lynching, however, was just one injustice of many woven into a fabric of political policies and practices that reified race and racism, and it is hard to distinguish its distinct role in the transmission of black disadvantage through the generations without the broader context of segregated schools, anti-miscegenation laws, and so on (though we still can and ought to try to understand different injustices in their own historical perspective). A complex group harm is thus produced by an entire political trajectory. Of course, speaking of a trajectory as a whole should not deny progress, and we should not fail to give credit to those historical moments when liberal

¹³⁶ Loury, *Anatomy of Racial Inequality*, 18-33, has a fascinating analysis of how cognitive biases create self-fulfilling social meanings. But note that among whites, there may nevertheless be some sense in which there is a “social reproduction” of unjust racial beliefs over the course of multiple generations. Joe Feagin, *Racist America: Roots, Current Realities, and Future Reparations* (New York: Routledge, 2001), 25-27, 131-132.

¹³⁷ The harm of boarding schools is one injustice that may contribute to any given tribe’s historical trajectory of political injustice, but unlike lynching, there is a direct, identifiable loss that is inheritable. Also, not all Indian tribes are disadvantaged; some may have a redress claim for boarding schools only.

¹³⁸ In Chapter 2, I provide an argument for understanding the toleration of lynching as a political injustice.

democratic principles triumphed.¹³⁹ It is only because of progress that today's whites have tamer racial beliefs than those of their predecessors, and are more readily able to recognize that the truly disadvantaged's situation is not of their own doing. Moreover, the idea that the state's unjust policies and practices are responsible for legitimizing the prejudices of whites and creating the situation of the truly disadvantaged does not change individual responsibility. People are responsible for their own actions and attitudes—whether this is the “endemic Negrophobia” of yesteryear's whites, or today's implicit biases masked by banal, politically correct speech.¹⁴⁰

The concept of a complex group harm is not specific to African Americans. The Native Hawaiian case is analogous to the African American case, for at stake is not just an original injustice or the failure to rectify an original injustice, but subsequent political acts and acts of omission that have compounded the original harm, and stigmatized Native Hawaiians, who fare poorly when it comes to wealth, health, employment, and education.¹⁴¹ Similarly, in the case of the Lakota, discussed in Chapter 2, the issue is not just the forced taking of the Black Hills, but a host of other abuses of political power, large and small; Lakota people moreover have the highest poverty rates of any group in the country.¹⁴² Interestingly, however, across all three cases, reparations seekers tend to focus on the Original Big Injustice that was never repaired—slavery, the overthrow of Queen Lili‘uokalani, and the illegal annexation of the Black Hills—rather than subsequent abuses of power. In the Native Hawaiian case, this can be explained by the fact that

¹³⁹ Here I am in complete agreement with Desmond S. King and Rogers M. Smith, “Racial Orders in American Political Development,” *American Political Science Review* 99 (2005): 75-92.

¹⁴⁰ Woodward, *Strange Career*, 90.

¹⁴¹ See Fernandez, *Drink the Bitter Waters*, esp. Chs. 3 and 4.

¹⁴² 2013 *American Indian Population and Labor Force Report*, U.S. Department of the Interior, January 16, 2014, <http://www.bia.gov/cs/groups/public/documents/text/idc1-024782.pdf>, 57.

the biggest issue that individuals see themselves as facing today is their lacking the right of self-determination and self-government, something that would better equip Native Hawaiian leaders to tackle the issues that their people face.¹⁴³ (Native Hawaiians are not recognized as a tribe and do not have sovereign status as Indian groups in the continental United States do.) There is thus a certain logic to the dual Native Hawaiian demand for sovereignty and reparations for the events of 1893.¹⁴⁴ Likewise, with the Lakota, the repatriation of the Black Hills is not just about the Lakota's having control over sacred land, but finding a long-term solution to the impoverished conditions of the Lakota people. As the former Oglala Lakota tribal president and South Dakota state senator Theresa Two Bulls put it, if the tribes would accept the U.S. government's payment for the Black Hills, "Our numbers are too big in terms of population, and the dollars would be expended in a hurry... in a week, two weeks' time, you're broke, and you don't have anything."¹⁴⁵ Tourism is South Dakota's second-largest industry, generating 20 percent of the state's tax revenue and supporting 28,000 jobs, and the Black Hills is the state's most visited destination.¹⁴⁶ Managing the Black Hills and providing employment for Lakota men and women would be a more lasting source of income for the Lakota than monetary redress: the land is

¹⁴³ For a good discussion, see Brian Duus, "Reconciliation between the United States and Native Hawaiians: The Duty of the United States to Recognize a Native Hawaiian Nation and Settle the Ceded Lands Dispute," *Asian-Pacific Law & Policy Journal* 4 (2003): 469-515, 470-481. Duus advocates the Akaka Bill, which lays out a detailed process by which Native Hawaiians would assume sovereign status and would designate a land base for Native Hawaiian use. 17 versions of the Akaka Bill were introduced in the 2000s. Also see 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," *University of Hawai'i Law Review* 17 (1995): 463-512.

¹⁴⁴ Duus, "Reconciliation," 514. Native Hawaiians have never been paid for annexed Hawaiian lands. Haunani-Kay Trask, *From a Native Daughter: Colonialism and Sovereignty in Hawaii* (Honolulu: University of Hawai'i Press, 1999), 27.

¹⁴⁵ Francine Uenuma and Mike Fritz, "Why the Sioux Are Refusing \$1.3 Billion," *PBS News Hour*, August 24, 2011, http://www.pbs.org/newshour/updates/north_america-july-dec11-blackhills_08-23.

¹⁴⁶ Website of the South Dakota Department of Tourism, last accessed March 5, 2015, <http://sdvisit.com/tools/facts/index.asp>

simultaneously a symbol of the chain of injustices that the Lakota have endured, and a means of alleviating its cumulative impact.¹⁴⁷ However, in the African American case, too much of an emphasis on slavery hurts the reparations cause. Those sympathetic to the African American quest for racial justice perceive that it is not merely slavery that has shaped present-day circumstances, and those who are less sympathetic are all too quick to point out that the harms and benefits of slavery are difficult to causally isolate. Moreover, there is the simple matter of demographics. There are approximately 250,000 Native Hawaiians living in Hawaii, and there are 170,110 Lakota: all American Indians and Alaskan Natives (a category that nevertheless does not include Native Hawaiians) compose less than one percent of the American population in total.¹⁴⁸ African Americans make up over 12 percent of the population.¹⁴⁹ It is thus natural for the black reparations claim to be more visible, and subject to greater scrutiny, than the reparations claims of Native Hawaiians and the Lakota. The most compelling version of the African American reparations claim refers to slavery, Jim Crow, and the vestiges thereof that “still linger to this day.”¹⁵⁰

¹⁴⁷ But note that a campaign to memorialize the site of the Wounded Knee Massacre has been pursued separately.

¹⁴⁸ 2010 Census data for Native Hawaiians combines the classification with that of Pacific Islanders, and allows multiple classifications. These numbers show 135,422 “Native Hawaiians or Pacific Islanders” living in Hawaii, and 355,816 “Native Hawaiians or Pacific Islanders alone or in combination” living in Hawaii. I use the statistic 250,000 since it is a number that I have seen mentioned multiple times in the source material; it also is a close median to the two census numbers. See “The Native Hawaiian and Other Pacific Islander Population: 2010,” *2010 Census Briefs*, May 2012, <http://www.census.gov/prod/cen2010/briefs/c2010br-12.pdf>. The Lakota statistic is taken from the 2010 Census, “The American Indian and Alaska Native Population: 2010,” *2010 Census Briefs*, January 2012, <http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf>.

¹⁴⁹ “The Black Population: 2010,” *2010 Census Briefs*, September 2011, <https://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf>.

¹⁵⁰ The House apology to African Americans is quoted; see H. Res. 194, 110th Cong. (2008). I am certainly not the first to suggest that a black reparations claim not focus on slavery: see Boris Bittker, *The Case for Black Reparations* (Boston: Beacon Press, 2003); David Lyons, “Corrective Justice, Equal Opportunity, and the Legacy of Slavery and Jim Crow,” *Boston University Law Review* 84 (2004): 1375-1404; Andrew Valls, “Reconsidering the Case for Black Reparations,” in *Reparations: Interdisciplinary Inquiries*, 114-129; Jonathan Kaplan and Andrew Valls, “Housing Discrimination as a Basis for Black Reparations,” *Public Affairs Quarterly* 2 (2007): 255-273; Randall Kennedy, *For Discrimination: Race, Affirmative Action, and the Law* (New York: Pantheon Books, 2013); and Ta-Nehisi

There is both instrumental and intrinsic value in blaming the government for a historical trajectory of political injustice, and for the myriad harms in the present day that are attributable to it. In the case of affirmative action, a history of political injustice resulting in present-day harm to blacks is an idea that theoretically everybody can get behind, whereas arguments for reparative measures that focus on individual whites' having unjustly benefited at the expense of blacks is always going to result in individual members of the politically dominant group feeling like they are being singled out. On a deeper level, however, it is a characteristic of political systems to both reflect the beliefs of the members of the dominant group and to further their perceived interests by means of law. The American eugenics movement began in society, but greatly expanded its reach through the legal-political order. So it is with racial beliefs, which had their roots in society, and found their legitimation and strength in race laws. A footnote on Northern black suffrage reveals that Tocqueville is thinking about race when he writes:

In my opinion the main evil of the present democratic institutions of the United States does not arise, as is often asserted in Europe, from their weakness, but from their overpowering strength; and I am not so much alarmed at the excessive liberty which reigns in that country as at the very inadequate securities which exist against tyranny. When an individual or a party is wronged in the United States, to whom can he apply for redress? If to public opinion, public opinion constitutes the majority; if to the legislature, it represents the majority, and implicitly obeys its injunctions; if to the executive power, it is appointed by the majority, and remains a passive tool in its hands; the public troops consist of the

Coates, "The Case for Reparations," *Atlantic*, June 2014, <http://www.theatlantic.com/features/archive/2014/05/the-case-for-reparations/361631>. Cf. Roy L. Brooks, *Atonement and Forgiveness: A New Model for Black Reparations* (Berkeley: University of California Press, 2004), which emphasizes slavery redress in the following sense: "Slavery has a presence in contemporary society. Many of the capital deficiencies wrought by slavery continue to play an ominous role in the lives of black Americans. These racial disadvantages follow their original arc in broad outline. Only the details have changed." Brooks, *Atonement and Forgiveness*, 35. Similarly, Thomas McCarthy writes of reparations for slavery, yet calls for a more "complex narrative... one in which the repeated refusal to acknowledge past wrongs and the continued failure to remedy them are themselves fresh wrongs that compound the original one, in which deep-seated racist attitudes are continually expressed in new and different ways, and in which hierarchies of power and privilege are continuously maintained in ever-changing circumstances." McCarthy, "Coming to Terms with Our Past, Part II: On the Morality and Politics of Reparations for Slavery," *Political Theory* 32 (2004): 750-772, 760. Finally, Naomi Zack emphasizes slavery in her discussion of the social and political construction of race, but argues that reparations are *for* race. Zack, "Reparations and the Rectification of Race," *Journal of Ethics* 7 (2003): 139-151.

majority under arms; the jury is the majority invested with the right of hearing judicial cases; and in certain States even the judges are elected by the majority. However iniquitous or absurd the evil of which you complain may be, you must submit to it as well as you can.¹⁵¹

Tocqueville's description of majority tyranny may seem to favor blaming the majority, rather than the government, for racial injustice. But looking closer, Tocqueville is pointing out that the majority exercises its power and influence not just through public opinion, but through the legislature, the executive, and the judiciary. It would be too simple to blame the societal majority, and interpersonal racism, for the enduring character of the color line without mention of its wielding and abusing political power. For unjust majority beliefs to harm a minority so profoundly, putting political power to illiberal, undemocratic use is a necessary condition. Alas, it is too easy to fail to see this, and opt for a superficial explanation of racial injustice. As Elizabeth Anderson tells us, "A major source of bias is unaccountable power over others... Power makes people morally blind."¹⁵²

If resentment is indeed a weapon against injury, injustice and cruelty, it is understandable for disadvantaged African Americans, stuck in place in a land of promise, to resent the injustice of their situation. It is understandable for non-disadvantaged African Americans to resent the burdens that the members of their race must bear. But it is difficult for those who are not themselves the targets of wrongdoing to sustain a sense of resentment on behalf of others. What whites, and all individuals in a democracy, can do is *blame*—that is, to assign responsibility and keep this judgment in one's mind. When it comes to a long train of racial abuses, and the

¹⁵¹ Alexis de Tocqueville, *Democracy in America*, tr. Henry Reeve (New York: Bantam Books, 2003), 301-302.

¹⁵² Elizabeth Anderson, "The Social Epistemology of Morality: Learning from the Forgotten History of the Abolition of Slavery," in Miranda Fricker and Michael Brady, eds., *The Epistemic Life of Groups: Essays in Collective Epistemology* (Oxford: Oxford University Press, forthcoming).

possibility of America's forever being marked by racial inequality, it is good for all citizens, and good for democracy, to blame the government.¹⁵³ To do so is to recognize the gap between democratic theory and democratic practice, and to recognize our falling short of the ideal of a self-governing people that is able to make laws that are just and fair. Blaming the government for abrogating liberal democratic principles affirms the value of these principles, and the value of the kind of government at which democratic practice should be aimed. Nor do we let ourselves off the hook: for our institutions, as Danielle Allen puts it, "are extensions of ourselves, as is the shell to the snail."¹⁵⁴

5.5 Conclusion

I have argued that complex group harms are political, and I have claimed that we should actively blame the government, but I have not yet made the case for black reparations. This is the task of Chapter 7. The other full-chapter study of a reparations case appears in Chapter 3, in which the example of eugenical sterilization laws was used to show how societal injustice becomes an injustice of the state. These two cases represent two extremes, as should now be apparent. Eugenical sterilization laws represent a quintessential example of an individuated harm resulting from state-sponsored injustice, affecting particular individuals who do not identify as a group. The historical trajectory of state-sponsored injustice against blacks, by contrast, is a complex group harm, involving a long history of the abuse of political power. If the argument for reparations were limited to cases like that of eugenical sterilization, where the injustice targeted

¹⁵³ Iris Marion Young's critique of blame in *Responsibility For Justice* (Oxford: Oxford University Press, 2011), 116-118, seems focused on blaming whites for racial injustice, which makes sense in light of the fact that Young does not see state-sponsored injustice as particularly significant.

¹⁵⁴ Danielle S. Allen, *Talking to Strangers: Anxieties of Citizenship since Brown v. Board of Education* (Chicago: University of Chicago Press, 2004), 172.

specific individuals, the harm is easily traceable to exactly one political practice, and the number of reparations recipients is small, I could probably persuade most to be reparationists without too much further effort.¹⁵⁵ Indeed, taxpayer-funded reparations to North Carolina sterilization victims have come to be celebrated as a great moral achievement on the part of the state and citizens. Alas, one of the main obstacles of the decade-long sterilization reparations battle in North Carolina was a general worry that this would set a precedent for slavery reparations. “If we do something like this, you open up the door to other things the state did in its history,” as former state senator Chris Carney remarked. “And some, I’m sure you’d agree, are worse than this.”¹⁵⁶ Things started moving forward when a Carolina think tank put out a policy report arguing that if North Carolina paid reparations to the living sterilization victims and no family members, this could not set a precedent for slavery reparations.¹⁵⁷

I have argued that what critics call “slavery” reparations are not—or perhaps more accurately, should not be—about slavery per se. A plausible black reparations claim is about America’s present-day racial predicament and about the disadvantages that shape the lives of a disproportionate number of African Americans. Of course, in describing this racial predicament, I have painted a bleak, if all too familiar, picture. Laws can legitimize and entrench beliefs and behaviors that are morally and democratically indefensible. When unjust societal prejudices graft

¹⁵⁵ Rhoda E. Howard-Hassmann makes this point in “Getting to Reparations: Japanese Americans and African Americans,” *Social Forces* 83 (2004): 823-840.

¹⁵⁶ Margaret Newkirk, “Sterilized Women Would Get Reparations Extension in N.C.,” *Bloomberg Business Week*, July 16, 2014, <http://www.businessweek.com/news/2014-07-16/sterilized-women-would-get-reparations-extension-in-n-dot-c>. This concern was the main hurdle to Rosewood race riot reparations as well. C. Jeanne Bassett, “Comments: House Bill 591: Florida Compensates Rosewood Victims and Their Families for a Seventy-One-Year-Old Injury,” *Florida State University Law Review* 22 (1994): 503-523, 509-510.

¹⁵⁷ Daren Bakst, *North Carolina’s Forced-Sterilization Program: A Case for Compensating the Living Victims* (Raleigh, NC: John Locke Foundation, 2011), <http://www.johnlocke.org/acrobat/policyReports/NCEugenics.pdf>.

onto systems of law and shape the world in accordance with their caprices, they have the ability to cause lasting harm. Worse still, a power imbalance favoring the dominant group is probably an inevitability of democracy itself, and beyond the ability of constitutional safeguards to protect against. In this light, it may seem that monetary reparations are a feeble attempt to buy our way out of the problem. But such a view overlooks the process that the American people would have to go through in order for black reparations to be a possibility.

Most reparations seekers, however, have little need to win over the hearts and minds of Americans to their cause. For those experiences of state-sponsored injustice resulting in individuated or symptomatic harms, as well as for many group harms as well, the government's quiet accountability is all that is desired. Currently, reparations seekers' two options are going before the courts or appealing to the legislature. Let us see how well their claims fare.

Chapter 6

The Case for a Federal Reparations Commission

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind....

- Federalist, No. 81

Thus far we have examined the liberal democratic case for the government's accountability for injustice against its citizens, and how paying monetary reparations can embody state accountability. We have seen how state-sponsored injustice comes about, paying special attention to how the privileged nature of political authority expands the reach of injustice. We have looked at how reparations make sense in light of the fact that laws and majoritarian moral beliefs change over time. Finally, we have examined the concepts of injustice and harm. With all this foundational work in place, it is now possible to look at how reparations claims play out in real world practice.

In what manner should reparations claims against the government be heard? Four different options arise. First, one could argue for the existing system, in which reparations claimants have the choice of litigating their claims, bringing their claims before the legislature, or making use of both avenues. The advantage of this system could be that it discourages fraudulent claims, as it is costly for reparations claimants from the standpoint of money and time. One might even argue that the existing system, convoluted and dysfunctional as it may seem, is actually efficient in ensuring that only claimants who very seriously believe that they have been wronged will persist in their claims for redress. Second, since the traditional venue for money claims in response to wrongdoing is the court, one could argue for reforming the law of sovereign immunity, of which legal scholars tend to be critical, so that reparations claimants have

an easier time litigating their claims. Third, one could argue that on principle, the decision whether to pay reparations is a political question, and should be determined by the legislature, the branch of government most representative of the popular will. Fourth, Congress could create a new body to combine the advantages of the judicial and legislative options while striving to avoid their shortcomings: a permanent commission devoted to hearing and acting on reparations claims.

In the case of the African American reparations claim, going directly before Congress is indispensably valuable towards the broader aims of racial justice. But for the majority of reparations claims, the commission option is an attractive way to institutionalize a norm of redress. The account begins with an examination of reparations lawsuits in the United States, and the legal barriers that are faced when plaintiffs try to demonstrate the government's liability for injustice. I then turn to an analysis of the U.S. Indian Claims Commission, a mid-twentieth century venue for reparations claims against the federal government by Indian tribes, in order to make the point that there is something deeply problematic about requiring reparations claimants to navigate an adversarial process. My criticism is not that reparations claimants are too sensitive to handle an adversarial process, or that an adversarial process is inimical to certain claimants' cultural backgrounds. Rather, adversarial processes are slow-moving and require much from the government resource-wise, and though worthwhile in some contexts, it is not nearly as difficult to determine whether there is moral validity to a redress seeker's claim as it is to determine guilt or innocence, or the liability or non-liability of a private defendant. In this light, it is perverse to devote a throng of government attorneys to finding legal loopholes so as to minimize the government's payout according to a standard of liability; taxpayer dollars are better spent on an investigation and funding a redress program. Next, I turn to the argument that Congress and state

legislatures are the most appropriate bodies to carry out reparative justice processes, and use a variety of examples to show that the legislature is not as expeditious as it may seem. Finally, I make the case for a permanently instituted reparations commission, which would function best if operating in tandem with a bureaucratic agency explicitly devoted to working with successful reparations claimants.

6.1 Litigating Reparations Claims: The Problem of Sovereign Immunity

Reparations claims aim at obtaining redress for state-sponsored injustice. Recall the discussion in Chapter 5 about how not all wrongful harms are unjust. A wrongful harm is not unjust if it occurs as a result of a democratically justifiable calculation of tradeoffs, or if it was accidental. The majority of litigated claims against the government are for routine, non-unjust harms, and therefore are not reparations claims. They are claims for compensation for the exercise of eminent domain, a fair resolution to a contract dispute, the government's tortious conduct, and so on. Seldom are claimants successful in bringing a reparations claim before the court as a money claim or a claim for tort damages, however. The reasons for this are the law of sovereign immunity and the nonconformity of reparations claims to standard legal norms. Though sovereign immunity derives from common law, the idea that the government cannot be sued without its consent tends to be justified in contemporary times by the argument that the government's liability for making hard choices and tradeoffs would produce a chilling effect on governance.¹ The best case outcome for reparations claimants who have gone before the court is a settlement. The government often does not admit liability or fault when it settles, something to

¹ See, e.g., Harold J. Krent, "Reconceptualizing Sovereign Immunity," *Vanderbilt Law Review* 45 (1992): 1529-1580. But as James Levine assesses things in "The Federal Tort Claims Act: A Proposal for Institutional Reform," *Columbia Law Review* 100 (2000): 1538-1571, 1547: "There is wide scholarly agreement on the failings of the FTCA caused by the discretionary function exception."

which reparations claimants, scholars, and journalists sometimes object. Yet my overall concern is not that many settlements with the government are no-fault, but they are so rare, and that so many resources are devoted to a civil lawsuit in which it is the job of a team of government attorneys to fight a reparations claim whose moral validity does not require a traditional judicial process to determine.²

By its nature, a lawsuit is an adversarial contest. The plaintiff seeks relief, and the defendant seeks to prove that she is not obliged to provide it. In litigation based on a reparations claim, the defendant is the government, and the task of government attorneys is to demonstrate that the government is not liable. Against such claims, the main line of defense is the government's immunity from suit with regard to the act upon which the claim is based. In American law, it is incumbent on reparations claimants to demonstrate that the government has waived sovereign immunity, which means successfully arguing that its wrongdoing fits into one of the statutory frameworks wherein sovereign immunity is waived automatically.

Demonstrating that civil action against the federal government falls within the domain of the Federal Tort Claim Act (FTCA) is the most feasible option for an individual harmed by the government to obtain a court-ordered payment. Up through the mid-twentieth century, tort claims against the government were brought before Congress as private claim bills.³ By 1946, it had become clear that it was highly inconvenient for the legislature to be tied up every time there was an accident involving a government employee. A bill entitled "More Efficient Use of

² The federal government's settlements with reparations claimants that I have come across are the following: the Tuskegee syphilis study, the USDA's discrimination against minority farmers ("*Pigford*"), the mismanagement of Indian trust lands ("*Cobell*"), some of the subjects of Cold War era radiation experimentation, and one military LSD experimentation subject. The state of Ohio has moreover settled with the injured students and families of the deceased in the Kent State shootings.

³ Harry Street, "Tort Liability of the State: The Federal Tort Claims Act and the Crown Proceedings Act," *Michigan Law Review* 47 (1949), 341-368, 346.

Congressional Time” was put to the vote, and it eventually became the Federal Tort Claims Act.⁴ Crucially, however, the FTCA contains a “discretionary function exception,” protecting the government against torts when it is exercising its discretionary power.⁵ The discretionary function, then, is a major exception to a major exception: the government cannot be sued without its consent; consent is provided by the FTCA; the discretionary function exception maintains that consent is not given when the government is performing a governmental function. In short, the FTCA waives sovereign immunity for an accident involving a government vehicle, but so long as this is not during a high speed police chase.⁶

The first major test of the scope of the discretionary function exception came in the Texas City Disaster, the ammonium nitrate explosion that killed 468 individuals and injured 3,500 in 1947. As the chemicals were produced and transported by the federal government, over 300 damages claims were consolidated into the FTCA case *Dalehite et al. v. United States*.⁷ The Supreme Court held that the FTCA did not provide a waiver of immunity, for there is no “liability arising from acts of a governmental nature or function”; the decision for the government to manufacture and transport fertilizer was an act of government discretion.⁸ The Court’s interpretation was extremely narrow: the FTCA contains a “private person standard” stipulating that the government is liable if there is a private equivalent to the act, and private companies quite obviously manufacture fertilizer. This was brought up by Justice Jackson on

⁴ *Ibid.*; 28 U.S. Code § 2674.

⁵ 28 U.S. Code § 2680.

⁶ Stanton R. Gallegos, “Are Police People Too? An Examination of the Federal Tort Claims Act’s ‘Private Person’ Standard as It Applies to Federal Law Enforcement Activities,” *Brooklyn Law Review* (2010): 775-806, 799-801.

⁷ *Dalehite et al. v. United States*, 346 U.S. 15 (1953).

⁸ *Dalehite*, 346 U.S. at 28, 37.

dissent.⁹ In his powerful opinion, Jackson argued that Congress's passing the FTCA demonstrated a growing desire to provide the "unshielded populace" with redress precisely in situations like Texas City Disaster; alas, "when the Government is brought into court as a tort defendant, the very proper zeal of its lawyers to win their case and the less commendable zeal of officials involved to conceal or minimize their carelessness" frustrates this ambition.¹⁰ As Jackson concluded, the FTCA was surely intended to "embrace more than traffic accidents": "If not, the ancient and discredited doctrine that 'The King can do no wrong' has not been uprooted; it has merely been amended to read, 'The King can do only little wrongs.'"¹¹ In Chapter 5, I used the Texas City Disaster as an example of an event that is not a state-sponsored injustice, but a tragedy for which the government bears responsibility.¹² However, problematizing the idea that the King can do only little wrongs applies equally to reparations claims: the King can do no injustice.

In suing the government, many reparations seekers find themselves in the universe of constitutional torts. This is because reparations claims often refer to cases of injustice in which the government violated constitutionally protected rights. However, for a constitutional tort to be successful under the FTCA, the plaintiffs must demonstrate that the government violated the constitution while not exercising a uniquely governmental function. This immediately excludes

⁹ *Dalehite*, 346 U.S. at 60: "The Government, as landowner, as manufacturer, as shipper, as warehouseman, as shipowner and operator, is carrying on activities indistinguishable from those performed by private persons. In this area, there is no good reason to stretch the legislative text to immunize the Government or its officers from responsibility..."

¹⁰ *Dalehite*, 346 U.S. at 49-50.

¹¹ *Dalehite*, 346 U.S. at 60.

¹² There still may be a good reasons for the government to be found liable in the case of a tragedy for which it bears causal responsibility; many legal scholars have argued that the FTCA is greatly in need of reform. See, e.g., Mark C. Niles, "Nothing But Mischief: The Federal Tort Claims Act and the Scope of Discretionary Immunity," *Administrative Law Review* 54 (2002): 1275-1353; Levine, "Federal Tort Claims Act."

cases in which an injustice happened according to a law, executive order, or military act.

Reparations claimants may and do try to litigate their claims nevertheless, perhaps knowing that the lawsuit will be unsuccessful but hoping for a settlement, or perhaps putting their hopes (and legal fees) on the unlikely prospect that the case will be an occasion for the law of sovereign immunity to evolve.¹³ However, for reparations seekers, pointing to the FTCA as a waiver of sovereign immunity for constitutional torts does not result in courts finding the government liable. To take one example, that of *Hohri v. United States*, in response to a lengthy list of rights violations to which Japanese American internees claimed to have been subject—

[S]undry violations of their constitutional rights under the Due Process, Equal Protection, and Privileges and Immunities Clauses of the Fifth Amendment; the Search and Seizure Clause of the Fourth Amendment; the Cruel and Unusual Punishment Clause of the Eighth Amendment; the rights to fair trial and counsel under the Sixth Amendment; the Press, Speech, Religion, Petition, and Assembly Clauses of the First Amendment; the prohibition of Bills of Attainder and Ex Post Facto Laws and the right to the writ of habeas corpus under Art. I, Section 9; and the protection from involuntary servitude under the Thirteenth Amendment....¹⁴

—the Court of Appeals’ response was: “We find that sovereign immunity bars all such claims.”¹⁵ In *Begay v. United States*, 205 Navajo plaintiffs alleged the federal government’s regulatory negligence in exposing uranium miners serving the country’s atomic weapons building program to dangerous levels of radiation without their knowledge.¹⁶ Convinced that “all

¹³ See *Jaffee v. United States*, 592 F.2d 712, 715 (1979), concerning radiation experiments on Atomic Veterans: “Jaffee strenuously urges that sovereign immunity is no more than a common law doctrine created by the courts, and as such courts have the power to abolish or modify it. He further asserts that in spite of its longevity, the doctrine is illogical, unjust, outdated, and that it should be stricken in its entirety when it impedes the vindication of what he characterizes as fundamental constitutional rights.”

¹⁴ *Hohri v. United States*, 782 F. 2d 227, 244 (1986).

¹⁵ *Hohri*, 782 F. 2d. The legal history of the *Hohri* case is complicated. For a good overview, see Mitchell T. Maki, Harry H. L. Kitano, and S. Megan Berthold, *Achieving the Impossible Dream: How Japanese Americans Obtained Redress* (Urbana, IL: University of Illinois Press, 1999), 125-128.

¹⁶ *Begay v. United States*, 591 F. Supp. 991 (D. Ariz. 1984).

the actions of various governmental agencies complained of by plaintiffs were the result of conscious policy decisions made at high government levels based on considerations of political and national security feasibility factors,” the court found that the discretion function exception of the FTCA prevailed, and that the federal government was immune.¹⁷ In the case of *Bibeau*, the court ruled against prisoners who had been research subjects in a dangerous testicular radiation study funded by the Atomic Energy Commission in the 1960s, with the government successfully arguing that the study fell under the auspices of the discretionary function exception.¹⁸ A slavery reparations lawsuit predating the FTCA, brought by the National Ex-Slave Mutual Relief, Bounty and Pension Association, was ruled to be barred by sovereign immunity.¹⁹ *Cato v. United States*, a 1995 case brought by a group of descendants of slaves, was similarly pronounced “outside the limited waiver of sovereign immunity by the United States... It is axiomatic that the United States can be sued only to the extent that it has waived its sovereign immunity.”²⁰

FTCA claims are sometimes denied by the courts because the plaintiff unsuccessfully tries to fit a non-tortious claim into a tort framework in order to show that sovereign immunity has been waived. *Olson v. United States* refers to events stemming from LSD and mescaline experiments conducted as part of the CIA’s Project MKULTRA.²¹ In the early days of

¹⁷ *Begay*, 591 F. Supp. at 1013.

¹⁸ *Bibeau v. Northwest Research Foundation, et al.*, 339 F.3d 942 (9th Cir. 2003). There were also private defendants in the case, with whom the plaintiffs eventually settled. See “No FTCA or IIED Claims States in Oregon Testicular Radiation Case,” *Prison Legal News*, March 15, 2005, <https://www.prisonlegalnews.org/news/2005/mar/15/no-ftca-or-iied-claims-stated-in-oregon-testicular-radiation-case>.

¹⁹ *Johnson v. McAdoo*, 45 App. D.C. 440, 441 (1916); 244 U.S. 643 (1917).

²⁰ *Cato v. United States*, 70 F.3d 1103, 1109 (9th Cir. 1995). Though the plaintiffs did not point to any specific waivers of sovereign immunity, the Court of Appeals considered the FTCA as a possible way for the case to move forward, and rejected it.

²¹ *Olson v. United States*, Civil Action No. 2012-1924 (D.C. 2013).

MKULTRA, there was a general understanding within the CIA that it would be fair game to slip LSD into the drink of any CIA official at any time so that the effects of the drug on an unknowing subject could be studied.²² Unsuspecting army scientists were given LSD at a working retreat in 1953, and one of them, Frank Olson, reacting extremely badly: after a week of extreme paranoia, he went through a glass window to his death.²³ The death was classified as a suicide, and Olson's family was not told that he had been an LSD experimentee. In 1976, after revelations of MKULTRA came to light, the Olson family was issued a presidential apology and \$750,000 from Congress in exchange for not litigating.²⁴ However, in the 1990s and 2000s, further details of Olson's death came out strongly suggesting that the scientist had been assassinated. *Olson* was an FTCA case charging the government with "negligently" covering up the actual events and making the death look like a suicide.²⁵ Though the judge stated that "the public record supports many of the allegations," he ruled that the "'negligent supervision' claim is really a disguised claim for misrepresentation or deception, forbidden by the FTCA," and that the plaintiffs cannot "plead around" something that the FTCA does not cover.²⁶ The case was therefore unsuccessful.

A number of cases involving members of the military were also brought under the FTCA, but plaintiffs faced the "*Feres* doctrine," which bars tort claims against the government for

²² John Marks, *The Search for the "Manchurian Candidate": The CIA and Mind Control* (New York: Times Books, 1979), 71.

²³ *Ibid.*, 82.

²⁴ *Ibid.*

²⁵ *Olson*, No. 2012-1924 (D.C. 2013).

²⁶ *Ibid.*

injuries connected to military service.²⁷ For a series of cases involving LSD testing on armed forces members, *Sweet v. United States*, *Bishop v. United States*, and *Stanley v. United States*, sovereign immunity under *Feres* precluded judges from finding for the plaintiffs.²⁸ The *Stanley* case went all the way to the Supreme Court: though the Court ruled for the United States, Justices O'Connor and Brennan found the majority decision morally troubling, comparing the government's actions to the pseudo-scientific experiments of the Nazi doctors.²⁹ O'Connor described the experiments as "so far beyond the bounds of human decency that as a matter of law it simply cannot be considered a part of the military mission."³⁰ However, though unsuccessful in court, Stanley's claim had a better resolution than the claims of Sweet, Bishop, and approximately 740 other military LSD testing subjects. In 1994 after multiple attempts, Congress passed a private claim bill awarding him redress.³¹ The only other veteran it did this for was James Thornwell, with whom the government settled.³² Another set of reparations cases barred by *Feres* involves armed forces members who were subjected to high levels of radiation at atomic weapons testing sites up through the early 1960s. Some "Atomic Veterans" had been made to witness nuclear explosions, then were interviewed afterwards by scientists and

²⁷ *Feres v. United States*, 340 U.S. 135 (1950).

²⁸ *Sweet v. United States*, 528 F. Supp. 1068 (D.S.D. 1981); *Bishop v. United States*, 574 F. Supp. 66 (D.D.C. 1983); *United States v. Stanley*, 483 U.S. 669 (1987).

²⁹ *Stanley*, 483 U.S. at 687 (Brennan, concurring in part and dissenting in part); *Stanley*, 483 U.S. at 710 (O'Connor, concurring in part and dissenting in part).

³⁰ *Stanley*, 483 U.S. at 709 (O'Connor, concurring in part and dissenting in part).

³¹ H. Res. 808, 103rd Cong. (1994).

³² The case concerning James Thornwell is an exception: it was settled after the district court was favorable to the argument that the government could be held liable for failing to provide follow-up care after Thornwell served as a human guinea pig for a new grueling interrogation technique in which he was made to take LSD without his knowledge. See *Thornwell v. United States*, 471 F. Supp. 344 (D.D.C. 1979). The settlement took place through a private claim bill, S. 1615, 96th Cong. (1980).

psychologists wishing to understand the experience; others participated in military drills in the vicinity of atomic weapons testing. Lest there be any doubt that an injustice was done, the court acknowledged that “test officials knew and understood throughout the periods in question that exposure to nuclear radiation created a health hazard,” as “a large body of literature existed on the subject” by the early 1940s; by 1946, the government knew more specifically that “radiation could cause genetic effects, histopathological changes, physiological changes, and biological and enzymatic disturbances.”³³ Nonetheless, the early cases were barred by *Feres*.³⁴ Hoping for relief of some sort, the Atomic Veterans and the families of the deceased began suing government contractors.³⁵ In a much decried move, Congress passed legislation mandating “any action against these contractors to be maintained solely against the United States pursuant to the FTCA.”³⁶ The court of course issued the legally-correct ruling that the Atomic Veterans’ cases were barred by *Feres*.³⁷

Another option is for reparations claimants to make a Tucker Act claim.³⁸ In cases where a monetary remedy is built into the Constitution or a statute, the Tucker Act waives sovereign immunity and allows plaintiffs to sue the government in the Court of Federal Claims to obtain it. If a claimant can demonstrate that either is relevant, the contract clause and the Fifth Amendment guarantee of just compensation for the taking of private property are viable candidates for

³³ *In re Consolidated United States Atmospheric Testing Litigation*, 616 F. Supp. 759, 777 (N.D. Cal. 1985).

³⁴ Carroll Dorgan, “Section 2212: A Remedy for Veterans—With a Catch,” *California Law Review* 75 (1987): 1513-1558, 1514.

³⁵ *Ibid.*, 1517-1518.

³⁶ 50 U.S. Code § 2783; *In re Atmospheric Testing*, 616 F. Supp. at 764.

³⁷ Dorgan, “Remedy for Veterans,” has an excellent account of Congress’s intending the legislation to have a Catch-22 nature.

³⁸ 28 U.S. Code § 1491.

litigating reparations claims on the basis of the Tucker Act. In the Japanese American internment case, this strategy had a chance at success: among other things, internment involved the government's taking the property of the internees' property without just compensation.³⁹ However, most reparations cases cannot plausibly be billed as Tucker cases. In *Zephier*, a lawsuit concerning the Indian boarding school system, the court was emphatic in its opinion that "Calling a tort claim a contract claim does not make it one."⁴⁰

Most of the time, reparations seekers have little to lose in listing as many causes of action as possible.⁴¹ Due to the extremely limited waiver of sovereign immunity that the FTCA provides and the narrow scope of the Tucker Act, if it is at all plausible, claimants list other causes of action that may have a chance of opening an avenue to redress. One of such causes of action is *Bivens*, though it involves no waiver of sovereign immunity. *Bivens* is useful, however, due to the fact that reparations claims usually involve constitutional violations: a *Bivens* proceeding is a lawsuit against a federal official who has acted unconstitutionally. In the 1971 case *Bivens v. Six Unknown Named Agents*, narcotics agents ransacked the home of Webster Bivens, searching for drugs, without probable cause.⁴² When he pressed charges, the Supreme Court held that the six narcotics agents could be found liable in their capacity as private individuals only. Some declared this a victory, as it opened up a pathway to redress for

³⁹ However, there was a jurisdictional issue; the Supreme Court held that *Hohri* had been brought before the wrong court. See *United States v. Hohri*, 482 U.S. 64 (1987).

⁴⁰ *Zephier v. United States*, No. 03-768L (Fed. Cl., Oct. 29, 2004).

⁴¹ *Hohri*, 482 U.S. is an exception. Had the plaintiffs focused exclusively on their Tucker Act claims, they would have likely complied with the jurisdictional requirements of the court at the outset.

⁴² *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

constitutional violations.⁴³ However, many legal scholars are critical of *Bivens*: the Supreme Court avoided coming to terms with the tension between sovereign immunity and the constitutional protection of individual rights by making individual officials, rather than the government, liable.⁴⁴ From a practical standpoint, as Cornelia Pillard describes in her article on the subject, only a fraction of *Bivens* proceedings result in damages for plaintiffs: even though the government typically ends up assuming the legal fees and damages on behalf of the government official, juries are not told this, and are influenced by a strong sense that it is unfair for an ununiformed official to be personally liable for a decision that she made on the job.⁴⁵ Further, if statutory laws or an executive order mandate the injustice, and it is protected by the courts, *Bivens* does not help because it is not designed to cut across separated powers, holding all branches of government to account. *Bivens* proceedings are only a possibility when there is an identifiable person against whom a civil lawsuit can reasonably be undertaken.⁴⁶ The Japanese American internment plaintiffs cited *Bivens* as a cause of action in a Hail Mary play of sorts, trying to convince the district court that the liability of individual officials for constitutional violations extended to the federal government. Predictably, their efforts were unsuccessful. For the most part, *Bivens* only appears alongside the FTCA in cases like those involving unethical human subjects experimentation, where responsibility was delegated to a finite number of

⁴³ Cornelia T. Pillard, "Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under *Bivens*," *Georgetown Law Review* 88 (1999): 65-104, 65-71.

⁴⁴ *Ibid.*, 71; Perry M. Rosen, "The *Bivens* Constitutional Tort: An Unfulfilled Promise," *North Carolina Law Review* 67 (1988-1989): 337-377, 338 *et passim*. For an important early critique of *Bivens*, see Peter H. Schuck, *Suing Government: Citizen Remedies for Official Wrongs* (New Haven: Yale University Press, 1983).

⁴⁵ Pillard, "Taking Fiction Seriously," 78, 93-94.

⁴⁶ Moreover, in cases involving members of the armed forces—e.g., *Stanley*, 483 U.S. at 709—the Court has maintained that "no *Bivens* remedy is available for injuries that 'arise out of or are in the course of activity incident to service.'" Here *Feres*, 340 U.S. at 146 is quoted.

particular officials to conduct particular tests.⁴⁷ Even then, the pathway of *Bivens* interpretation has led to the Supreme Court pronouncement in 2007 (though not in the context of a reparations lawsuit) that damages for the violation of the constitution by officials are “not an automatic entitlement,” as “in most instances... a *Bivens* remedy [is] unjustified.”⁴⁸

A related action sometimes brought up in discussions of reparations claims, most notably, Boris Bittker’s 1973 work, *The Case for Black Reparations*, is worth mentioning.⁴⁹ Sometimes called the “Klu Klux Klan Act,” Section 1983 was revived in the mid-twentieth century after a long period of dormancy since being curtailed in the infamous *Slaughter-House Cases*.⁵⁰ Hailing from an era of Black Codes, in which state laws explicitly authorized the violation of rights protected by the Fourteenth Amendment, the statute reads:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...⁵¹

On its face, Section 1983 would seem to be helpful to plaintiffs in reparations lawsuits, as its subject is the deprivation of rights according to the law. Bittker dwelled on Section 1983 at

⁴⁷ Even in this particular case, some argue that *Bivens* is inappropriate. As Nestor Davidson writes in “Constitutional Mass Torts: Sovereign Immunity and the Human Radiation Experiments,” *Columbia Law Review* 96 (1996): 1203-1251, 1232: “Individual officers have the ability to hide behind the facade of a massive bureaucracy and to shield their actions from disclosure for decades. In such a situation, courts should focus on the institutional responsibility of the government as a whole, and not on the actions of the particular officers who implemented the policy.”

⁴⁸ *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). See Richard H. Fallon, “Asking the Right Questions about Officer Immunity,” *Fordham Law Review* 80 (2011): 479-507, 487.

⁴⁹ Boris Bittker, *The Case for Black Reparations* (Boston: Beacon Hill Press, 2003), esp. 36-58.

⁵⁰ For a summary of the history of Section 1983, see Schuck, *Suing Government*, esp. 47-48, and Rosen, “The *Bivens* Constitutional Tort,” 339-340.

⁵¹ 42 U.S. Code § 1983.

length because he was interested in finding a legal basis for black reparations for the deprivations suffered by living African Americans who had been made to attend segregated schools. A host of cases could have been brought against education officials in individual states, flooding the courts.⁵² However, the statute excludes persons acting “under color” of *federal* law—this is the domain of *Bivens*.⁵³ Moreover, the courts have generally interpreted Section 1983 as applying to *persons*, that is, to state officials in their personal capacity rather than their official capacity, and as not waiving sovereign immunity.⁵⁴ So, though technically Bittker is right that Section 1983 could have been employed by African Americans in the hope of obtaining reparations for a Jim Crow education system, it is telling that it was never used this way. Reparations claimants do not have the feeling that they are calling state power to account when they litigate against their fellow citizens, even if they acted quite wrongly in their official capacity. This is demonstrated clearly enough in *Scheuer v. Rhodes*, a Section 1983 case concerning the Ohio National Guard’s 1970 firing upon student protestors at Kent State University, brought by the injured and the families of the deceased against a group of 29 defendants.⁵⁵ The district court and appeals court found for the defendants, citing the usual reason of the officials’ immunity from liability.⁵⁶ However, the Supreme Court was favorable to the plaintiffs, finding immunity to be qualified rather than absolute, meaning that the officials’ liability depended on the facts of the case bearing out a

⁵² Bittker, *Case for Black Reparations*, esp. 36-58.

⁵³ Rosen, “*Bivens* Constitutional Tort,” contains a good comparative analysis of Section 1983 and *Bivens*.

⁵⁴ I say “generally” because the Supreme Court has endorsed an interpretation of Section 1983 that holds municipalities accountable for wrongdoing. See *Owen v. City of Independence*, 445 U.S. 622 (1980). Note that *Owen* is not a reparations case.

⁵⁵ *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

⁵⁶ *Scheuer*, 416 U.S. at 235.

Section 1983 violation.⁵⁷ After the remand, a jury trial was held. The defendants prevailed, and the plaintiffs appealed. Though the 29 defendants were being sued as private individuals, the State of Ohio paid their legal fees, and the government laudably realized that the money it would have to pay to defend them on appeal would be better spent on a settlement.⁵⁸ In 1979, after what the plaintiffs described as a “long legal and political struggle” which made clear to them that persons in their position “have little recourse and then only through an expensive and lengthy process,” the state of Ohio paid redress to all the injured students and the families of the four who died, and issued a statement of regret.⁵⁹ The official response to this statement from the plaintiffs gets at the heart of what is unsatisfactory about *Bivens* and Section 1983 proceedings. Their primary aim in litigating had been, “Insofar as possible, to hold the State of Ohio accountable for the actions of the officials and agents in the event of May 4, 1970 at Kent State University.”⁶⁰ After stating a belief that “some of the guardsmen on Blanket Hill on the fateful day also became victims of an Ohio National Guard policy which sent them into a potential citizen confrontation with loaded combat rifles,” the plaintiffs said that they “did not want those individual guardsmen to be personally liable for the actions of others and the policy of a governmental agency under whose orders they served” but “the doctrine of sovereign immunity which protects the State of Ohio from being sued without its permission, made it necessary... to

⁵⁷ *Scheuer*, 416 U.S. at 243.

⁵⁸ “Accounts,” from the May 4 Archive website, last accessed February 16, 2015, <http://www.may4archive.org/accounts.shtml>.

⁵⁹ *Ibid.*

⁶⁰ Quoted in “Aftermath,” from the May 4 Archive website, last accessed February 16, 2015, <http://www.may4archive.org/aftermath.shtml>. Of Section 1983, the plaintiffs said: “It is a provision which is little used—but, when it is used, it has little use. A citizen can be killed by those acting under the color of the law almost with impunity.” *Ibid.*

take individuals to court.”⁶¹ Given this sentiment, the Kent State plaintiffs were fortunate to obtain redress on the terms that they did. Indeed, they were fortunate to get a settlement. Nine days after the Kent State shootings, there was another confrontation between students and law enforcement officials at Jackson State, which resulted in two students being shot to death. Section 1983 litigation was unsuccessfully brought against the officers: the jury found some of them to be “guilty of tortious conduct as a matter of law,” but because there was a barrage of fire, they determined that there was no proof that any one officer was responsible for the deaths.⁶² As for the State of Mississippi and the City of Jackson? They were immune from suit.⁶³

Usually, the failure of the FTCA, Tucker Act, *Bivens*, or Section 1983 to properly support a liability claim is the first line of defense against plaintiffs seeking reparations. In most cases, attorneys will also try to show that the relevant statute of limitations has expired. Courts often cite the statute of limitations as a supplementary reason why the plaintiff’s arguments are not successful, and occasionally, do not even consider the question of the government’s immunity, and find against the plaintiff because the case was brought too late. The latter was the case in

⁶¹ *Ibid.*

⁶² *Burton v. Waller*, 502 F.2d 1261, 1286 (1974). A government report that investigated the Jackson State shootings and other campus incidents during the student protest era highlights the racial context in the Jackson State case. As per the *Report of the President’s Commission on Campus Unrest* (Washington, D.C.: U.S. Government Printing Office, 1970), 450, 454: “The Jackson City Police Department has 19 uniformed black policemen on a force of 279 members. No black policeman holds an officer rank. Of the 65 law enforcement officers in front of Alexander Hall, two were black; they did not shoot. The Commission concludes that racial animosity on the part of white police officers was a substantial contributing factor in the deaths of two black youths and the gunshot injuries of twelve more... the Commission concludes that a significant cause of the deaths and injuries at Jackson State College is the confidence of white officers that if they fire weapons during a black campus disturbance they will face neither stern departmental discipline nor criminal prosecution or conviction.”

⁶³ *Burton*, 502 F.2d at 1286. For a critique of sovereign immunity in the Kent State and Jackson State cases, see Paul R. Verkuil, “Immunity or Responsibility for Unconstitutional Conduct: The Aftermath of Jackson State and Kent State,” *North Carolina Law Review* 50 (1971): 548-611.

Cox, an LSD experimentation lawsuit.⁶⁴ The FTCA has a two year statute of limitations, and the court calculated that the plaintiff needed to file his initial claim by May 18, 1979. The fact that he did not do so until August 27 of that year was fatal to *Cox's* case.⁶⁵ In *Scott v. Casey*, an FTCA case concerning LSD experiments on prisoners, the district court ruled that the plaintiffs had played down their knowledge of the government's involvement in the study in order to bring the case within the limitations period, and that the statute of limitations barred the case.⁶⁶ In *Alexander v. State of Oklahoma*, a case brought by the living survivors of the Tulsa Race Riot, the plaintiffs argued that a 2001 report ordered by the Oklahoma legislature restarted the statute of limitations clock and allowed the case, which was filed in 2003, but the court did not buy it.⁶⁷ Though it acknowledged that the plaintiffs had a strong moral claim, the appeals court found that even though the courts were rigged against African Americans in Oklahoma for decades following the riot, the claim could have feasibly been brought in the 1960s or 1970s.⁶⁸ An expired statute of limitations was also cited as an issue in other LSD experimentation cases, the Japanese American internment case, and the case regarding the fatal defenestration of Frank Olson.⁶⁹

For lawsuits brought by reparations seekers, again, the best case outcome is that the government settles. As the cases that were eventually settled were litigated, the plaintiffs faced

⁶⁴ *Cox v. United States*, 513 F. Supp. 564 (1981).

⁶⁵ *Ibid.*

⁶⁶ *Scott v. Casey*, 562 F. Supp. 475 (1983).

⁶⁷ *Alexander v. State of Oklahoma*, 382 F.3d 1206 (10th Cir. 2004).

⁶⁸ *Ibid.*

⁶⁹ Richard Epstein argues that on principle, a reparations lawsuit brought by the descendants of slaves should fail for reason of an expired statute of limitations in Epstein, "The Case Against Black Reparations," *Boston University Law Review* 84 (2004): 1177-1192, 1183-1187.

all of the usual obstacles: sovereign immunity, *Bivens*-related issues, and expired statutes of limitations. Why, then, would the government settle if it is not likely to be found liable? The reasons vary from case to case. Perhaps there are political reasons, a desire by an administration to score points with certain voters. This is often charged in the most disreputable reparations program in recent times, *Pigford v. Glickman* and its heir *In re Black Farmers*, concerning racial discrimination by the U.S. Department of Agriculture.⁷⁰ Presumably some radiation experimentation cases against the U.S. government were settled because the congressionally appointed Advisory Committee on Human Radiation Experiments recommended monetary payments.⁷¹ Here settlement may have been morally motivated, but it also allowed the government to say that justice had been done without further Congressional action. Well-timed publicity may play a role too: James Thornwell's LSD reparations case was settled through a private claim bill soon after the television show *60 Minutes* aired an exposé segment on the cruelties endured by the soldier.⁷² Finally, reparations claimants may have their cases heard by a sympathetic judge whose opinions accentuate the ethical importance of redress, leading the government to settle for moral reasons even if it believes that it ultimately will not be held liable. A Cincinnati-based radiation experiment is sometimes compared to the more well-known Tuskegee syphilis study because its subjects were poor African American men. In the 1995

⁷⁰ The big media exposé was Sharon LaFraniere, "U.S. Opens Spigot After Farmers Claim Discrimination," *New York Times*, April 25, 2013, <http://www.nytimes.com/2013/04/26/us/farm-loan-bias-claims-often-unsupported-cost-us-millions.html>. See also *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999); *In re Black Farmers Discrimination Litigation*, 856 F. Supp. 2d 1 (D.D.C. 2011); "The Settlement Agreement," website for *In re Black Farmers Discrimination Litigation Settlement*, last accessed February 15, 2015, <https://www.blackfarmercase.com/SettlementAgreement.aspx>.

⁷¹ *The Human Radiation Experiments: Final Report of the Advisory Committee on Human Radiation Experiments* (Oxford: Oxford University Press, 1996), 512-513.

⁷² The *60 Minutes* piece aired in March 1979, according to Tom Buckley, "TV: A Soldier's Ordeal in Thornwell," *New York Times*, January 28, 1981, <http://www.nytimes.com/1981/01/28/arts/tv-a-soldier-s-ordeal-in-thornwell.html>. The settlement bill, S. 1615, 96th Cong. (1980), was passed a year later.

reparations case, Judge Sandra Beckwith denied the government and *Bivens* defendants' motion to dismiss.⁷³ The opinion is worth quoting at length, as its language stands in stark contrast to the formulaic legal language of many rulings concerning reparations claims against the government:

The conduct attributed to the individual and *Bivens* Defendants—all representatives of government—strikes at the very core of the Constitution. Even absent the abundant case law that has developed on this point since the passage of the Bill of Rights, the Court would not hesitate to declare that a reasonable government official must have known that by instigating and participating in the experimental administration of high doses of radiation on unwitting subjects, he would have been acting in violation of those rights. Simply put, the legal tradition of this country and the plain language of the Constitution must lead a reasonable person to the conclusion that government officials may not arbitrarily deprive unwitting citizens of their liberty and their lives. If the Constitution were held to permit the acts alleged in this case, the document would be revealed to contain a gaping hole. This is so in part because the alleged conduct is so outrageous in and of itself, and also because a constitution inadequate to deal with such outrageous conduct would be too feeble in method and doctrine to deal with a very great amount of equally outrageous activity. Indeed, virtually all of the rights that we as a nation hold sacred would be subject to the arbitrary whim of government... The allegations in this case indicate that the government of the United States, aided by officials of the City of Cincinnati, treated at least eighty-seven of its citizens as though they were laboratory animals. If the Constitution has not clearly established a right under which these Plaintiffs may attempt to prove their case, then a gaping hole in that document has been exposed.⁷⁴

The personality of the judge was also undoubtedly a factor in the eventual settlement of *Cobell v. Salazar*, a case concerning circumstances stemming from the 1887 Dawes Act. The most significant Indian policy of the late nineteenth century, under Dawes, parcels of reservation lands were allotted to individual Indian families in the hope of breaking up tribes and encouraging Native peoples to live alongside homesteaders as assimilated Christian farmers. In a series of moves that reveals the profound irony of the term “Indian giver,” the federal

⁷³ *In re Cincinnati Radiation Litigation*, 874 F. Supp. 796 (1995).

⁷⁴ *In re Cincinnati*, 874 F. Supp. at 815-822.

government reversed its policy and took Dawes lands away, renting plots to whites and holding the proceeds in trust for individual Native families. There were demands for a formal accounting of the trust money, or “IIM accounts,” throughout the twentieth century, and in 1996, Eloise Cobell, herself a banker, initiated and served as the lead plaintiff for the largest ever class action lawsuit against the U.S. government.⁷⁵ Department of the Interior officials were extremely reluctant to comply with the accounting request, and Judge Royce Lamberth held several of them in contempt of court.⁷⁶ In a 2005 ruling (one of the 80 published opinions pertaining to the case), Judge Lamberth berated Interior:

The entire record in this case tells the true story of Interior’s degenerate tenure as Trustee-Delegate for the Indian trust—a story shot through with bureaucratic blunders, flubs, goofs and foul-ups, and peppered scandals, deception, dirty tricks and outright villainy—the end of which is nowhere in sight. Despite the breadth and clarity of this record, Interior continues to litigate and relitigate, in excruciating fashion, every minor, technical legal issue. This is yet another factor forestalling the final resolution of the issues in this case and delaying the relief the Indians so desperately need. It is against this background of mismanagement, falsification, spite, and obstinate litigiousness that this Court is to evaluate the general reliability of the information Interior distributes to IIM account holder.⁷⁷

More reflectively:

At times, it seems that the parties, particularly Interior, lose sight of what this case is really about. The case is nearly a decade old, the docket sheet contains over 3,000 entries, and the issues are such that the parties are engaged in perpetual, heated litigation on several fronts simultaneously. But when one strips away the convoluted statutes, the technical legal complexities, the elaborate collateral proceedings, the layers upon layers of interrelated orders and opinions from this Court and the Court of Appeals, what remains is the raw, shocking, humiliating truth at the bottom: After all these years, our government still treats Native American Indians as if they were somehow less than deserving of respect that

⁷⁵ David E. Wilkins, *Hollow Justice: A History of the Indigenous Claims in the United States* (New Haven: Yale University Press, 2013), 143.

⁷⁶ Quoted in Wilkins, *Hollow Justice*, 171.

⁷⁷ *Ibid.*, 172-173.

should be afforded to everyone in the society where all people are supposed to be equal.⁷⁸

By far the most incendiary turn of phrase issuing from Lamberth was that Interior was a “dinosaur—the morally and culturally oblivious hand-me-down of a disgracefully racist and imperialist government that should have been buried a century ago.”⁷⁹ Interior charged Lamberth with partiality to the plaintiff, and the Court of Appeals agreed, removing Lamberth from the case. (“Justice must have an appearance of justice,” said the court.⁸⁰) Regardless, Lamberth undoubtedly had an influence on the case: the \$3.4 billion settlement, finalized in 2010, was highest amount the government had ever settled for. However, as the bulk of the settlement fund was split among tens of thousands of individual American Indians in \$500-\$1,000 increments, many belonging to the plaintiff class have expressed extremely mixed feelings about the outcome of *Cobell*.⁸¹

Encapsulating a state of affairs that goes beyond *Cobell* are Attorney General Eric Holder’s words about the settlement: “The United States could have continued to litigate this case, at great expense to the taxpayers... It could have let all of these claims linger... But with this settlement, we are erasing these past liabilities and getting on track to eliminate them going forward.”⁸² In *Cobell*, the government did not have to settle; settlement was its choice. It is arguably a choice that saved taxpayers money, as defending against a case like *Cobell* is

⁷⁸ Ibid., 172.

⁷⁹ Ibid.

⁸⁰ Ibid., 174.

⁸¹ Generally, see Armen H. Merjian, “An Unbroken Chain of Injustice: The Dawes Act, Native American Trusts, and *Cobell v. Salazar*,” *Gonzaga Law Review* 46 (2011): 609-658.

⁸² Quoted in Charlie Savage, “U.S. Will Settle Indian Lawsuit for \$3.4 Billion,” *New York Times*, December 8, 2009, <http://www.nytimes.com/2009/12/09/us/09tribes.html>.

extremely costly. (As mentioned in the introductory chapter, a hundred government attorneys defended the government against the *Cobell* plaintiffs.) But Holder also insinuates that in a legal war of attrition, the government will win. If the government chooses to spend taxpayer dollars litigating a case rather than putting this money towards a reparations package, that is its prerogative. It is regrettable that getting to a settlement took over 13 years. But though an earlier, bigger settlement package would have been preferable, the *Cobell* settlement is one of the better outcomes of a convoluted legal system that melds liberal democratic ideals and sovereign immunity.

6.2 Towards a Norm of Redress: The Case of the Indian Claims Commission

Some complain about the government's settlement of reparations cases when settlements do not admit liability.⁸³ Indeed, if the whole point of making a reparations claim is to call state power to account, and the government's attorneys fight a reparations claim tooth and nail to show that the government is not liable, and a settlement comes with a direct statement that liability is not being admitted, then it is understandable that a settlement may feel like a qualified victory. However, demonstrating the government's legal liability is only a goal that arises in the context of an adversarial legal contest. When reparations claimants embark upon their quest for justice, legal liability is no doubt a symbol for the greater moral good of the government's taking meaningful responsibility for injustice and being accountable to them for it. However, the American political system has not found a principled way of demonstrating this moral responsibility. It is all ad hoc, or else approximated by liability, which is in turn approximated by

⁸³ For an example, see the statements of those involved in the Kent State shootings lawsuit and settlement, e.g., Charles A. Thomas, "December Dialogues: The Settlement Reconsidered," in *Kent State/May 4: Echoes Through A Decade*, ed. Scott L. Bills (Kent, OH: Kent State University Press, 1988), 239-244.

the government's willingness to settle and pay redress. My proposal is for a political norm of redress so that a government anticipates the need to take moral responsibility for its injustices, and moreover so that it can do so in a way that is distinct from legal liability. The concept of a norm of redress was broached in Chapter 3, but the overall idea is that, if there is a morally valid reparations claim, the default action should be for the government to pay redress without putting up a fight. The government should have its doors open to reparations claims, and have an established and fair procedure for dealing with them.

Some may find it surprising, but in the United States, there has already been gesture at the spirit of a norm of redress in one particular context, that of redress claims for annexed tribal lands during the period of American westward expansion. When it comes to forging out an alternative to the government's legal liability for injustice, the story of the Indian Claims Commission (ICC) could not be any more instructive. In American law, the best protections against the abuse of political power pertain to contracts and property rights due to the Tucker Act. Of all the reparations claims against the United States government, Indian land claims have been the most successful in being given a hearing perhaps because they naturally fall within the areas of law where the majority of citizens are safeguarded from power's abuse: legally, treaties are a kind of contract, and many Indian land acquisitions took place according to a violation of a treaty on the part of the U.S. federal government; the Fifth Amendment states that private property cannot "be taken for public use, without just compensation."⁸⁴ Though American law has consistently maintained that Indian tribes have the rights of occupants, rather than land

⁸⁴ As part of the ICC legislation, Congress created the "Indian Tucker Act" (28 U.S. Code § 1505). For a discussion, see Nell Jessup Newton, "Indian Claims in the Court of the Conqueror," *American University Law Review* 41 (1992): 753-854, 774. Also see *The United States Indian Claims Commission Final Report*, August 13, 1946 through September 30, 1978, http://www.narf.org/nill/documents/icc_final_report.pdf, 1-3.

owners, American Indians have never quiescently accepted this, and have fought to demonstrate that just compensation should be accorded for annexed lands. Indian land claims emerged in the nineteenth century as tribes sought to prove that the constitutional protections concerning contracts and private property were applicable to them, and not just whites. The Court of Claims, which is nowadays the Court of Federal Claims, had come into existence in 1855 largely due to the military's need to take over strategically-located private property in fighting the Civil War.⁸⁵ Once the Tucker Act was passed, the new specialized court proved to be a reliable venue for many individuals to enter claims for just compensation. As soon as the court began operating, Natives filed claims alongside whites, but their status before the Court of Claims was unclear. In 1863, before any Indian claims that had been filed were decided, Congress amended the original legislation to bar cases regarding the seizure of Indian lands.⁸⁶ Tribes responded with an onslaught of requests for jurisdictional bills from Congress so that their disputes could be heard in the Court of Claims nonetheless.⁸⁷ After decades of the status of Indian lands claims being effectively trapped in legal purgatory, the idea of a judicial body specifically devoted to Indian claims began to be batted about.⁸⁸ By 1946, two important factors led Congress to set up an Indian Claims Commission.⁸⁹ That Congress was backlogged with jurisdictional bills indicated

⁸⁵ See, e.g., William Wiecek, "The Origin of the United States Court of Claims," *Administrative Law Review* 20 (1968): 387-406.

⁸⁶ Section 9 of the statute setting up the Court of Claims specified that claims were excluded "growing out of or dependent on any treaty stipulation entered into with foreign nations or with the Indian tribes." *U.S. Indian Claims Commission Final Report*, 2.

⁸⁷ *Ibid.*

⁸⁸ Though the suit was dismissed, the Court did hear the claim of Queen Lili'uokalani regarding Native Hawaiian lands, but these were not *Indian* lands. See *Liliuokalani v. United States*, 45 Ct. Cl. 418 (1910). Note that Hawaiian land claims were not within the jurisdiction of the ICC.

⁸⁹ Wilkins, *Hollow Justice*, 42, 68.

that Indian land claims were not going to lose their energy without a resolution—incidentally, 1946 was precisely the year that Congress became overwhelmed with private claim bills and passed the Federal Tort Claims Act.⁹⁰ Also, Indians had demonstrated great patriotism during the Second World War, joining the military at much higher rates than any other group, with Navajo “code talkers” making important contributions that were celebrated in the media.⁹¹ Plus, Indian leaders argued that it was hypocritical, given their service and that World War II was fought under the banner of freedom, to not give Indians the same rights and protections enjoyed by other Americans.⁹² Extensive legislative debates were held over the Indian Claims Commission bill, and for many members of Congress, passing the bill came to be a matter of moral importance. As Congressman Henry Jackson, whom David Wilkins notes was “ordinarily not a great champion of Indian causes,” proclaimed, “Let us at least pay what we promised to pay... and let us see that the Indians have their fair day in court so that they can call the various Government agencies to account on the obligations that the Federal Government has assumed.”⁹³ When the bill passed, Karl Mundt, another member of Congress, declared the ICC “an example for all the world to follow in its treatment of minorities.”⁹⁴

The purpose of the ICC was for claims against the federal government for events that took place before 1946. Its jurisdiction moreover was exclusive to group reparations claims: it

⁹⁰ Ibid., 52-53.

⁹¹ Michael Lieder and Jake Page, *Wild Justice: The People of Geronimo vs. the United States* (Norman: University of Oklahoma Press, 1997), 60-61.

⁹² Ibid.

⁹³ Quoted in Wilkins, *Hollow Justice*, 67.

⁹⁴ Jeffrey Ostler, *The Lakotas and the Black Hills: The Struggle for Sacred Ground* (New York: Penguin Books, 2010), 151.

could only hear claims on behalf of entire tribes, thus barring all claims pertaining to the trust lands allocated in the Dawes Act that were later the subject of *Cobell*, because these were claims of individual Indians.⁹⁵ However, aside from this jurisdictional provision, the ICC in many ways operated exactly like regular specialized federal court, adhering to the usual liability standards.⁹⁶ This was to the disappointment of many. A unique institutional design had been envisioned by the architects of the ICC Act. There would be three commissioners—in early drafts, one of them was to be Native—who would oversee an “Investigative Division.”⁹⁷ The division would operate out of Washington, D.C., but its personnel would have great latitude to go out into the field and conduct in-person research about the circumstances of each claim. From both the legislative history of the ICC Act and its text, it is moreover clear that there was an intent to give the Commissioners the ability to settle accounts with Indian tribes without being beholden to standards of liability. Claims regarding original treaties that were revised or dispensed with by means of “fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact” could be heard before the ICC, as could claims “based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.”⁹⁸ However, the three Commissioners who were appointed were selected precisely because they had no prior knowledge or experience in Indian affairs.⁹⁹ They quickly became bogged down in learning an incredibly complex and specialized new field of law, and proceeded by exercising extreme

⁹⁵ Wilkins, *Hollow Justice*, 73.

⁹⁶ Generally, see Wilkins, *Hollow Justice*; and Chapter 5, “How the Commission Becomes a Court,” of Lieder and Page, *Wild Justice*.

⁹⁷ Wilkins, *Hollow Justice*, 72.

⁹⁸ H. Res. 4497, 79th Cong. (1946).

⁹⁹ Lieder and Page, *Wild Justice*, 86-88.

caution in their judgments, relying heavily upon existing legal norms, and only making awards in favor of tribes when the government's legal liability could be successfully demonstrated by the attorneys for the tribe. The Commissioners moreover failed to create an Investigative Division. As one of the later Commissioners himself reflected, the Commission "has chosen to sit as a Court, and, as a result, the Congressional mandate has been utterly frustrated."¹⁰⁰

It is sometimes observed by those sympathetic to Native claims against Western governments that an adversarial legal process is ill-suited to mediate between two parties with extremely different cultural worldviews on terrain that clearly is designed for one side and not the other. Indeed, Wilkins observes in his book on the ICC that the "adversarial system that the ICC adopted worked to the advantage of federal officials but severely disadvantaged Native claimants" by being "an alien system... which couched everything in the language of Western law and relied on legal technicalities, doctrines, and ideas."¹⁰¹ However, the real obstacle does not seem to have been cultural difference: throughout the political history of the United States, Native peoples have proved themselves to be able to operate in the Western legal system with impressive facility. Rather, it is an unavoidable fact of liability-finding processes themselves. An adversarial setup is designed so that the claimant is in the position of demonstrating that, according to the standards of the law, he has been wronged. The defendant defends against the charge, strategizing to minimize what he will owe if found liable, with nothing being the optimal amount. That the Indian Claims Commission sat as a court occasioned the government's attorneys' taking advantage of the disadvantageousness of existing Indian law to Indians, making arguments that the Commissioners had little trouble buying. Though the just compensation

¹⁰⁰ Quoted in Wilkins, *Hollow Justice*, 79.

¹⁰¹ *Ibid.*

clause of the Fifth Amendment is a robust protection against the abuse of political power, Supreme Court precedent held that the Fifth Amendment did not cover Indian land unless a land title had been specifically recognized by the U.S. government.¹⁰² The government obviously had a strong economic incentive to grant only a tribe's right of occupancy—which could be removed at any time without just compensation—as a “ward” of the government, rather than a tribe's property rights. The ICC Act's “fair and honorable dealings” clause may seem to have been a directive by Congress to hear the “Indian land title” cases as if they involved government-recognized property titles, and give tribes all the benefits of the Fifth Amendment.¹⁰³ But in an adversarial process, the government's attorneys were naturally in the position to emphasize the well-established judicial distinction between occupancy and title, which allowed for great latitude in minimizing the amount that the federal government had to pay. Payments to tribes fell short of just compensation in at least two ways. To begin with, “offsets” were deducted.¹⁰⁴ Since no white person subject to eminent domain had ever had to go through offsetting, some commentators have complained that it was unfair to deduct federal expenditures on the tribe from the overall payments.¹⁰⁵ But though offsetting certainly slowed the claims process down, as sometimes a century or more of ledgers had to be analyzed, the practice of offsetting was the

¹⁰² *Johnson v. M'Intosh*, 21 U.S. 543 (1823).

¹⁰³ American Indians were not granted citizenship until 1924, and even thereafter, the federal government held that the Bill of Rights did not apply to tribal groups until 1968, when the Indian Civil Rights Act extended the protections of the Bill of Rights to tribes. 25 U.S. Code § 1302.

¹⁰⁴ As Newton, “Indian Claims,” 818-819, points out, the ICC Act itself allowed for offsetting, suggesting that perhaps I am giving Congress too much credit in my claim that the legislation setting up the ICC contains the seeds of a norm of redress that would not give rise to excessive litigiousness on the part of the government.

¹⁰⁵ As Wilkins writes in *Hollow Justice*, 199-200: “Private non-Indian citizens receive incredible benefits from the federal government, and corporations receive gratuities and tax breaks. When private individuals or corporations initiate lawsuits against the government, nothing is deducted for Social Security, FDIC, and various other subsidies.... tribal nations were required to pay offsets for services they received when the intent of those services was to destroy Native culture and political status, not to enhance it.”

smaller of the factors that reduced the size of awards, as several significant categories of expenditures were excluded, including the cost of relocating a tribe, and administrative, educational, health, and highway-related expenses.¹⁰⁶ Much more impactful was the fact that the Commissioners decided to assess land claims according to the original dollar amount that the acreage was worth the year the land was annexed—no inflation, no interest. This was completely contrary to the longstanding judicial interpretation of just compensation under the Fifth Amendment.¹⁰⁷ In 1968, Frank Allen, a Stillaguamish Indian, offered to buy the LBJ Ranch at a nineteenth century price of \$1.10 an acre in protest.¹⁰⁸ Allen received a polite letter of reply from the President’s office explaining that the Johnson family did not wish to sell.¹⁰⁹

Another result of the adversarial process used by the Indian Claims Commission-Court is that when land claims did not readily conform to existing legal standards, the Commissioners had to improvise. For instance, the Western Shoshone Territory, covering two-thirds of the state of Nevada, was never formally annexed by U.S. government.¹¹⁰ And so, a new legal concept was invented, “gradual encroachment.”¹¹¹ When this innovation did not satisfy the claimants’ lawyers, the state pulled the year 1872 out of thin air to date the annexation of Nevada.¹¹² To the Western Shoshone, it is likely that the idea of gradual encroachment would have been more

¹⁰⁶ Ibid., 107.

¹⁰⁷ For a discussion, see Howard M. Freidman, “Interest on Indian Claims: Judicial Protection of the Fisc,” *Valparaiso University Law Review* 5 (1970): 26-47.

¹⁰⁸ Jim Hoagland, “Fair’s Fair—Indian Offers \$1 an Acre for LBJ Ranch,” *Washington Post*, June 1, 1968. ProQuest.

¹⁰⁹ Ibid.

¹¹⁰ Newton, “Indian Claims,” 761, 826-830.

¹¹¹ Wilkins, *Hollow Justice*, 199; Newton, “Indian Claims,” 827.

¹¹² Wilkins, *Hollow Justice*, 199; Newton, “Indian Claims,” 762.

satisfying as part of an analysis of historical causality, because that is what it was, than as a concept relevant to the government's legal liability. Given the non-equivalency of the government's moral responsibility for injustice and its legal liability, the Commissioners ought to have embraced the fact that the ICC was not beholden to the law, and analyzed the claims from a moral point of view.

During the 31 year duration of the ICC, 204 claims were dismissed and 274 were successful; claims that had not been resolved by the ICC by the time its lifespan had come to an end were transferred to the Court of Claims.¹¹³ A total of \$800 million went to Indian Country as a result of the successful ICC claims, with Oklahoma's Kiowa, Comanche, and Apache receiving the highest amount, \$35 million.¹¹⁴ From the standpoint of the U.S. government's accountability for injustice, results are mixed. Having a forum for Indian land claims is better than having no forum. The payments were not large, but they were not negligible. Christopher Kutz has a line about how governments might as well say it "with daisies instead of roses" when it comes to monetary redress, and it seems that this captures the logic of the amounts that the Commissioners felt they could award.¹¹⁵ But when a dispute is adjudicated on the government's turf, with the government as both the defendant and the judge, it natural that claimants felt doubly wronged by the government's attorneys taking advantage of the ward status of Indian peoples to minimize the amount that the government owed, and the Commissioners siding with them, especially in light of the ICC's congressional mandate to resolve claims "based upon fair and honorable dealings that are not recognized by any existing rule of law or equity." A belief in the United States

¹¹³ Newton, "Indian Claims," 774.

¹¹⁴ Wilkins, *Hollow Justice*, 122-124.

¹¹⁵ Christopher Kutz, "Justice in Reparations: The Cost of Memory and the Value of Talk," *Philosophy & Public Affairs* 32 (2004): 277-312, 304.

government's ability to live up to the ideals in which it claims legitimacy was demonstrated in Indian peoples' feeling entitled to have their claims adjudicated according to the Fifth Amendment, to be treated as having had property rights in the lands protected by treaties rather than as conquered peoples. For the Commissioners to have interpreted the law as only allowing for daisies was morally insulting. Indeed, some individuals walked away from the ICC process with the impression that the Commission had been set up so that tribes would stop pestering Congress, having had their day in court, since the legislature would then be able to point to the legal principle of *res judicata* and say that the matter had already been judged.¹¹⁶ Of course, when it comes to daisies versus roses, it may not have been possible for the government to have paid the equivalent of just compensation to each tribe due to legitimate fiscal constraints. This was the beauty of the ICC bill's mandate, as it allowed for the possibility of greater integrity on the part of the government. If the Commissioners did not choose to make themselves beholden to determining the government's legal liability, individual decisions could have been accompanied by an acknowledgement that morally, the government owed roses, even though daisies were all it could afford.

From a reparative justice point of view, would the ICC have done a better job had it been an actual commission, and had it used a process of investigation to assess the moral validity of each claim rather than an adversarial process to determine the government's monetary burden? Doubtless this is so. If the aim is not to determine liability according to the law, it need not be part of the process for the government to try to defend itself. There is much wisdom to Congress's idea of the ICC as largely an investigative body. When a claim was formally submitted, a preliminary investigation could have looked into the validity of the complaint, and if

¹¹⁶ See, e.g., the analysis in Newton, "Indian Claims," 830.

the claim satisfied appropriate initial criteria, the ICC's main energies could have been devoted to a conducting an investigation. Of course, hindsight being what it is, it is possible for us to appreciate the gravity of the Commissioners' decision to run the ICC as a court for Indian land claims. But the shortcomings of the ICC are instructive in thinking through the reasons why a norm of redress is preferable to standards of legal liability when it comes to reparations claims, and how it might be institutionalized in a liberal democracy. In an adversarial process, the government's default position is not that it has a moral duty to pay redress, but rather, that it is its right to fight the claim. An adversarial process is inimical to the idea that individuals legitimately wronged by the government should receive redress on principle, and frustrates the attempt to form a norm of redress.

Let us turn, however, to yet another set of matters. Again, existing reparations claims have to traverse either the courts or the legislature, and virtually nothing has been said about the latter thus far. Indeed, when it comes to satisfying the moral demands of reparative justice, going before the legislature is currently the best option for reparations seekers.

6.3 The Legislative Alternative to Judicial Redress

In an important book on black reparations, Roy Brooks considers the idea that reparations claims should be determined politically. Writes Brooks: "Cases seeking judicial redress against a government for the latter's commission of a past injustice may be too hot for courts to handle—too political. Courts may feel this question is more suited for a legislative rather than a judicial solution."¹¹⁷ And indeed, this is precisely what the court opined in *Cato*, the case brought by the descendants of slaves: in addition to the case being barred by the usual legal obstacles, "the

¹¹⁷ Roy L. Brooks, *Atonement and Forgiveness: A New Model for Black Reparations* (Berkeley: University of California Press, 2004), 106. Also see *Ibid.*, 99, 103-4, 119, 134, 127.

legislature, rather than the judiciary, is the appropriate forum for plaintiff's grievances."¹¹⁸ When the legitimacy of the reparations claim is doubted by the politically dominant class due to its benighted view of the group, much is to be gained by contending for reparations at the site of the legislature, in full public view. And so, in the specific case of *Cato*, I believe that the legislature is the best option, as does Brooks.¹¹⁹ However, what about cases concerning individuated and symptomatic harms?¹²⁰ Are reparations claims best understood as political matters?

To begin with, the majority of reparations claims that have been successful have made their way through a sympathetic legislature. Most famously, Japanese American internees were paid \$20,000 each through the Civil Liberties Act of 1988; the same legislation resulted in \$12,000 reparations payments, along with funds for scholarships and cultural preservation projects, to Aleuts who had been relocated during the Second World War.¹²¹ In spite of its having once closed off all judicial avenues to redress for Atomic Veterans, Congress awarded reparations and an apology through the Radiation Exposure Compensation Act of 1990 (RECA) to Atomic Veterans and uranium miners who developed cancer.¹²² That same year, it passed the Native American Grave Protection and Repatriation Act (NAGRPA), which set up a federally-funded program to restore human remains and cultural items to tribes that continues to this

¹¹⁸ *Cato*, 70 F.3d. Cf. Epstein, "Case Against Black Reparations," 1182-1183, who maintains that a slavery reparations lawsuit is problematic due to a legitimate statute of limitations issue, yet argues vigorously against it concerning a political question that should be dealt with by the legislature.

¹¹⁹ See Chapter 7; see also Robert Westley, "Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?" *Boston College Third World Law Journal* 40 (1998-1999): 429-476, 436.

¹²⁰ This is the terminology that I use in Chapter 5.

¹²¹ H. Res. 442, 100th Cong. (1988).

¹²² First enacted in 1990, Congress expanded the RECA program to be more reparations payee-friendly in 2000. See H. Res. 2372, 101st Cong. (1990); S. 1515, 106th Cong. (2000).

day.¹²³ The sacred Blue Lake was repatriated to the Taos Pueblo by a congressional act,¹²⁴ and the site of the Sand Creek Massacre was memorialized.¹²⁵ As mentioned before, several individual human subject experimentees were provided redress by Congress.¹²⁶ State legislatures have paid reparations as well. In 1994, the Florida legislature awarded \$150,000 to each living survivor of the Rosewood Race Riot of 1923 and funded 25 college scholarships.¹²⁷ North Carolinians who had been subject to sterilization surgeries at the hands of the State Eugenics Board were each awarded \$50,000 by the state legislature in 2013.¹²⁸

The legislative option offers many benefits to reparations claimants. First, given all the examples of successful reparations cases, the sheer fact of the legislature's expediency when it comes to reparative justice would seem to recommend the legislative route to claimants. Second, the legislature is not beholden to a standard of legal liability. There are political and budgetary considerations, but no legal constraints. The legislature has the leeway to pay redress just because a claim is morally valid. And, though there is inevitably debate over the legitimacy of a given reparations claim, this is hardly an adversarial process; there is no sense in which "the government" as a monolithic entity puts up a fight and defends itself. Third, because the

¹²³ H. Res. 5237, 101st Cong. (1990).

¹²⁴ H. Res. 471, 91st Cong. (1970); see also John J. Bodine, "Blue Lake: A Struggle for Indian Rights," *American Indian Law Review* 1 (1973): 23-32.

¹²⁵ S. 2950, 106th Cong. (2000).

¹²⁶ As a matter of procedure, funding for settled reparations lawsuits usually goes through Congressional appropriations, i.e., the Tuskegee syphilis study, H. Res. 4783, 100th Cong. (1987-1988); a private claim bill, i.e., the settlement of James Thornwell's LSD experimentation claim, S. 1615, 96th Cong. (1980); or specific legislative act; i.e., the *Cobell* and *Pigford* settlements, H. Res. 4783, 111th Cong. (2010).

¹²⁷ C. Jeanne Bassett, "Comments: House Bill 591: Florida Compensates Rosewood Victims and Their Families for a Seventy-One-Year-Old Injury," *Florida State University Law Review* 22 (1994): 503-523.

¹²⁸ S.B. 421, General Assembly of North Carolina, Session 2013, March 26, 2013.

legislature is less rule-bound than the courts, it has the flexibility to design a reparations program of great breadth if it chooses to do so. One of the many issues with pursuing a judicial means of redress is that, unless claimants choose to bring a class action lawsuit, a remedy will only be provided to those with enough legal wherewithal to undertake civil action. By contrast, a Congressional reparations program can seek out worthy payees who were not actively involved in making a reparations claim: not all 100,000 Japanese American internees who were paid redress took part in the redress movement. Fourth, redress is often preceded by formal hearings, bringing claimants in to speak before members of Congress, or an investigation. Both are ways of looking into the moral validity of a reparations claim and providing a nuanced understanding of responsibility, blame, harm, and what is owed. A report produced by an investigative body is an opportunity to bring reparations claimants in as participants in writing an official history that is often itself a reparative justice measure, an antidote to years of whitewashing state-sponsored injustice and denying its moral gravity. Exemplary in this respect is the 1980 Commission on Wartime Relocation and Internment of Civilians, which resulted in the tome *Personal Justice Denied*.¹²⁹ The report brought to light a set of events that were either unknown to or rationalized by the public at large, and provided legitimacy to the claims of Japanese Americans who said that they had been wronged by the government during World War II. It made the recommendation of reparations and apologies to Japanese Americans and the Aleut, and with the exception of it upping individual Aleut payments from \$5,000 to \$12,000 each, Congress followed the report's directives.¹³⁰ The 1994 Advisory Committee on Human Radiation

¹²⁹ *Personal Justice Denied: Report of the Commission on Wartime Relocation and Internment of Civilians*, Parts 1 and 2, December 1982 and June 1983, <http://www.archives.gov/research/japanese-americans/justice-denied>.

¹³⁰ *Ibid.*; H. Res. 442, 100th Cong. (1987).

Experiments (ACHRE) published a report analyzing a wide range of unethical government-sponsored experiments. The Tuskegee Syphilis Study Legacy Committee issued a short report in 1996, recommending an apology, which President Clinton gave, and the creation of what eventually became the National Center for Bioethics in Research and Health Care at Tuskegee University.¹³¹ North Carolina conducted an investigation of the impact of its State Eugenics Board, and the legislature heeded the North Carolina Eugenics Compensation Task Force's recommendation of reparations.¹³²

These four advantages—expediency, non-boundedness to a standard of liability, ability to seek out worthy reparations payees and make right with them, and investigative capacities—make a compelling case for the legislature. Moreover, due to the potential of a highly-publicized reparations claim and program to bestow legitimacy and teach the public about a legacy of state-sponsored injustice, in the case of the black reparations claim, there is no substitute for the benefits of the legislative road to redress.¹³³ But in spite of the fact that the legislature has paid reparations a number of times, there is no general presumption, no norm of redress that has formed as a result of its doing so. Many worthy claims have failed at various stages in the legislative redress process. Numerous bills to return Black Hills lands to the Lakota were brought

¹³¹ *Final Report of the Tuskegee Syphilis Study Legacy Committee*, May 1996, website of “Bad Blood: The Tuskegee Syphilis Study,” Historical Collections at the Claude Moore Health Sciences Library, University of Virginia, last accessed February 28, 2015, <http://exhibits.hsl.virginia.edu/badblood/report>.

¹³² *Preliminary Report of the Governor's Task Force to Determine the Method of Compensation for Victims of North Carolina's Eugenics Board, Pursuant to Executive Order 83*, January 27, 2012, http://www.sterilizationvictims.nc.gov/documents/preliminary_report.pdf.

¹³³ H.R. 40 is a longstanding Congressional bill to set up an investigative commission to study the possibility of reparations for slavery and Jim Crow, but it has never made it out of committee. H. Res. 3745, 101st Cong. (1989); H. Res. 40, 102th Cong. (1991); H. Res. 40, 103th Cong. (1993); H. Res. 891, 104th Cong. (1995); H. Res. 40, 105th Cong. (1997); H. Res. 40, 106th Cong. (1999); H. Res. 40, 107th Cong. (2001); H. Cong. Res. 452, 107th Cong. (2002); H. Res. 40, 108th Cong. (2003); H. Res. 40, 109th Cong. (2005); H. Res. 40, 110th Cong. (2007); H. Res. 40, 111th Cong. (2009); H. Res. 40, 112th Cong. (2011); H. Res. 40, 113th Cong. (2013); H. Res. 40, 114th Cong. (2015).

before Congress beginning in the mid-1980s, but without success.¹³⁴ 17 times throughout the 2000s, versions of the “Akaka Bill” were unsuccessfully introduced to give Native Hawaiians the rights of self-government, as well as to open negotiations between Native Hawaiians, the state of Hawaii, and the federal government regarding the “transfer of lands, resources, and assets dedicated to Native Hawaiian use.”¹³⁵ The California legislature passed two bills to study California’s involvement in “repatriating” persons of Mexican ancestry to Mexico during the 1930s, but both were vetoed by the governor. The Oklahoma Commission to Study the Tulsa Race Riot of 1921 issued a report in 2001 recommending reparations, but the legislature refused to act, though it had set up the Commission. Moreover, as with the courts, legislative redress can be arbitrary, with one reparations claim experiencing success, and a similar one failing. For example, reparations bills were passed for two military LSD test subjects, but virtually identical bills for three other military LSD test subjects fell flat—not to mention others who were denied by the courts but did not try or manage to get their bill sponsored. Memorial sites were sought for both the Sand Creek Massacre of 1864 and the Wounded Knee Massacre of 1890, arguably parallel events in American Indian history. Congress passed a bill creating the Sand Creek Massacre National Historic Site in 2000.¹³⁶ In the case of Wounded Knee, the Big Foot’s Claims Council (later the Wounded Knee Survivors’ Association) formed in 1901 for the purpose of obtaining redress, which resulted in subcommittee hearings, but no Congressional action, in

¹³⁴ S. 1453, 99th Cong. (1985); H. Res. 3651, 99th Cong. (1985); S. 705, 100th Cong. (1987); H. Res. 1506, 100th Cong. (1987); H. Res. 5680, 101st Cong. (1990).

¹³⁵ S. 2899, 106th Cong. (2000); S. 81, 107th Cong. (2001); S. 1783, 107th Cong. (2001); S. 746, 107th Cong. (2001); H. Res. 617, 107th Cong. (2001); S. 344, 109th Cong. (2003); H. Res. 665, 108th Cong. (2003); S. 147, 109th Cong. (2005); S. 3064, 109th Cong. (2006); S. 310, 110th Cong. (2007); S. 708, 111th Cong. (2009); S. 381, 111th Cong. (2009); H. Res. 862, 111th Cong. (2009); S. 1011, 111th Cong. (2009); H. Res. 1711, 111th Cong. (2009); S. 3945, 111th Cong. (2010); S. 675, 112th Cong. (2011).

¹³⁶ S. 2950, 106th Cong. (2000).

1938.¹³⁷ The claim was then unsuccessful before the ICC, and after the ICC's conclusion, numerous Wounded Knee Massacre bills were introduced, first concerning monetary reparations, and later concerning a historical memorial site, over a 20 year period. However, Congress never elected to move forward with any of the proposals.¹³⁸

Furthermore, in spite of the legislature not being beholden to a standard of legal liability, sometimes it may be influenced by it anyway. A committee report on a reparations bill on behalf of Lloyd Gamble, one of the LSD experimentees, contained a letter from the assistant attorney general stating that the FTCA "was passed by Congress largely because the legislative process is ill-suited to resolve individual personal injury claims," and that "the courts have uniformly held that the Federal Tort Claims Act's limited waiver of sovereign immunity should be strictly construed."¹³⁹ The bill "would effectively bypass the Supreme Court decision in *Feres*... which holds that the United States has not waived sovereign immunity from suits by members of the military allegedly injured incident to their military service."¹⁴⁰ (Bypassing the judiciary was exactly the point!)

Also, though Congress has the power to design a comprehensive redress program, it also may fail to do so, especially for the more individuated harms: individuals are not a group and are unlikely to come together to campaign the legislature as one. In the recommendation section of

¹³⁷ Mario Gonzalez and Elizabeth Cook-Lynn, *The Politics of Hallowed Ground: Wounded Knee and the Struggle for Indian Sovereignty* (Urbana: University of Illinois Press, 1999), 141; Subcommittee on Indian Affairs, *Sioux Indians, Wounded Knee Massacre: Hearings Before the U.S. House Committee on Indian Affairs*, 75th Cong., 3rd sess., March 7 and May 12, 1938.

¹³⁸ S. 2900, 94th Cong. (1976); S. 3213, 102nd Cong. (1992); H. Res. 5856, 102nd Cong. (1992); H. Res. 2435, 103rd Cong. (1993); S. 278, 103rd Cong. (1993); S. 382, 104th Cong. (1995); and H. Res. 877, 104th Cong. (1995).

¹³⁹ *Report to Accompany H.R. 1009*, 104th Cong., 2nd sess., May 1, 1996.

¹⁴⁰ *Ibid.*

the Advisory Committee on Human Radiation Experiments Report, the Committee members considered “questions of remedies from the perspective of what, ethically, ought to be done,” recognizing that some of the remedies, “including financial compensation, may not be available under current federal law.”¹⁴¹ Their recommendation was as follows: “To the extent that such remedies are not available under current law, we encourage the administration to work with Congress to develop such remedies through legislation or other appropriate means.”¹⁴² There were approximately 4,000 radiation experimentees, but a bill for a program to pay reparations to all of them went before Congress and did not pass.¹⁴³ This is clearly suboptimal, and has the ability to undermine success of a reparative justice effort, even to a mere observer. As one journalist complained of a settlement package concerning a handful radiation experimentation claims, it is problematic “that the Government has so far decided not to mount a campaign to get the names of all those in the experiments and to notify them that they were subjects of radiation experiments.”¹⁴⁴

Most importantly, the legislative route may not be as expedient as it appears. It is incredibly difficult to campaign the legislature for redress. In an aptly titled book, *Achieving the Impossible Dream*, the imagery of the “lining up of different celestial bodies” is used throughout

¹⁴¹ *Final Report of the Advisory Committee on Human Radiation Experiments*, 492.

¹⁴² *Ibid.*

¹⁴³ H. Res. 2463, 104th Cong. (1995). To be fair, not all 4,000 experimentees would have necessarily qualified under the Committee’s recommendations; the Committee found (reasonably) that “even when the facts are clear and the identities of subjects known, financial compensation is [not] necessarily a fitting remedy when people have been used as subjects without their knowledge or consent but suffered no material harm as a consequence; the remedy that emerged as most fitting was an apology from the government.” *Final Report of the Advisory Committee on Human Radiation Experiments*, 515.

¹⁴⁴ Philip J. Hiltz, “U.S. to Settle for \$4.8 Million in Suits on Radiation Testing,” *New York Times*, November 20, 1996, <http://www.nytimes.com/1996/11/20/us/us-to-settle-for-4.8-million-in-suits-on-radiation-testing.html>.

to analyze the factors by which Japanese Americans obtained reparations.¹⁴⁵ As with the courts, the legislative redress process is slow-moving, and for older claims, reparations seekers die of old age at high rates over the course of it. Further, for many individuals and groups, the celestial bodies do not line up: no member of Congress is willing to support the bill, a sponsor does not have the backing of her peers, or the bill is vetoed. Often passing reparations legislation requires years and the dogged support of a solid contingency of long-term Congressional office holders who believe in the morality of reparations as much as the claimants do. Reparations claims *are* special interest claims, but coming from very ordinary citizens who usually do not have political connections or vast financial resources. A low-profile claim from a single individual is usually a low priority, hardly given more than a moment's consideration in committee. More visible claims seem to occupy the realm of symbolic, feel-good politics, with favored groups receiving favorable treatment. Internment reparations are widely celebrated, but there is a lingering suspicion among some that "reparations afforded decisionmakers an opportunity to point to a model minority that survived and flourished despite hardship."¹⁴⁶ Eric Yamamoto has argued that the model minority stereotype is damaging to Japanese Americans, and has expressed a worry about the impact of redress on relations with other groups: "Others might legitimately ask, why no reparations for the government-sanctioned enslavement of African Americans? Why limited reparations for some and no reparations for [other] Native Americans deprived of land and culture? Why no reparations for Native Hawaiians despite the illegal government-assisted overthrow of the Hawaiian monarchy?"¹⁴⁷ This does not mean that internment reparations should

¹⁴⁵ Maki, Kitano, and Berthold, *Achieving the Impossible Dream*, 16.

¹⁴⁶ These are the words of Eric K. Yamamoto in "Friend, Foe, or Something Else: Social Meanings of Redress and Reparations," *Denver Journal of International Law and Policy* 20 (1991-1992): 223-242, 231.

¹⁴⁷ *Ibid.*, 237

not have been paid—on the contrary—but Yamamoto’s sentiment should give us pause. If reparations claimants must go before the legislature to obtain redress for their claims to have a chance at success, is it satisfactory that only certain groups have been successful? Indeed, some use this logic to argue against reparations generally, expressing a concern that paying redress to any given group will open a Pandora’s Box of grievances. However, that the validity of reparations claims requires demonstrable present-day harm considerably limits the number of potentially eligible claims.

If the legislature were to a commit to a norm of redress, paying reparations to those with valid claims as a matter of principle, then there would there would be little further issue. The main problem with the legislative road to redress—namely, that it casts away too many valid claims—would be dealt with. Of course, if a group needs broader recognition of their claim’s legitimacy, getting the public on their side and going before the legislature is still the best option. But overall, in the words of Donald Barry and Howard Whitcomb: “Special legislation is an uncertain and unreliable device that leaves the principle of broad government immunity in place.”¹⁴⁸ For the vast majority of cases, it would be best to have a specific body created that combines the advantages of the judiciary and the legislature, institutionalizing a norm of redress and embodying it.

6.4 The Case for a Federal Reparations Commission

The Court of Federal Claims (formerly the Court of Claims) has been mentioned a few times in this chapter. It is a specialized court that exists largely to hear claims based on the Tucker Act—by and large, claims concerning contracts and eminent domain. A great deal of lore

¹⁴⁸ Donald D. Barry and Howard R. Whitcomb, *The Legal Foundations of Public Administration*, Third Edition (Lanham, MD: Rowman & Littlefield, 2005), 260.

surrounds the court. Set up as “a practical negative upon that vicious maxim, ‘the sovereign can do no wrong’,” as characterized by one lawyer in 1855,¹⁴⁹ an informational brochure about the Court describes it as a place where “the federal government stands as the defendant and may be sued by citizens seeking monetary redress.”¹⁵⁰ As the brochure continues, “For this reason, the Court has been referred to as the ‘keeper of the nation’s conscience’ and ‘the People’s Court.’”¹⁵¹ No matter “the nature of the claim, the notability of the claimant, or the amount in dispute, the Court of Federal Claims acts as a clearing house where the government must settle up with those it has legally wronged.”¹⁵² It is “the institutional scale that weighs the government’s actions against the standard measure of the law and helps make concrete the spirit of the First Amendment’s guarantee of the right ‘to petition the Government for redress of grievances.’”¹⁵³ The lofty self-understanding that the Court of Federal Claims presents to the world is captured by an 1866 quote by Abraham Lincoln etched in big block letters on the walls of the court’s lobby: “It is as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals.”¹⁵⁴

Most reparations lawsuits do not go before the Court of Federal Claims, as actions based on the FTCA are not within its specialized jurisdiction. In at least one case, the 2004 Indian

¹⁴⁹ Quoted in Newell W. Ellison, “The United States Court of Claims: Keeper of the Nation’s Conscience for One Hundred Years,” *George Washington Law Review* 24 (1956): 251-266, 252.

¹⁵⁰ *The United States Court of Federal Claims: The People’s Court* (Washington, D.C.: U.S. Court of Federal Claims, 2007), http://www.uscfc.uscourts.gov/sites/default/files/court_info/Court_History_Brochure.pdf.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ Abraham Lincoln, “First Annual Message to Congress,” December 3, 1861, in *The Collected Works of Abraham Lincoln*, Vol. 5, ed. Roy P. Basler (Rockville, MD: Wildside Press, 2008), 35-53, 44.

boarding school reparations lawsuit, the plaintiffs tried their luck in the Court of Federal Claims, but were told (among other things) that because they were making a tort claim, they had gone before the wrong court.¹⁵⁵ Few cases heard before the Court involve actual injustice; almost all involve routine claims for compensation.¹⁵⁶ But the rhetoric found in the Court of Federal Claims brochure points to the aspirational idea of an institutional order in which there is a forum in which non-notable claimants can hold the government to account, a democracy in which the government *does* see it as its duty to render justice against itself—promptly no less—in favor of citizens. My proposal is for a permanently-instituted Federal Reparations Commission that aspires to this ideal, and that exists in order to bind a government that claims its legitimacy in liberal democratic principles to its higher political purposes.

Why a Reparations Commission should be a commission rather than a court should already be evident from the discussion of the Indian Claims Commission. Its procedures should be non-adversarial, with an aim to determine not legal liability, but moral responsibility. Reparations claimants could, of course, still go before the legislature or opt for traditional litigation. But a Reparations Commission would provide a markedly more attractive option if claimants do not have the political clout or resources to lobby Congress, or else do not wish to go through a grueling adversarial process, cannot afford lawyers, or know that there is no claim based on legal liability. Considerations of sovereign immunity would be irrelevant to a Reparations Commission, as no liability determination is being made. Moreover, though there are good reasons for statutes of limitations in a legal context, an ideal moral statute of limitations

¹⁵⁵ As the judge ruled, the “physical, sexual, and psychological abuse claimed by the plaintiffs in this case, even if true, consists of tortuous actions not remediable by this court.” See *Zephier*, No. 03-768L (Fed. Cl. 2004).

¹⁵⁶ ICC cases transferred to the Court of Federal Claims after the ICC ended are the exception.

on a claim is no doubt much longer than its ideal legal equivalent.¹⁵⁷ In the existing system, claimants may not bring a reparations claim immediately because they perceive that the odds of success are slim, and feel powerless against the Leviathan. In many cases, claimants come forward when the media turns its attention to the harms they have endured, suggesting that popular opinion has come around to support the moral core of the claim, and stirring hope in the real possibility of justice. A Reparations Commission would be available to claimants seeking prompt justice for recent state-sponsored wrongdoing, as well as to claimants looking for a resolution to older claims.

Ideally, a Reparations Commission would operate in a series of stages. First, the Commissioners would examine a claim that has been filed, seeing whether there is sufficient evidence as to its moral and factual validity—not all claims will be worthy. From there, the Commissioners would organize an investigative body: perhaps a combination of Reparations Commission officials, members of the group who made the claim, and/or persons with in-depth knowledge of the claim's subject. The investigative body could do site visits, conduct public hearings, carry out original research, call upon experts, and so on, with the aim of writing a report. In the tradition of *Personal Justice Denied*, a report would contain the investigation team's recommendations for monetary and/or tailored reparations, the form (i.e., individual or group payments), and the amount. Next, the Reparations Commissioners would bring in the claimants or representatives of the claimant class to discuss the proposals and resolve any issues. Finally, there is the matter of redress itself. It could be wise to give Reparations Commissioners the discretion to award up to a certain amount for claims against the federal government without

¹⁵⁷ Rodney C. Roberts, "Another Look at Moral Statute of Limitations on Injustice," *Journal of Ethics* 11 (2007): 177-192, makes the even bolder claim that there should be no moral statute of limitations on injustice.

the need for Congressional approval. The Commissioners might apologize on the federal government's behalf, or else coordinate an apology by the President or Congress on the same day that a reparations decision is announced. If reparations are sought for state-level injustice, the Reparations Commission should be able to involve state-level officials in both the investigative process and decisions concerning the payment of reparations, since reparations would come from the individual state's coffers. If a tailored form of reparations is sought, whether at a state or federal level—for instance, the restitution of sacred lands, the memorialization of a historically significant site, etc.—the Reparations Commission might serve as a go-between and means of advocacy for claimants who have gone through the Commission's process, working with the appropriate body of government to make good upon the resolution agreed to by the Commission and the claimants.

In the United States, we do not lack the experience or equipment to authorize and implement a Reparations Commission. The idea of “alternative dispute resolution” has thrived in recent years as a substitute for litigation.¹⁵⁸ The notion of an investigative body whose aim is to issue a report with recommendations builds off of successful reparations processes that taken place through Congress. Having a specialized institution devoted to reparations claims draws from the wisdom of specialized administrative bodies and boards, both in the domestic sphere (e.g., the former Indian Claims Commission, the National Labor Relations Board) and internationally (e.g., the Inter-American Commission on Human Rights). Whereas the legislature is necessarily general, a specialized institution would be able to develop an expertise in the

¹⁵⁸ See, e.g., Derek C. Bok, “A Flawed System of Law Practice and Training,” *Journal of Legal Education* 33 (1983): 570-585; Jethro K. Lieberman and James F. Henry, “Lessons from the Alternative Dispute Resolution Movement,” *University of Chicago Law Review* 53 (1986): 424-439; Kenneth R. Feinberg, “How Can ADR Alleviate Long-Standing Social Problems,” *Fordham Urban Law Journal* 34 (2006): 785-796.

particular kind of individual-government interaction that takes place when reparations claims are aired. The mandate of a Reparations Commission would be to excel at being responsive to reparations claims, treating claimants with respect, and implementing a process that satisfies the moral goals of reparative justice.

Reaching the decision to award reparations, however, is not all that reparative justice requires. A well-designed, well-implemented reparations program is needed if reparations are to go to more than a small number of payees. A program with gaping deficiencies can undermine reparative justice, from the standpoint of claimants and the public alike. To take one example, the first ten years of the Radiation Exposure Compensation Act (RECA) program—which, again, provided redress to uranium miners and Atomic Veterans—have been widely decried because many with legitimate claims were turned away.¹⁵⁹ Presumably on principle, so that legal fees would not consume the entirety of a RECA award, lawyers were not allowed to accept more than \$10 for helping a claimant fill out a form. But since a large number of the claimants who had developed radiation-associated cancers during their years of uranium mining were illiterate and poor, the forms were completely opaque to individuals with valid claims. As the attorney from the Navajo uranium miners case assessed things, “They’ve put these people in a bureaucratic legal maze designed to prevent compensation to Navajo miners. There’s no pity for what happened to these people. No understanding. You have a compassionate program administered in an utterly uncompassionate manner.”¹⁶⁰ Indeed, many did not know of the RECA program at all. RECA underwent a major overhaul in 2000, which included changing the \$10 rule to a 10

¹⁵⁹ Doug Brugge and Rob Goble, “The Radiation Exposure Compensation Act: What is Fair?” *New Solutions* 13 (2003): 385-397.

¹⁶⁰ Keith Schneider, “A Valley of Death for the Navajo Uranium Miners,” *New York Times*, May 3, 1993, <http://www.nytimes.com/1993/05/03/us/a-valley-of-death-for-the-navajo-uranium-miners.html>.

percent rule, and since then, the program has gotten better results.¹⁶¹ At the same time, the “Pigford” program, set up to pay redress to black farmers, allowed attorneys to assist claimants. This was abused, however, when at least one lawyer travelled around to African American churches and essentially fed individuals lines to write on the forms.¹⁶² Since discrimination claims are extremely hard to verify—USDA officials unsurprisingly did not record their denying farm loans and subsidies to individuals on the basis of their being black—the program was rife with fraud.¹⁶³ Pigford became even more of a scandal, and a liability for the Obama administration, when the decision was made to create three more programs to pay redress to American Indian, Latino and Hispanic, and women farmers, without evidence that there were more than a handful of individuals belonging to each group who had experienced discrimination in the manner of the Pigford plaintiffs.¹⁶⁴ As few individuals have come forward to claim payments, some suspect that the expansion of the Pigford program was motivated by a desire to curry favor with minority voters.¹⁶⁵ Sadly, there *is* well-documented historical evidence bearing out the validity of the black farmers’ redress claim: USDA discrimination has colossally

¹⁶¹ Brugge and Goble, “Radiation Exposure Compensation Act,” 393. The 10 percent rule was invalidated in *Hackwell v. United States*, 491 F.3d 1229 (10th Cir. 2007). See “Expenses and Costs under Radiation Exposure Compensation Act,” website of RECA Compensation Program, Department of Justice, last accessed February 27, 2015, <http://www.justice.gov/civil/common/reca>. Here I make a judgment call that is worth disclosing. It seems clear that the uranium miners and Atomic Veterans experienced injustice at the hands of the government in a way that fits the definitions outlined in Chapter 5. However, there is a third group that can apply for a payment through RECA if they or a deceased relative developed cancer: the “downwinders,” that is, persons living in communities surrounding nuclear weapons production sites. I consider the health effects experienced by downwinders a tragedy but not an injustice; there was no attempt to exploit these individuals in the way that their “human guinea pig” counterparts were exploited. Payments are still warranted, but for the same reason that they are warranted in the case of the Texas Disaster.

¹⁶² LaFraniere, “U.S. Opens Spigot.”

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

¹⁶⁵ See, e.g., Ross Kaminsky, “The Pigs of Pigford,” *American Spectator*, April 30, 2013, <http://spectator.org/articles/55683/pigs-pigford>.

impacted the lives of albeit a relatively small number of individuals.¹⁶⁶ But the reparations claims of the black farmers will probably never recover from their disrepute.

Lawyers or no lawyers? How to protect against fraud in an individual reparations payment program without turning away valid claimants? These are questions more for practice than theory, and speak to the need for an institutional setup that is likely to, with time and experience, come up with viable answers. A Reparations Commission should thus operate alongside a federal bureau that specializes in designing and implementing reparations programs. For individual reparations payments, each program would need its own criteria for determining who qualifies as a payee, what documentation they are required to provide, a transparent claims process, a strategy for finding worthy payees who are unaware of the program, and protections against fraud. A group reparations payment would require a different structure, with an aim of choosing and delegating responsibility to reparations trustees, who in turn would be charged with setting up programs and projects to benefit disadvantaged group members.¹⁶⁷

Overall, I think that few would question the appeal of the proposal for a commission and bureau devoted to the work of reparative justice over the existing option of reparations claimants going before the judiciary. Objections might arise that, due to the existence of a Federal Reparations Commission, the courts would be unwilling to resolve claims that are viable enough on a liability standard for the government to settle, or to reform the existing law of sovereign immunity. But there would still be plenty of valid compensation claims, many involving

¹⁶⁶ The extremely well-researched book by Pete Daniel, *Dispossession: Discrimination Against African American Farmers in the Age of Civil Rights* (Chapel Hill: The University of North Carolina Press, 2013), is persuasive on this point. It is interesting that even though Daniel's focus is black farmers, he mentions poor white farmers who were discriminated against at several points throughout the book. It is unsatisfactory from the standpoint of reparative justice for these individuals to have been left out of the redress program.

¹⁶⁷ See Chapter 7 for more details and the argument for this.

constitutional torts against the government, that founder in the existing system and speak to the need for sovereign immunity's reform.¹⁶⁸ Moreover, though some might think that reparations claimants as litigants are deserving of McDonald's hot coffee-esque paydays, this has never happened in the existing system. The *Cobell* settlement might have seemed like an enormous sum—again, \$3.4 billion—but given the sheer number of members of the claimant class, it is not an outlandish amount. Moreover, had the federal government not spent over 13 years defending itself against the *Cobell* plaintiffs, funds for an even higher level of redress, enough to actually change the life prospects of individual American Indian families, might have been available.¹⁶⁹ The *Cobell* plaintiffs and the Department of Interior agreed that over the history of the Dawes Act trust, \$13 billion was deposited that Interior could not account for—*before* interest.¹⁷⁰ Surely absent litigation, more than \$3.4 billion could have been found for the claimants.

The strongest objection comes from a comparison of the proposal for a Reparations Commission to direct legislative action. In the previous section, the legislative route to redress was considered mostly in pragmatic terms. However, one might believe that, on principle, all reparations claims are political matters, and that political matters should directly traverse the legislature. This is due to the fact that different people have different political goals that sometimes come into conflict with one another: in a democracy, the legislature is the branch of government most representative of the popular will.¹⁷¹ Take the example of the debate over

¹⁶⁸ For example, James Levine, "Federal Tort Claims Act," proposes an administrative body with the power to award compensation for tort claims against the government. This reform idea would fit in nicely with the present proposal.

¹⁶⁹ Merjian, "Unbroken Chain of Injustice," 646 *et passim*.

¹⁷⁰ House Committee on Resources, *Can a Process Be Developed to Settle Matters Relating to the Indian Trust Fund Lawsuit?: Hearing before the Committee on Resources*, 108th Cong., 1st sess., July 9, 2003.

¹⁷¹ Jeremy Waldron, "The Core of the Case against Judicial Review," *Yale Law Journal* 115 (2006): 1346-1406.

abortion. One side claims that women have the right to make choices about their own bodies, and the other side claims that a fetus has a right to life.¹⁷² One might reasonably think that it may not have been appropriate for the Supreme Court to have ruled on the abortion question, as a democratically-elected legislature is best equipped to conduct a rich ethical debate about how we should live together.¹⁷³ Similarly, one might think that all reparations claimants should bring their claims before the court of public opinion, directly persuading the people as to the moral validity of their claim.

In the case of *Cato*, the court did in fact insinuate that, as a matter of principle, Congress is the appropriate site for slavery reparations due to the democratic nature of the legislature. However, *Cato* is the exception rather than the rule. Judges do not usually bring up the connection between the legislature and the democratic will if they direct reparations seekers to Congress. In the case brought by Navajo uranium miners, the court sent the plaintiffs to Congress not because their case should be resolved politically on principle, but simply because the judiciary could not both award redress and follow the law. “This tragedy of the nuclear age... cries for redress. Such relief should be addressed by the Congress,” said the district court.¹⁷⁴ The appeals court affirmed: “this is the type of case that cries out for redress, but the courts are not able to give it; Congress is the appropriate source in this instance.”¹⁷⁵ Still, one might hold that the decision whether to pay redress should be politically determined, and debated by the legislature and members of the public as such. To this my response is threefold. First, a

¹⁷² *Ibid.*, 1346.

¹⁷³ *Ibid.*, 1385 *et passim*.

¹⁷⁴ *Begay*, 591 F. Supp. at 1013.

¹⁷⁵ *Begay v. United States*, 768 F.2d 1059, 1066 (9th Cir. 1985).

Reparations Commission would have to be authorized by the legislature. Creating a new institution of this kind would foster debate around the general question: Should liberal democracies adhere to a norm of redress, and make it a goal to pay reparations for all claims that are valid, or not? Second, there is a place for the public in the investigative process. Extremely innovative deliberative mechanisms have been developed in recent decades to make public forums more democratic, and these sorts of techniques can be used to organize meaningful debate between the supporters of a particular reparations claim and critics.¹⁷⁶ Third, we can look to the experience of reparations seekers who have gone before the legislature, and see that the democratic debate generated by the prospect of legislative redress often is not as rich, and does not receive near the attention, as one might like. There are exceptions, of course. Internment redress for Japanese Americans was prominent; a few state-level reparations claims, like eugenical sterilization reparations in North Carolina and reparations for the Rosewood Race Riot in Florida, were as well. But many reparations programs enacted by the legislature were accompanied by almost no debate: rich debate unfolds only if the public takes notice, and often the public does not. Nevertheless, the existence of a reparations commission would not preclude a group who would receive public attention (and whose claim would benefit from it) from targeting Congress for passing reparations legislation.

My aim in this section has been to lay out the case for a Federal Reparations Commission, and only a sketch of the institution has been provided. Further matters of institutional design would need to be worked out if the political will emerged for a better way of

¹⁷⁶ Archon Fung, "Survey Article: Recipes for Public Spheres: Eight Institutional Design Choices and Their Consequences," *Journal of Political Philosophy* 11 (2003): 338-367.

handling reparations claims. I doubt that there is such a will now.¹⁷⁷ Though I believe that most Americans would consider the majority of reparations claims that I have discussed here to be morally valid, unsatisfied reparations claims are not a political issue area to which voters pay heed. Each particular reparations claim and program enjoys some degree of media attention, but incidents thereof are infrequent enough that it is doubtful that the public registers taxpayer-funded payments to uranium miners with cancer, to families of the victims of the Kent State shootings, to American Indian IIM account holders, and to veterans who served as human guinea pigs for CIA-led LSD experiments as a distinct set of political phenomena, and worthy of consideration as such. But when the *Washington Post* or the *Cleveland Plain Dealer* or the *Los Angeles Times* tells the story of some person or persons deeply harmed by power's abuse, fighting a decade or more against Kafkaesque forces to hold to account a government that subscribes to liberal democratic ideals, I hope that this will trigger more than transient irritation on the part of the reader, and be recognized as part of a broader pattern of state unaccountability for injustice. From there, that the political will for a norm of redress will take shape is a matter of democratic faith.

6.5 Conclusion

A valid reparations claim emerges from a liberal democratic scandal. By means of the government's authority, things happened that should not have happened in a country that values liberty and justice for all. Sometimes the disgraceful nature of the injustice in question is evident to all right away. Sometimes it takes a while for the politically dominant class to appreciate what was so wrong with the injustice. But it should come as no shock that a government would ever

¹⁷⁷ See a brief discussion of this point in Rhoda E. Howard-Hassmann, "Getting to Reparations: Japanese Americans and African Americans," *Social Forces* 83 (2004): 823-840, 825.

act unjustly, operating on the prejudices and perceived interests of some individuals to the extreme detriment of others. Sovereign immunity, alas, “allows the government to violate the Constitution or laws of the United States without accountability,” as Erwin Chemerinsky succinctly puts it.¹⁷⁸ It is auspicious that the federal and state legislatures have proven themselves willing to make up for this accountability deficit, but we can do better, apologizing and paying reparations whenever power is abused. Though trying to make up for injustice is never as good as having prevented it, it is unrealistic to expect that angels will ever govern men. Given this, to borrow the words of Judge Lamberth regarding *Cobell*, we should view each reparations claim as a “reminder of the evils that result when large numbers of the politically powerless are placed at the mercy of institutions engendered and controlled by a politically powerful few,” a reminder “that even today our great democratic enterprise remains unfinished,” and a reminder “that the terrible power of government, and the frailty of the restraints of the exercise of that power, are never fully revealed until government turns against the people.”¹⁷⁹

Of course, when it comes to the circumstances that give rise to the black reparations claim (and to be fair, contra Lamberth, probably the *Cobell* case as well), at issue is not simply the unaccountable power of elites. The “politically powerful few” emerge from a benighted and hypocritical majority. Let us turn to the case for black reparations. The harm to which the black reparations claim refers is so great, and so quick to be rationalized away by the majority, that no court, and certainly no commission, would be up to the task of reparative justice. African Americans would have to appeal to the majority itself and win over their support.

¹⁷⁸ Erwin Chemerinsky, “Against Sovereign Immunity,” *Stanford Law Review* 53 (2001): 1201-1224, 1213.

¹⁷⁹ *Cobell v. Norton*, 229 F.R.D. 5, 7 (D.D.C. 2005), vacated sub nom. *Cobell v. Kempthorne*, 455 F.3d 217 (D.C. Cir. 2006). Quoted in Merjian, “Unbroken Chain of Injustice,” 609.

Chapter 7

The Case for Black Reparations

Hence whatever else the Negro stereotype might be as a social instrumentality, it is also a key figure in a magic rite by which the white American seeks to resolve the dilemma arising between his democratic beliefs and certain antidemocratic practices, between his acceptance of the sacred democratic belief that all men are created equal and his treatment of every tenth man as though he were not.

- Ralph Ellison, 1946 ¹

At no point have I made the claim that state power must be called to account for its own sake under all circumstances. If there were a case in which the government's accountability would have no benefit for the claimants, or if it would make their situation worse, I would not recommend seeking reparations out of stubborn adherence to principle. However, in the African American case, reparations are promising for at least two reasons. First, monetary redress could go a long way in alleviating some of the material inequalities that have resulted from state-sponsored injustice. Second, even though it is plausible to say that almost all Americans know about slavery, many have not thought critically or carefully about the role that twentieth century governmental policies and practices have played in preventing blacks from undergoing a trajectory of mobility that is similar to that of immigrant groups. Visible indices of racial inequality that all Americans have witnessed do not accord with deep-seated beliefs about America as the land of opportunity, so the inequality is too often explained away in terms of the self-defeating cultural practices of those who live in the inner city. There is much to be gained in delegitimizing this explanation, and the meaningful accountability embedded in the payment of reparations to African Americans has much potential in this regard.

¹ Ralph Ellison, "Twentieth Century Fiction and the Black Mask of Humanity," in *The Collected Essays of Ralph Ellison*, ed. John F. Callahan (New York: Modern Library, 2003), 81-99, 85.

The chapter begins with a discussion of affirmative action, arguably the most significant race-related policy of the past half-century. Implemented in various forms across different economic and educational spheres in the United States, affirmative action has often been justified with reference to the same sorts of arguments used by proponents of black reparations. Indeed, as I argue, affirmative action *did* try to rectify centuries of injustice in a way that was sensitive to one of the most troubling manifestations of the harms that African Americans experienced, the inaccessibility of decent employment and educational opportunities. But, one of the biggest issues with affirmative action is that its justification denied the political nature of black disadvantage, putting the blame almost entirely on society for its racial prejudice. While it held to account firms that discriminated invidiously, missing was accountability on the part of the state itself for a culture of racially stratified work that was the cumulative, self-compounding product of almost 200 years of racially unequal laws. Second, I lay out the case for monetary reparations to blacks as a group, and argue that “getting to reparations” will require a highly visible social movement devoted to the cause.² Third and finally, some have argued that distributive justice is the right way to contend with black disadvantage: not group-specific programs, and certainly not black reparations. However, I argue that a group reparations award to African Americans need not—indeed, should not—exclude non-blacks who live in neighborhoods targeted for reparative justice efforts. Moreover, Martin Gilens has persuasively demonstrated that even though redistribution in America is low, Americans adhere to beliefs indicating an overall commitment to distributive justice.³ Poor whites and immigrant groups

² I use the phrase of Rhoda E. Howard-Hassmann, “Getting to Reparations: Japanese Americans and African Americans,” *Social Forces* 83 (2004): 823-840.

³ Martin Gilens, *Why Americans Hate Welfare: Race, Media, and the Politics of Antipoverty Policy* (Chicago: University of Chicago Press, 1999).

whom critics worry would be left out of reparative justice would in fact greatly benefit from a measure able to discredit the white misconception of inner city blacks as the “undeserving poor.”

7.1 Affirmative Action as a Redress Program

Perhaps for their deep appreciation of the morality of *ubi jus ibi remedium*, lawyers and legal academics are on average much more sympathetic to the black reparations claim than the general American public. As any two minute look at the literature would confirm, an overwhelming majority of authors who have argued for black reparations are law professors. In the *Harvard Law Review* in 2001, an anonymous note was published containing the following claim: “Advocates of African-American reparations face the same basic challenge as any group seeking reparations: seeking redress from a majority group that is reluctant to relinquish any of its institutional, social, or economic power. *But those who claim African-American reparations must overcome the additional hurdle of the commonly held public belief that society is already paying a debt, through welfare and race-preference programs, that it should not be obliged to pay in the first place.*”⁴ Is it actually unfair that African Americans should be singled out to justify the case for black reparations in light of other policy measures aiming to benefit blacks?

I do not think that it is. Generally speaking, there are at least two senses in which a theoretical account might be guilty of being ahistorical. One is to theorize about ideals in a vacuum, ignoring history because paying attention to it muddies the attempt to understand concepts. The other is to be selectively history-conscious in diagnosing a problem, paying attention to those real world events that the ahistorical ideal theorist seems to flagrantly ignore, while at the same time, disregarding history when it comes to advocating a particular solution.

⁴ “Bridging the Color Line,” *Harvard Law Review* 115 (2001-2002): 1689-1712, 1696. My italics.

The second trap of ahistoricism is one into which many reparationists fall.⁵ Accounts of reparations often ignore that since at least 1965, the status of marginalized groups and past injustice has been at the center of popular debate over affirmative action. This is a debate that has been weighed in on by a large number of scholars and political actors who have never thought about monetary reparations in any serious way.⁶ Alfred Brophy has observed that the increased interest in black reparations in recent decades correlates with the curtailment of affirmative action.⁷ “So as courts restrict affirmative action and as it loses support in legislatures,” writes Brophy, “reparations offers the hope of a different language for talking about many of the same issues.”⁸ In this light, it seems more than fair to call upon reparationists to respond to the objection that a program to redress injustices against blacks has already been carried out.

On its broadest definition, “affirmative action” refers to efforts undertaken by private and public sector employers, as well as educational institutions, to provide employment and high-quality schooling for underrepresented groups. Once the idea is accepted that reparations can be material but non-monetary—land repatriation and other “tailored” forms of reparations—it seems apparent that a state might try to repair injustice by opening up opportunities to those

⁵ In my early thinking on the subject, I fell into this trap. I was largely persuaded to rethink my position by Olamide Olatunji, who wrote her senior thesis on reparations under my supervision and considered affirmative action a form of reparations. See Olatunji, “‘Black Is, Black Ain’t’: The Complication of Black Identity in the Allocation of Black Reparations” (senior thesis, Harvard College, 2014).

⁶ See Thomas Nagel, “Equal Treatment and Compensatory Discrimination,” *Philosophy & Public Affairs* 2 (1973): 348-363; Judith Jarvis Thomson, “Preferential Hiring,” *Philosophy & Public Affairs* 2 (1973): 364-384; Robert Amdur, “Compensatory Justice: The Question of Costs,” *Political Theory* 7 (1979): 229-244; Michael E. Levin, “Reverse Discrimination, Shackled Runners, and Personal Identity,” *Philosophical Studies* 37 (1980): 139-149; and the essays collected in *NOMOS XXXIII: Compensatory Justice*, ed. John W. Chapman (New York: New York University Press, 1991).

⁷ Alfred Brophy, “Some Conceptual and Legal Problems in Reparations for Slavery,” *NYU Annual Survey of American Law* 58 (2003): 497-556, 499. Cf. Richard A. Epstein, “The Case Against Black Reparations,” *Boston University Law Review* 84 (2004): 1177-1192, 1189.

⁸ *Ibid.*

denied it. My claim is this: in its heyday in the United States, what has been called “strong” affirmative action was in many ways a reparations program. Unlike “weak” affirmative action, strong affirmative action involved treating blacks preferentially in hiring, promotion, and admissions decisions, with employers and schools setting quotas, goals, and targets to increase the number of minorities.⁹ Weak affirmative action, by contrast, aims at diversity. At least on its face, it rejects the notion of preferential treatment: once the pool has been narrowed down to only the most qualified applicants, diversity is a valid consideration when choosing among comparable candidates.

Why might strong affirmative action, or preferential treatment, be understood as a tailored form of reparations? Generally speaking, tailored reparative justice involves a reflection on the nature of what happened and the specific harm that has resulted, and targets those areas wherein the harm is felt the most. Tailored reparations aim to be direct and expeditious. For example, with the Tuskegee syphilis study, individual reparations took the form of an apology, monetary payments, and lifetime free healthcare under the Tuskegee Health Benefits Program for the surviving victims and any family members who were infected with syphilis.¹⁰ The health care program is the tailored element of the Tuskegee reparations package: given that some of the participants were still alive and in need of treatment for syphilis when the study was exposed, it is fitting that the state should subsidize their medical needs. Similarly, some of the wives and

⁹ Louis P. Pojman makes the distinction between “strong” and “weak” affirmative action in Pojman, “The Case Against Affirmative Action,” *International Journal of Applied Philosophy* 12 (1998): 97-115. The definition of weak affirmative action, which Pojman defends against strong affirmative action, is broader than the one that I am giving here: “the dismantling of segregated institutions, widespread advertisement to groups not previously represented in certain privileged positions, special scholarships for the disadvantaged classes (e.g., the poor, regardless of race or gender), and even using diversity or under representation of groups or history of past discrimination as a tie breaker when candidates for these goods and offices are relatively equal.” *Ibid.*, 98.

¹⁰ Susan Reverby, *Examining Tuskegee: The Infamous Syphilis Study and Its Legacy* (Chapel Hill: University of North Carolina Press, 2009), esp. 13-28.

children of the participants were infected with syphilis; these individuals were for the most part too poor to afford high quality medical care on their own.¹¹ Combining tailored redress with symbolic and monetary redress is extremely attractive from the standpoint of accountability. By tailoring redress to the specific harm, the wrongdoer is actively trying to help those affected by its wrongdoing surmount the damage its actions caused. The syphilitic widow will not get her husband back, but she may be cured of syphilis, and this—along with her feeling that the government has done all that it could do in light of its wrong actions, and has treated her with respect throughout the reparative justice process—is the best that can be expected under such circumstances.

Like the Tuskegee Health Benefits program, affirmative action was a remedy tailored to the enduring effects of long-term injustice. In the Civil Rights era, one of the most visible manifestations of slavery and segregation was black unemployment and the relegation of employed blacks to the lowest rungs of the employment ladder. However, as affirmative action policy came into being, there were at least three different causes of black workplace and educational marginalization that were at play, some of which affirmative action addressed well, and some of which it did not.

The first cause was *direct discrimination* against blacks. Sometimes discrimination was overt, and sometimes it was subtle. Much of it took the form of white workers feeling insulted by the idea that a black worker could do their job, taking their own occupational positions to be

¹¹ Ibid.

degraded by the integration of blacks into the workplace, or else worrying that blacks would gain ascendance over whites.¹²

A second cause was that many employment-seeking blacks lacked the requisite education or training for the jobs they sought, or were encountering a concrete ceiling of historical precedent because no African American person had ever held a skilled position in a given company or industry. Segregation had thus created a *culture of racially stratified work*, with blacks excluded from the better paying, more rewarding jobs that ambitious and talented persons tend to seek.¹³

A third cause was a class of black individuals who were not employed, or whose employability prospects were not judged highly if done so from the standpoint of white middle class values. These individuals, usually living in crowded inner city neighborhoods or housing projects, were at the time often called “*the hardcore unemployed*.”¹⁴ (William Julius Wilson called this group “the truly disadvantaged”; Martin Gilens sardonically uses the language of “the undeserving poor.”¹⁵) In the mid-1960s, most employers did not consider taking it upon themselves to overcome the education and training gaps that seemed to them to be prerequisite to conscripting the hardcore unemployed into the workforce.

¹² Derrick A. Bell Jr., “Bakke, Minority Admissions, and the Usual Price of Racial Remedies,” *California Law Review* 67 (1979): 3-19, 13.

¹³ Generally, see Jacqueline Jones, *American Work: Four Centuries of Black and White Labor* (New York: W. W. Norton & Company, 1999).

¹⁴ John David Skrentny, *The Ironies of Affirmative Action: Politics, Culture, and Justice in America* (Chicago: The University of Chicago Press, 1996), 93.

¹⁵ William Julius Wilson, *The Truly Disadvantaged: The Inner City, the Underclass, and Public Policy* (Chicago: University of Chicago, 1987); Gilens, *Why Americans Hate Welfare*, Ch. 3.

How well did strong affirmative action address the relegation of blacks to the margins of the economic sector when it came to these three causes? To answer this question, it is necessary to delve into affirmative action's complex history. When affirmative action came into being, many assumed that antidiscrimination was what the letter of the 1964 Civil Rights Act demanded.¹⁶ "Affirmative action" had none of the connotations that it has now; it was a term invented by one of President John F. Kennedy's speechwriters in a 1961 executive order whose meaning was intentionally left to be worked out in practice.¹⁷ And so, affirmative action in the early and mid-1960s meant state-level Fair Employment Practice Committees (FEPCs) and later the federal-level Equal Employment Opportunity Commission (EEOC) reviewing individual complaints on a case-by-case basis.¹⁸ Difficulties abounded with this method: the processing time was lengthy, complaints of discrimination against employers were difficult to prove, and finally, firms that discriminated the most blatantly were rarely subject to review.¹⁹ (Blacks tended to apply to places where they knew other blacks worked, and these were places less prone to racially discriminatory employment practices.²⁰) Moreover, the individual complaint method did little to combat the culture of racially stratified work. While the Civil Rights Act seemed to signify the doors opening for African American farmhands, maids, nannies, custodians, busboys, porters, and elevator operators to apply for well-remunerated skilled jobs in white-owned

¹⁶ For more on what antidiscrimination entails, see Owen Fiss, "Groups and the Equal Protection Clause," *Philosophy & Public Affairs* 5 (1976): 107-177, 109.

¹⁷ Skrentny characterizes Executive Order 10925 as "wedded to [a] color-blind view of the world." Skrentny, *Ironies of Affirmative Action*, 7.

¹⁸ *Ibid.*, 114-115; Jones, *American Work*, 362.

¹⁹ Jones, *American Work*, 362.

²⁰ Skrentny, *Ironies of Affirmative Action*, 118-120.

companies, employers were being asked to judge mid-career black applicants based, for the most part, on their potential rather than on their having a relevant proven record. However, if blacks were in competition with whites who had employment experience related to the open position, it was hard to say that a given black applicant who had been thereto denied access to such work was “more qualified” than the white applicant. In terms of education credentials, the post-*Brown v. Board* education system was still fundamentally unequal, preparing many African Americans for little beyond the lowest ranks of employment.²¹ Perhaps more invidiously, it was easy for an employer to cite qualifications and credentials as an excuse to not be an industry trailblazer in terms of workplace integration, when the reason was more accurately a fear that clients and customers would perceive the measure as politically radical. And so, early antidiscrimination efforts did little to dismantle a hundred years of separate and unequal following the Civil War.

When two candidates were equally qualified, and one was white and one was black, or if a black candidate was less qualified than a white candidate, hiring the black candidate came to be known as a “racial preference.” The Civil Rights Act was unambiguous about *not* asking employers to give racial preference to blacks. “Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title,” as Section 703 (j) went, “to grant preferential treatment to any individual or to any group... on account of an imbalance which may exist.”²² Under the Johnson administration, the practice of racial preferences came into being because, even though the Act did not *require* racial preferences, it did not seem to *prohibit* them, at least according to early

²¹ J. Harvie Wilkinson characterizes 1955-1959 as a period of “absolute defiance” with respect to school integration; 1959-1964, by contrast, was a period of “token compliance.” Wilkinson, *From Brown to Bakke, The Supreme Court and School Integration: 1954-1978* (New York: Oxford University Press, 1979), 78.

²² 42 U.S. Code § 2000e-2.

interpretations by the Supreme Court. The individual complaint method of affirmative action underwent a transformation into a system of quota- and target-based racial preferences for blacks, something that tangibly combatted a culture of racially stratified work and was powerful in forming a new black middle class. How did this happen, given the letter of the law?

In his thorough study, John Skrentny provides an answer: administrative pragmatism.²³ In the mid-1960s, the EEOC was backlogged with more complaints than it could process; it was understaffed, underfunded, and its slow processing time was a favorite topic of journalists.²⁴ Racial quotas were so far from being on the political radar of the Johnson administration that, as Skrentny points out, a domestic policy adviser wrote a memo in 1966 containing fifteen different proposals to improve nondiscrimination in employment, and not a single one referred to racial goals or quotas.²⁵ And yet, that same year, EEOC adviser Alfred Blumrosen ushered in an era of what we now know as affirmative action by requesting “racial reporting” forms to be sent out to firms under EEOC jurisdiction in order to determine which employers were “underutilizing” black workers.²⁶ By construing “underutilization” as “discrimination,” and by taking action on a firm-by-firm and industry-by-industry basis rather than a complaint-by-complaint basis, the EEOC suddenly had the upper hand on employers, who could no longer point to the credentials of a given black applicant as a reason for choosing his white counterpart. If a firm was underutilizing black workers in the most desirable ranks of employment, then it was up to the firm to provide job training to make up the qualification gap. Otherwise the EEOC could—and

²³ Skrentny, *Ironies of Affirmative Action*, 125.

²⁴ *Ibid.*, 122-126.

²⁵ *Ibid.*, 126.

²⁶ *Ibid.*, 127.

did—say that firms were discriminating against black workers. The logic of this caught on quickly among civil rights leaders. “Companies have to make a conscious effort to make up for the past injustices,” as Marion Berry put it.²⁷ Racial reporting forms thus put the onus entirely on employers—including the federal government, which also began subjecting its own hiring practices to scrutiny—to rectify racially stratified workplaces.

It is not hard to see how the “underutilization” theory of discrimination quickly brought about the voluntary use of racial quotas and preferences by employers. On the basis of the racial reporting forms, the EEOC could compile data on different industries by their geographical location, and report back to employers about their “index of utilization” when it came to minority hiring.²⁸ What, then, were employers to do? The answer that came from above was simple: whatever employers dreamed up. As Office of Federal Contract Compliance director Edward C. Sylvester Jr. said in 1967, “There is no fixed and firm definition of affirmative action. I would say in a general way, affirmative action is anything that you have to do to get results.... Affirmative action is really designed to get employers to apply the same kind of imagination and ingenuity that they apply to any other phase of their operation.”²⁹ And so, employers began hiring minority candidates in large numbers for positions that had been previously only held by whites, enacting affirmative action plans that contained hiring targets and goals as evidence of their non-underutilization of black workers. Universities began reserving fixed numbers of spots to ensure that enough minority applicants would gain admission each year. “Set-asides” were used to give preference for government contracts to minority-owned firms. If blacks lacked the

²⁷ Quoted in *Ibid.*, 129.

²⁸ *Ibid.*, 133.

²⁹ *Ibid.*, 135.

specified qualifications, then at first it seemed that “anything that you have to do to get results” meant training programs. However, in addition to training programs, it also soon meant relaxing the qualifications themselves. At issue in the *Griggs* case, decided by the Supreme Court in 1971, was the fact that job applicants at the Duke Power Company were required to have a high school diploma and pass an IQ test.³⁰ In a unanimous decision, the Court determined that these criteria had a disparate impact on blacks. As the justices interpreted the Civil Rights Act of 1964, “practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”³¹ The Court’s *Griggs* ruling, however, was in tension with the colorblind language of the Civil Rights Act—it was not difficult for whites to look to the Act and claim reverse discrimination based on the Court’s theory, since blacks who had not been able to make it above the bar that had thereto been used to select candidates were suddenly being hired for jobs that had previously gone to whites. If blacks were being hired and promoted to jobs on the basis of their skin color, this meant that whites were not receiving job offers and promotions on the basis of the fact that they were not black, amounting to discrimination, which the Civil Rights Act forbade.³² Nevertheless, in spite of the letter of the Act, reverse discrimination cases that came before the Supreme Court over the course of the early- and mid-1970s were victories for affirmative action proponents.

³⁰ *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

³¹ *Griggs*, 401 U.S. at 430.

³² For a related discussion of how the Fourteenth Amendment was construed to forbid reverse discrimination, see Fiss, “Groups and the Equal Protection Clause,” 108-129.

The most important and pivotal reverse discrimination case, decided in 1978, was *Regents of the University of California v. Bakke*.³³ With *Bakke*, the rationale underlying affirmative action began to undergo a shift. The plaintiff, a white man named Allan Bakke, had applied to medical school at the University of California-Davis, and barely missed the cutoff for automatic admission. The school had, however, reserved 16 of the 100 available spots for minorities through a special program. Though Bakke's grades and scores were well above those of the individuals receiving admissions through the program, Bakke did not qualify because he was white. Justice Powell was the deciding vote, and wrote an opinion holding the school's quota system to be unconstitutional, ordering Bakke's admission. It was permissible, however, to use race as one of many factors taken into account in making admissions decisions.

Significantly, the bulk of Powell's opinion was devoted to his rejecting the reparative ("compensatory") rationale for affirmative action. For a decade, affirmative action advocates had made reference to past injustices and the need for compensatory measures to bring about racial equality. Powell firmly rejected this argument, writing about the unfairness of "forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making."³⁴ For Powell, there was nothing particularly unique about the history of the minorities who were benefited by the Davis special program:

[T]he white 'majority' itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and

³³ *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). For a similarly-spirited discussion of the Powell opinion and Marshall dissent in *Bakke*, see Randall Kennedy, *For Discrimination: Race, Affirmative Action, and the Law* (New York: Pantheon Books, 2013), Ch. 4. Kennedy's understanding of affirmative action as serving the aims of reparative justice is the basis of his defense of the practice.

³⁴ *Bakke*, 438 U.S. at 298.

nationality, for then the only ‘majority’ left would be a new minority of white Anglo-Saxon Protestants.³⁵

Powell went on to compare the *Bakke* case to related cases ruled on by the court where special measures had been upheld as narrowly tailored, appropriate remedies for “specific instances of racial discrimination.”³⁶ But “remedying of the effects of ‘societal discrimination’” was for Powell “an amorphous concept of injury that may be ageless in its reach into the past.”³⁷ The Court, Powell argued, had “never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations.”³⁸ Some degree of race-consciousness may be needed in admission, since the School of Medicine did have a legitimate interest in diversity, but a strict quota of 16 minority matriculates was not necessary to have a diverse class. A more holistic approach used by schools like Harvard was preferable: “the race of an applicant may tip the balance in his favor” once the pool was narrowed to the point where only qualified candidates remained.³⁹

Of the four dissenting justices, Justice Marshall’s opinion is worth noting.⁴⁰ Not only did Marshall explicitly reject Powell’s argument against the reparative rationale for affirmative action, his opinion narrated America’s racial history with an emphasis on the role that the laws of

³⁵ *Bakke*, 438 U.S. at 295-296.

³⁶ *Bakke*, 438 U.S. at 307.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Bakke*, 438 U.S. at 316.

⁴⁰ Justices Marshall, White, and Blackmun wrote opinions; Justice Stevens dissented but did not write a separate opinion.

the United States have played in subjugating blacks. The “implicit protection of slavery embodied in the Declaration of Independence was made explicit in the Constitution,” as Marshall wrote.⁴¹ States followed the federal government’s lead in establishing “the machinery to protect the system of slavery through the promulgation of the Slave Codes.”⁴² Challenges ensued, but with the infamous *Dred Scott* decision, “the position of the Negro slave as mere property was maintained by this Court.”⁴³ In the aftermath of the Civil War, the peculiar institution was “replaced by a system of laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property.... The combined actions and inactions of the State and Federal Governments maintained Negroes in a position of legal inferiority for another century after the Civil War”⁴⁴ The responsibility of the Supreme Court extended beyond its *Dred Scott* decision; the Court interpreted the Civil War Amendments “in a manner that sharply curtailed their substantive protections,” maintaining that “Negroes who were excluded from public places suffered only an invasion of their social rights at the hands of private individuals,” and that “Congress had no power to remedy that.”⁴⁵ Most reprehensible was the Court’s decision in *Plessy v. Ferguson*: “In upholding a Louisiana law that required railway companies to provide ‘equal but separate; accommodations for whites and Negroes, the Court held that the Fourteenth Amendment was not intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two

⁴¹ *Bakke*, 438 U.S. at 389.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Bakke*, 438 U.S. at 390.

⁴⁵ *Bakke*, 438 U.S. at 391.

racism.”⁴⁶ Jim Crow laws were most notoriously associated with the South, but Marshall pointed out how “in many of the Northern States, the Negro was denied the right to vote, prevented from serving on juries, and excluded from theaters, restaurants, hotels, and inns.”⁴⁷ As America went to war to promote freedom abroad, “under President Wilson, the Federal Government began to require segregation in Government buildings; desks of Negro employees were curtained off; separate bathrooms and separate tables in the cafeterias were provided; and even the galleries of the Congress were segregated.”⁴⁸ *Brown v. Board*, and the series of court decisions leading up to it, “did not automatically end segregation, nor did they move Negroes from a position of legal inferiority to one of equality,” as Marshall wrote.⁴⁹ “The legacy of years of slavery and of years of second-class citizenship in the wake of emancipation could not be so easily eliminated.”⁵⁰ In brief, the “experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. *It is not merely the history of slavery alone, but also that a whole people were marked as inferior by the law.*”⁵¹

The usual characterization of the points of opposition between Marshall and Powell has to do with remedying historical injustice versus promoting diversity, and the fact that Marshall saw the American black experience as uniquely characterized by adversity and Powell did not. However, it is significant that, whereas Marshall emphasized the American legacy of state-

⁴⁶ *Bakke*, 438 U.S. at 392.

⁴⁷ *Bakke*, 438 U.S. at 394.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Bakke*, 438 U.S. at 400. My italics.

sponsored injustice against blacks, Powell almost always used the language of a “societal injury”⁵² and “societal discrimination.”⁵³ For Marshall, the distinctly *political* nature of black-white inequality, that the legal system had for so many years violated the basic rights of blacks, accounted for the state’s interest in affirmative action. But for Powell, because the School of Medicine did not have a history of discriminating that it was trying to make up for—it was less than a decade old⁵⁴—and because societal discrimination was, again, an amorphous concept, the Court’s job was to uphold the Fourteenth Amendment and the Civil Rights Act. This meant preventing the university from discriminating against the white man, Allan Bakke.

Diversity-based, “weak” affirmative action would continue in the majority of states for decades. Indeed, some would celebrate Powell’s opinion because it *did* hold race to be a valid factor in admissions decisions.⁵⁵ But Marshall’s powerful dissent notwithstanding, with *Bakke* an era of strong affirmative action, characterized by quotas and explicit raced-based preferences, had come to a close.⁵⁶

⁵² *Bakke*, 438 U.S. at 297.

⁵³ *Bakke*, 438 U.S. at 306, 307, and 310.

⁵⁴ *Bakke*, 438 U.S. at 272.

⁵⁵ Bell, “Bakke,” 18.

⁵⁶ With *Bakke*, quotas were unconstitutional for entities receiving public funds. In the 1979 *United Steelworkers* case, the Court held that private employers could use temporary quotas, and in the *Fullilove* case, it ruled minority “set-asides” to be constitutional, as per a Congressional piece of legislation, the 1977 Public Works Act—a rare case in which Congress actually weighed in on affirmative action. Still, the *Bakke* case is widely viewed as either the end, or else the beginning of the end, of an era of quotas, as well as the turning point from strong to weak affirmative action. See Jones, *American Work*, 362; Terry Anderson, *The Pursuit of Fairness: A History of Affirmative Action* (Oxford: Oxford University Press, 2004), 155-157. Labeling the fourteen years between the Civil Rights Act and *Bakke* as an era of strong affirmative action not only makes sense in terms of policies, but also in terms of results; it is generally accepted among affirmative action scholars that progress in integrating the workplace has stagnated since that era. For an empirical analysis, see Kevin Stainback, Corre L. Robinson, and Donald Tomaskovic-Devey, “Race and Workplace Integration: A Politically Mediated Process?” *American Behavioral Scientist* 48 (2005): 1200-1228.

The history of affirmative action as I have presented it here, with strong affirmative action as a kind of tailored form of reparations, is no doubt controversial. There are even shortcomings with the characterization based on my own theoretical analysis. First and most importantly, I have repeatedly maintained that reparations “call state power to account.” This formulation has the advantage of emphasizing that reparations are about accountability, a concept that is able to make sense of how, even if it is impossible to completely root out the lingering vestiges of wrongdoing, a meaningful response on the part of the wrongdoer is still owed. Also, the formulation emphasizes cases in which the wrongdoer is the state, and the unique damage that the abuse of political power is able to cause. However, if affirmative action had a “bureaucratic virgin birth,” as one 1960s journalist put it, how does it fit the pattern that seems to characterize all other reparations claims, with reparations claimants actually calling state power to account?⁵⁷ Second, if strong affirmative action *was* a form of reparations for state-sponsored injustice, doubt can be shed on the idea that reparations “came from” the state. Employers and schools, after all, devised their own affirmative action plans—for fear of being found as discriminatory by the EEOC at first, but many quickly demonstrated their commitment to affirmative action, and that they would continue using it in hiring, promotion, and admissions decisions voluntarily, even if this meant having to defend themselves before the Supreme Court.⁵⁸ All the while, the government treated itself as one employer among many. Third, strong affirmative action was not just for blacks. It was for members of other groups, particularly Latinos, and often for American Indians, Asians, and women as well. Many quota-based

⁵⁷ Anderson, *Pursuit of Fairness*, 197.

⁵⁸ *Ibid.*, 187. Indeed, Bell points out that in the *Bakke* case, minority rights groups did not want the U.C. Regents to take the case to the Supreme Court because they predicted an unfavorable outcome, yet the Regents were determined to defend their right to continue with the affirmative action program and optimistic about their prospects of success. Bell, “Bakke,” 5.

affirmative action programs, like the one at the UC-Davis School of Medicine, were willing to take any minority on its list. If there was an era in which the logic of affirmative action matched that of Justice Marshall's opinion, then why were other groups included? Finally, it may be controversial to characterize the era of strong affirmative action as concluding with *Bakke*. Does not diversity-based affirmative action result in racial preferences?

Let us respond to each of these issues in turn. First, I am persuaded to consider affirmative action a tailored form of reparations because even though Skrentny may be right that it was an administrative invention, reparative justice arguments were used before it came into practice and all along the way to justify it.⁵⁹ Something that Skrentny does not seem to consider is the possibility that the vagueness surrounding affirmative action could have been a strategy. Perhaps there were political reasons to leave it to firms to "invent" their own method of realizing the EEOC mandate rather than openly call for racial preferences. There was the language of Section 703 (j) to get around, a compromise to appease Congress's Southern segregationists, which unambiguously states that it does not *require* racial preferences.⁶⁰ In the absence of subsequent legislation authorizing the state to make employers and schools to use racial preferences, it would have been legally problematic for the Johnson administration to come out as directly mandating employers to desegregate workplaces through this mechanism. Yet it is apparent that the idea of racial preferences as a form of reparations was in the air in the early and mid-1960s. In the widely read 1963 book, *Why We Can't Wait*, Dr. Martin Luther King Jr. wrote of how "America must seek its own ways of atoning for the injustices she has inflicted upon her

⁵⁹ For more on the "remedy-for-past-discrimination justification," see Girardeau Spann, *The Law of Affirmative Action: Twenty-Five Years of Supreme Court Decisions on Race and Remedies* (New York: New York University Press, 2000), 6 *et passim*.

⁶⁰ Nancy MacLean, *Freedom Is Not Enough: The Opening of the American Workplace* (New York: Russell Sage Foundation, 2006), 71.

Negro citizens... as the practical and moral way to bring the Negro's standards up to a realistic level."⁶¹ America could take a lesson from India, King argued, where discriminating against the "untouchable" caste is a crime, and significant public funds were budgeted for housing and job opportunities in villages predominated by untouchables.⁶² "Moreover, the prime minister said, if two applicants compete for entrance into a college or university, of the applicants being an untouchable and the other of high caste," King wrote, "*the school is required to accept the untouchable.*"⁶³ That the reparative justice logic is at work in King's thought is unambiguous:

Few people consider the fact that, in addition to being enslaved for two centuries, the Negro was, during all those years, robbed of the wages of his toil. No amount of gold could provide an adequate compensation for the exploitation and humiliation of the Negro in America down through the centuries. Not all the wealth of this affluent society could meet the bill. Yet a price can be placed on unpaid wages. The ancient common law has always provided a remedy for the appropriation of the labor of one human being by another. This law should be made to apply for American Negroes. The payment should be in the form of a massive program by the government of special, compensatory measures which could be regarded as a settlement in accordance with the accepted practice of common law.⁶⁴

In his 1965 commencement address to Howard University, President Lyndon Johnson spoke of "the glorious opportunity of this generation to end the one huge wrong of the American Nation," and it is clear that he was referring to measures that his administration would take *beyond* the passage of the Civil Rights Act and the pending Voting Rights Act.⁶⁵ "Freedom is not enough,"

⁶¹ Martin Luther King Jr., *Why We Can't Wait* (New York: Signet Classic, 2000), 166.

⁶² *Ibid.*

⁶³ *Ibid.* My italics.

⁶⁴ *Ibid.*, 127.

⁶⁵ Lyndon B. Johnson, "To Fulfill These Rights," Commencement Address, Howard University, June 4, 1965, in *Public Papers of the Presidents of the United States: Lyndon B. Johnson, 1965, Volume II* (Washington, D. C.: Government Printing Office, 1966), 635-640, <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650604.asp>.

as Johnson stated. “You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please.”⁶⁶ Crucially, however, it is coherent to say both that many approved of affirmative action for reparative justice reasons, *and* that the practice thereof fell short of calling state power to account. The complete absence of the government’s accountability was precisely one of affirmative action’s major weaknesses. Nevertheless, at the time of the inception of the policy, the overriding argument for affirmative action clearly was not diversity or some instrumental benefit, but America’s dark racial history, and providing a remedy for centuries of the continual violation of basic rights. Of course, all that being said, recall the argument of Chapter 4: comprehensive reparative justice with the government’s meaningful accountability is unlikely in the immediate aftermath of a major legal change resulting from a social movement.⁶⁷ That the Civil Rights Act of 1964 was a transformative legal transition is undeniable, as it created a solid legal basis for ending de jure segregation that the *Brown* decision a decade earlier had not been able to provide. And so, though it would have been better had affirmative action debates been conducted on the plane of Justice Marshall’s argument in his *Bakke* dissent, with explicit reference to political injustice, it is not clear that this would have passed muster with white Southern Congressmen or their constituencies. The backdoor bureaucratic method it had to be.

Second, and relatedly, if strong affirmative action failed to call state power to account for the role that racially unequal laws had played in creating a racially stratified culture of work, did redress actually even come from the state, or did it come from society? At times, the federal government acted as if it was ordering a societally-based remedy for societal discrimination. But

⁶⁶ Ibid.

⁶⁷ See Chapter 4 of this dissertation.

though perhaps necessary in order to implement it, it was a weakness of strong affirmative action to have placed blame on employers for discriminating and underutilizing minority workers. That Justice Powell's rejection of strong affirmative action was based on an understanding of societal discrimination as "an amorphous concept of injury" irremediable under the Fourteenth Amendment is revealing. Societal discrimination *is* amorphous. But turning one's gaze to the government, one immediately sees "specific instances of racial discrimination," that is, specific moments in America's political history when the laws unambiguously subjugated blacks. The logic of strong affirmative action as a tailored form of reparations for state-sponsored injustice is compatible with the method that was used: it is perfectly legitimate to fashion a remedy for state-sponsored injustice that calls upon members of society to contribute in shouldering the burden. And after all, monetary reparations are funded by taxpayers; the state does not have separate coffers from which reparations for its injustice could be paid.

Third, what to make of the fact that affirmative action benefited other groups besides blacks? It was common in the 1960s—much more common than it is in today's post-*Bakke* age of diversity—to distinguish African Americans from other groups. In the Howard commencement speech, President Johnson compared the African American experience to the "experience of other American minorities" as involving "a valiant and a largely successful effort to emerge from poverty and prejudice."⁶⁸ But these other groups, said the president, "did not have the heritage of centuries to overcome, and they did not have a cultural tradition which had been twisted and battered by endless years of hatred and hopelessness, nor were they excluded—these others—because of race or color—a feeling whose dark intensity is matched by no other

⁶⁸ Johnson, "To Fulfill These Rights."

prejudice in our society.”⁶⁹ It was black anti-segregation activism that led to the Civil Rights Act; African Americans were the main group whom the Johnson administration and EEOC officials had in mind for being strong affirmative action’s beneficiaries. Debates over both the Act and affirmative action were overwhelmingly colored in black and white, as were Supreme Court decisions on the matter.⁷⁰ Nevertheless, the Civil Rights Act of 1964 always used the language of “race, color, religion, or national origin,” and in the section on equal employment opportunity, Title VII, it was “race, color, religion, *sex*, or national origin.”⁷¹ And so, affirmative action might be understood as a tailored form of reparations to blacks that other racial/ethnic minorities and white women benefited from. The levels of state-sponsored injustice experienced by other groups varies. Latino and Chicano workers mostly faced the kinds of societal discrimination that immigrant groups have always faced.⁷² American Indians experienced significant state-sponsored injustice, and women of all races had a legacy of gender-discriminatory laws to overcome as well. However, I doubt that most people were thinking about the political dimensions of the disadvantages leveraged upon these different groups. The passage from Johnson’s Howard commencement speech quoted just above characterizes the black experience as unique due to the level and longevity of prejudice, but with no mention of unjust laws. In the *Bakke* decision, Justice Powell’s claim, again, was that blacks were marginalized as

⁶⁹ Ibid.

⁷⁰ Typical were claims like that of the Court in the *Griggs* case: “If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited,” with no mention of any other minority group besides blacks. *Griggs*, 401 U.S. at 431.

⁷¹ 42 U.S. Code § 2000e-2. Jonathan Leonard points out that the inclusion of women in Title VII was “a misfired tactical maneuver by senators attempting to kill the entire bill.” Leonard, “Women and Affirmative Action,” *Journal of Economic Perspectives* 3 (1989): 61-75, 62.

⁷² Jennifer Lee and Frank D. Bean, *The Diversity Paradox: Immigration and the Color Line in Twenty-First Century America* (New York: Russell Sage Foundation, 2010).

a result of societal discrimination. If few people who took part in debates over affirmative action thought of it as redress for *political* injustice, it makes sense that other groups were quickly added in as beneficiaries. Indeed, the University of California Davis special medical school admissions program was for “Negroes, Mexican-Americans, American Indians, and Asians”—something that Marshall’s black-focused *Bakke* dissent all but ignored.⁷³

Fourth, just because Powell’s opinion struck down racial quotas and the reparative justice argument for affirmative action, this does not have to mean that tailored reparations for workplace and educational discrimination concluded in 1978. However, I would like to suggest that while reparative justice, no matter its form, is both forward- and backward-looking, diversity-based, “weak” affirmative action is forward-looking only.⁷⁴ As such, it is more closely related to distributive justice than reparative justice. For the most part—though this point is contentious among political philosophers, especially those in the “luck egalitarian” school—distributive justice does not lay out priorities for individuals on the basis of how individual circumstances came about. In real world distributive justice, information on present circumstances alone is needed to determine who should be the beneficiary of a program rationalized by distributive considerations. Diversity-based affirmative action does not take into account history; it just assumes that fairness demands that all members of a society or a community have a chance and place in a desirable career path or educational institution. In taking measures to ensure that a college class or a place of employment is not exclusively composed of white males, universities and firms are able to show to the outside world that they

⁷³ *Bakke*, 438 U.S. at 309ff.

⁷⁴ Some, like Paul Peterson, follow Justice Blackmun’s *Bakke* opinion and insist that the diversity rationale is a covert form of a quota, though Peterson himself admits that this is not a common perception on the part of the public. *Bakke*, 438 U.S. at 406; Peterson, “A Politically Correct Solution to Racial Classification,” in *Classifying by Race*, ed. Paul E. Peterson (Princeton, NJ: Princeton University Press, 1995), 3-17, 7-8.

take fairness seriously. Indeed, the movement, at least among university admissions committees, towards wanting greater socioeconomic diversity among matriculates indicates distributive justice concerns. Of course, most people making an argument for diversity-based affirmative action do not invoke notions of fairness or the justice of the distribution of desirable positions in society. Rather, pragmatic reasoning is used, and probably for pragmatic reasons. Diversity is strategically well-suited to put to rest claims that affirmative action involves reverse discrimination: if firms and educational institutions are benefited from the viewpoints of individuals from a wide array of backgrounds, then a white candidate cannot say that he has been discriminated against, since the minority candidate contributes something that he cannot.⁷⁵

The critics of monetary reparations for blacks often contend that America has already paid in the form of affirmative action (and sometimes, welfare programs as well). It is easy for reparationists to simply contend that, no, America has not paid its debts to blacks, and that affirmative action was not a form of reparations—insulted by the question, as was the author of the anonymous *Harvard Law Review* note that began this section. Though I believe that the contention that reparations to blacks have already been paid in the form of welfare rests on extremely shaky logical ground—it seems eminently clear that the rationale of public benefits programs derives from distributive justice *simpliciter*—I do not see why a reparationist should be able to avoid discussing affirmative action. To be fair, there are arguments against considering affirmative action a form of reparations, and I have tried to outline them here. But given its radical ambition of undoing a culture of racially stratified work, and bringing blacks and other groups into America’s lily-white universities and professional schools, I think that it is hard to deny that affirmative action, at least until *Bakke*, was undertaken in the reparative justice spirit.

⁷⁵ See *Bakke*, 438 U.S. at 316.

Ultimately, I am interested in defending the payment of monetary reparations to blacks *even though* there have been other efforts to make up for the toll of state-sponsored injustice.

Before moving to this argument, a few brief thoughts on reverse discrimination. At least during the era of strong affirmative action, any white who believed that he would have been hired, admitted, or promoted had he had dark skin was able to claim that he bore the burden of remedying injustice that he had no part in.⁷⁶ Indeed, affirmative action was deeply unpopular. As the *Bakke* case unfolded, the *New York Times* published an op-ed in favor of the minority admissions program, but had to own up to the fact that letters to the editor, hailing presumably from the *Times*' left-leaning readership, favored Bakke's admission 15 to 1.⁷⁷ Affirmative action proponents, of course, have always been quick to point out all the advantages that whites have had by virtue of their skin color: Ira Katznelson's book on race and social policy in the first half of the twentieth century is provocatively titled *When Affirmative Action Was White*.⁷⁸ Further, legacy admissions and veterans' preferences tend to favor whites, but are not merit-based. Other defenses focus on the idea that *no one* "deserves" *anything*: Judith Jarvis Thomson has argued that affirmative action "is not to make the young white male applicants themselves make amends

⁷⁶ Justice Powell thought this too, but he did not think that reverse discrimination charges applied to diversity-based affirmative action. See *Bakke*, 438 U.S. at 318: "...The applicant who loses out on the last available seat to another candidate receiving a 'plus' on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment."

⁷⁷ The *New York Times* op-ed, "Reparation, American Style," is discussed in Anderson, *Pursuit of Fairness*, 154. See also Jennifer Hochschild, *Facing Up to the American Dream: Race, Class, and the Soul of the Nation* (Princeton: Princeton University Press, 1995), 143-144, for the unpopularity of affirmative action with whites.

⁷⁸ Ira Katznelson, *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America* (New York: W. & W. Norton and Company, 2005).

for any wrongs done to blacks and women.... the job for which the white male competes isn't his, but is the community's."⁷⁹

Yet, while the white perception of affirmative action as being anti-meritocratic is often the focal point of affirmative action debates, a more worrying criticism is that the burden of the policy is unevenly distributed among whites.⁸⁰ Imagine what it would have been like if strong affirmative action were a monetary remedy instead of a job or a spot at a university: it would have been as if only particular whites, the ones who had narrowly missed out on an employment or educational opportunity, were being asked to personally hand over a reparations check to their black counterparts who made the cut, as if they were the only ones who had been unjustly enriched by historical injustice. Whites in industries in which blacks did not frequently seek employment, and whites at the upper levels of the income distribution into whose ranks blacks were not being promoted as frequently, did not have to "pay" at all. Had it been politically feasible for affirmative action to call state power to account, that is, for it to have unambiguously been a redress program for political injustice, this would have allowed for more creativity in how Americans talked about affirmative action. One might visualize President Johnson standing before the nation, explaining American political history in the language that Justice Marshall used in his *Bakke* dissent, and promising that the federal government would do all it could to repair the cumulative impact of American laws treating blacks unequally for most of the nation's history. But universities and firms would have to pitch in with the redress effort, since education and employment meant everything for advancement in American society, and provide

⁷⁹ Thomson, "Preferential Hiring," 382. Cf. Anita L. Allen, "Was I Entitled or Should I Apologize? Affirmative Action Going Forward," *Journal of Ethics* 15 (2011): 253-263.

⁸⁰ This does not mean that the burden of any reparations program needs to be split evenly among members of the dominant class, or members of society. Under a progressive taxation system, persons in higher income brackets will contribute more to a treasury that funds monetary reparations, and this does not seem especially problematic.

opportunities to blacks to make up for the state's unconscionable wrongdoing. Whites may have still grumbled. But it would seem hard to legitimately say that the logic of affirmative action was that marginal white candidates did not deserve an opportunity because they had benefitted from injustice. Again, given earlier arguments about the likelihood of meaningful redress in the aftermath of liberal democratic social transformation, it makes perfect sense that Johnson did not stand before the American people and talk about affirmative action in this way. In fact, it is remarkable that quota-based affirmative action took place at all, if only for a spell.

Was the era of strong affirmative action justified? In spite of its shortcomings—including issues that I have not brought up here, like the idea that affirmative action promotes tokenism,⁸¹ and what has been called the “stigma of undeservedness”⁸²—I believe that it was. To use the words of Randall Kennedy, “The racial homogeneity in key institutions that was so prevalent and taken for granted prior to the 1960s—all-white presidential candidates, all-white legislators, all-white firms, all-white university classes, all-white college faculties, all-white newsrooms, all-white police departments, all-white corps of military officers—is inconceivable today.”⁸³ The inconceivability of radical racial homogeneity today is a win for democracy. It is hard to imagine a remedy that would have had as much potential to greatly chip away at, if not dismantle, the American culture of racially stratified work.

⁸¹ Richard Delgado, “Affirmative Action as a Majoritarian Device: Or, Do You Really Want to Be a Role Model?” *Michigan Law Review* 89 (1991): 1222-1231; Richard Rodriguez, *The Hunger for Memory: The Education of Richard Rodriguez* (New York: Random House, 2005), 151-186.

⁸² Pojman, “Case Against Affirmative Action,” 99 *et passim*; Bell, “Bakke,” 18. Cf. Kennedy, *For Discrimination*, 9-11.

⁸³ Kennedy, *For Discrimination*, 240.

7.2 Monetary Reparations: Why and How?

I have tried to make the case for considering affirmative action a form of tailored reparations. The case could similarly be made for considering an era of court-ordered school desegregation as tailored reparations aimed at repairing a separate and unequal school system.⁸⁴ However, there is no issue in having tailored forms of reparations that are attune to the specific nature of the harm that state-sponsored injustice has caused, and monetary reparations to individuals or to the group. Contemporary reparations programs provide monetary reparations alongside more tailored modes of redress all the time—e.g., for the Tuskegee syphilis experiment and the Canadian residential school system. Though these two programs provided tailored and monetary reparations in a single package, there do not seem to be any significant philosophical obstacles to a time lag between tailored reparations to African Americans and monetary reparations.

Why should there be monetary reparations to blacks in the twenty-first century? To begin with, as strong affirmative action were taking place, state-sponsored injustices against African Americans took at least two new forms. First, there has been a worsening of urban residential segregation in the post-Civil Rights era: “No group in the history of the United States has ever experienced the sustained high level of residential segregation that has been imposed on blacks in large American cities *for the past fifty years*,” as Douglas Massey and Nancy Denton have written.⁸⁵ They argue that this is a result of taxpayer-funded highway and urban renewal

⁸⁴ It is worth noting that schools are more segregated today than they have been at any point in time since the end of the Civil Rights era. Erica Frankenberg, Chungmei Lee, and Gary Orfield, *A Multiracial Society with Segregated Schools: Are We Losing the Dream?* (Cambridge, MA: Civil Rights Project at Harvard University, 2003), 4.

⁸⁵ See Douglas Massey and Nancy Denton, *American Apartheid: Segregation and the Making of the Underclass* (Cambridge, MA: Harvard University Press, 1998). For an account that focuses more on political actors and less on political institutions, see Charles M. Lamb, *Housing Segregation in Suburban America Since 1960: Presidential and Judicial Politics* (Cambridge: Cambridge University Press, 2005). See also Jonathan Kaplan and Andrew Valls, “Housing Discrimination as a Basis for Black Reparations,” *Public Affairs Quarterly* 2 (2007): 255-273; Ta-Nehisi

programs targeting black neighborhoods that were sprawling in the “wrong” directions, channeling residents into high-density housing projects and intensifying segregation patterns in ways that abetted the intergenerational transmission of disadvantage.⁸⁶ A second significant development has been a “New Jim Crow” penal system.⁸⁷ In her “frontlash” theory, Vesla Weaver directly links the gains of the Civil Rights era to the skyrocketing incarceration rate in the decades that followed.⁸⁸ According to Weaver’s theory, when political elites find themselves on the losing side of a political contest, they became the entrepreneurs of a new issue that allows them to regain their dominance and recoup some of their losses.⁸⁹ On the heels of the Civil Rights Movement, Nixon declared that the “first civil right” was the “right to be free from violence,” and in a way that was completely unprecedented in American history, crime became a federal problem.⁹⁰ Weaver persuasively demonstrates that this had everything to do with race. Today one in three black men in their 20s is either in prison or on parole.⁹¹

Coates, “The Case for Reparations,” *Atlantic*, June 2014, <http://www.theatlantic.com/features/archive/2014/05/the-case-for-reparations/361631>.

⁸⁶ Massey and Denton, *American Apartheid*, esp. 55: “[B]lack critics complained that ‘urban renewal’ simply meant ‘Negro removal’ and the evidence largely bears them out.” Also see *Ibid.*, 56-58, 186-189.

⁸⁷ Michelle Alexander, *The New Jim Crow: Mass Incarceration In The Age Of Colorblindness* (New York: The New Press, 2012); see also Becky Pettit and Bruce Western, “Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration,” *American Sociological Review* 69 (2004): 151-169.

⁸⁸ Vesla M. Weaver, “Frontlash: Race and the Development of Punitive Crime Policy,” *Studies in American Political Development* 21 (2007): 230-265. Weaver’s characterization of her own theory is useful: “Instead of a bungee cord recoiling when stretched too far, we can think of frontlash as water moving swiftly through a path that eventually comes to an end, forcing the water to seek alternative routes or as a weed that after being killed by weed killer mutates into a new variety, becoming resistant.” Weaver, “Frontlash,” 238.

⁸⁹ *Ibid.*, 236.

⁹⁰ *Ibid.*, 249.

⁹¹ *Ibid.*, 230.

However, the case for monetary reparations to African Americans does not rest entirely on new events in a historical trajectory of state-sponsored injustice. Though these injustices should receive our attention because they are the most recent political abuses, there would still be a case for monetary reparations so long as American central cities remained disproportionately poor and black. Recall the three issues that African Americans faced during the Civil Rights era: direct discrimination, America's culture of racially stratified work, and the plight of the inner city black poor. While affirmative action did a lot to combat discrimination and to integrate the workplace, the "hardcore unemployed" were left behind then, and continue to be left behind.⁹² A line from *Why We Can't Wait* was extremely prescient: "We cannot tap the ghettos in order to screen out a few representative individuals," King wrote, "leaving others to wait in grim shacks and tenements."⁹³ Indeed, as Jennifer Hochschild has observed, "disparities within the black population are now vastly greater than they used to be and are arguably so great that well-off and poor blacks live in distinctly different worlds."⁹⁴ When it came to white collar work, the poor residents of the inner city usually did not have the education level or experience to be competitive. When it came to entry level jobs for which no formal training or background was needed, employers who did not directly discriminate nevertheless tended to assess job candidates on the basis of their perceived socioeconomic class, a phenomenon described by Joleen

⁹² A discussion of affirmative action's inability to effectively benefit the most disadvantaged African Americans appears in Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge, MA: Belknap Press of Harvard University Press, 1997), 334-340. Gutmann and Thompson argue that affirmative action and reparations "address different dimensions of the shared aim of overcoming racial injustice," and that the possibility of reparations does not "warrant rejecting preferential hiring unless a democratic government is actually prepared to institute a substantial reparations policy." *Ibid.*, 338-339. See also Andrew Valls, "Racial Justice as Transitional Justice," *Polity* 36 (2003): 53-71.

⁹³ King, *Why We Can't Wait*, 159.

⁹⁴ Hochschild, *Facing Up to the American Dream*, 4. More recently, see also Patrick Sharkey's bleak analysis of high poverty African American neighborhoods in *Stuck in Place: Urban Neighborhoods and the End of Progress towards Racial Equality* (Chicago: University of Chicago Press, 2013).

Kirschenman and Kathryn Neckerman in their essay, “We’d Love to Hire Them, But...”⁹⁵ King’s own proposal, in the spirit of the G.I. Bill of Rights for war veterans, was a “broad-based and gigantic Bill of Rights for the Disadvantaged” for America’s “veterans of the long siege of denial.”⁹⁶ To aid to those who carry the heaviest weight of America’s political history of race is similarly the purpose of monetary reparations.⁹⁷ Affirmative action, furthermore, did not make explicit reference to the American federal and state governments as agents of injustice. My claim is that all blacks, but especially the black poor, would benefit from the state’s accountability for the harms that racist laws have leveraged upon African Americans. And for reasons that I shall explain shortly, the non-black poor would benefit from this too.

Let us, then, get into the case for reparations. The most logical scope would be for unjust federal policies and practices throughout American history. State governments are no doubt highly complicit in political injustice against blacks. However, the federalist arrangement has been largely determined by decisions made at the federal level, along with the scope of powers left to the states. It is both reasonable and meaningful for the federal government to be accountable and pay reparations to African Americans for the political history of Justice Marshall’s *Bakke* dissent.⁹⁸

⁹⁵ Joleen Kirschenman and Kathryn Neckerman, “‘We’d Love to Hire Them, But...’: The Meaning of Race for Employers,” in *The Urban Underclass*, ed. Christopher Jencks and Paul E. Peterson (Washington D.C.: The Brookings Institution, 1991), 203-232.

⁹⁶ King, *Why We Can’t Wait*, 170.

⁹⁷ This is a common view among black reparations proponents. See, e.g., Randall Robinson, *The Debt: What America Owes to Blacks* (New York: Plume, 2001), 8.

⁹⁸ Monetary reparations to blacks as a group would not preclude claims for individuated harms to which a comparably small set of African Americans were or are subject.

There are various ways that a monetary reparations program could take place. The first is what King and other Civil Rights leaders, like Whitney Young, envisioned: an across-the-board government-led effort to end black disadvantage. In the 1960s, the comparison to the G.I. Bill was used frequently. Whitney Young used the language of an “immediate, dramatic, and tangible domestic Marshall Plan” which would have the goal of “closing the intolerable economic, social, and educational gap” separating blacks and whites.⁹⁹ The G.I. Bill/Marshall Plan analogy is revealing. Though local efforts would have to be harnessed to transform America’s racial landscape, King and Young both accepted that Washington would likely set the agenda. In many ways, then, the redress envisioned by the Civil Rights leaders would be a top-down effort.

More recently, however, legal scholars advocating black reparations—notably Robert Westley, Charles Ogletree, and Randall Robinson—have argued for a large, federally funded group reparations award that would be used for things like scholarships, human capacity-building programs, infrastructure investment, and economic development grants.¹⁰⁰ Westley and Ogletree have more specifically proposed that a group of democratically elected trustees oversee the use of the funds, addressing the problems faced by poor, segregated communities in a bottom-up, black-led effort.¹⁰¹ The details of this proposal would need to be worked out, but we might imagine that the reparations trustees would be chosen through a democratic process, and that there would be a charter and periodic elections. From there, trustees would use their mandate

⁹⁹ Whitney M. Young, *To Be Equal* (New York: McGraw-Hill, 1964), 27.

¹⁰⁰ Charles J. Ogletree, Jr., “Reparations for the Children of Slaves: Litigating the Issues,” *University of Memphis Law Review* 33 (2002-2003): 245-264; Robert Westley, “Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?” *Boston College Third World Law Journal* 40 (1998-1999): 429-476; Robinson, *The Debt*. See also “Bridging the Color Line”; Robert K. Fullinwider, “The Case for Reparations,” *Philosophy & Public Policy* 20 (2000): 1-8.

¹⁰¹ Ogletree, Jr., “Reparations for the Children of Slaves”; Westley, “Many Billions Gone.”

and the money to try to figure out some answers to albeit a difficult question: how to improve the situation of the truly disadvantaged?

In a country with a colonial past in which it is often in the interest of minority leaders to forge out partnerships with white elites, there is no doubt a strategic element in the idea of a domestic Marshall Plan/G.I. Bill. The idea would be more palatable to white elites (whether they are conscious of this or not), since redress efforts would ultimately take place through state agencies, and would therefore remain under state (i.e., mostly white) control. Aside from this, there are policy reforms that could be undertaken that need not necessarily make reference to state-sponsored injustice against blacks, but that the idea of reparations could spur along. If federal and state governments were sincere about the idea of improving the situation of the truly disadvantaged, these reforms could go a long way. However, they also might not, and it would be a cruel irony if a set of reforms meant to emblemize state power being held to account for racial injustice did no more than reproduce existing structures of racial domination. The trustee proposal has better symbolism, putting trust in black leaders—W. E. B. Du Bois’s “Talented Tenth”¹⁰²—to earn legitimacy with the truly disadvantaged, and use their skills and experience to design programs that could raise up the most marginalized black Americans. The most successful community-level transformations have benefitted from precisely this structure, with strong leadership uniting members of a community around a common mission. (Geoffrey Canada’s

¹⁰² As W. E. B. Du Bois famously proclaimed, “The Negro race, like all races, is going to be saved by its exceptional men.” Du Bois, “The Talented Tenth,” in *The Negro Problem: A Series of Articles by Representative Negroes of Today* (New York: James Pott and Company, 1903). In his later Marxist days, Du Bois seemed to realize that there was an elitist tinge to the Talented Tenth idea, and urged that even a poor individual could be exceptional in the sense that he described. Du Bois, *Dusk of Dawn: An Essay Toward an Autobiography of Race* (Oxford: Oxford University Press, 2007), 217. See Tommie Shelby, *We Who Are Dark: The Philosophical Foundations of Black Solidarity* (Cambridge: Harvard University Press, 2005), Ch. 2, for a good discussion of Du Bois’ Talented Tenth, black leadership, and the role of black solidarity in overcoming black disadvantage. See Hochschild, *Facing Up to the American Dream*, Chs. 6-7, for an empirical look at why privileged blacks help the struggling members of their race.

Harlem Children's Zone is one shining example;¹⁰³ also promising is the work of Hollis Roberts and Gregory Pyle as back-to-back chiefs of the Oklahoma Choctaw Nation.¹⁰⁴) Aiming to make the across-the-board reform dream of the Civil Rights leaders a reality, but carrying it out themselves, the trustees would be in a unique position to set up targeted initiatives in every urban community and rural area across the United States where poor blacks live in concentrated poverty. Nor is the idea unfamiliar to social scientists who work on urban poverty. Patrick Sharkey, in his recent book-length empirical study of immobility and race in inner city neighborhoods, sees "a sustained effort to reduce concentrated poverty by investing in neighborhoods" as the most promising possibility for combatting the issues that his analysis identifies.¹⁰⁵ To be sure, transformative change is not going to happen overnight. But black leaders, equipped with a mandate, funding, a strong sense of linked fate, and an appreciation of the gravity of overseeing a hard-won monetary reparations fund, would be in a better position than anyone to make a lasting difference in the lives of the truly disadvantaged.

How would America get to monetary reparations? This is not an easy question. I have argued that our existing American legal system does not provide redress for the majority of state-sponsored injustices, and a reparations commission could respond to the fact that it is not viable for most to obtain reparations from the legislative branch of government. However, state-sponsored injustice against blacks is unique for two reasons. First, many Americans, like Justice Powell in the *Bakke* decision, believe that all groups, including white immigrants, have

¹⁰³ Paul Tough, *Whatever It Takes: Geoffrey Canada's Quest to Change Harlem and America* (New York: Houghton Mifflin, 2009); Sharkey, *Stuck in Place*, 191-195.

¹⁰⁴ Valerie Lambert, *Choctaw Nation: A Story of American Indian Resurgence* (Lincoln: University of Nebraska Press, 2007).

¹⁰⁵ Sharkey, *Stuck in Place*, 139.

historically experienced high levels of discrimination, and that the African American experience is not particularly unique. This idea quickly leads to a prejudicial view that the social and economic position of poor blacks is of their own doing. This view is historically inaccurate and morally insensible: it is *the* benighted racial belief of today's whites. (And some blacks as well.) No sum of money awarded by a judicial commission would be commensurate with the social fruits of African Americans' doing what it would take to successfully obtain monetary reparations from Congress. Robert Westley has gone as far as arguing that legislative redress is worth fighting for even if the reparations campaign is ultimately unsuccessful.¹⁰⁶ Second, given today's benighted beliefs about black disadvantage, there would likely be widespread doubt on the part of whites as to the legitimacy of judicially-mandated, taxpayer-funded reparations, just as there was with affirmative action.¹⁰⁷ Here, pragmatism must prevail: nothing should be viewed as African Americans going behind closed doors to obtain monetary reparations. The struggle for monetary reparations should take place out in the open; white support should be directly fought for and won.

What would this actually look like? Recall the idea that legal change accompanied by moral learning on the part of the politically dominant class usually comes from social movements. A black reparations social movement ought to aim at winning over the American

¹⁰⁶ See Westley, "Many Billions Gone," 436.

¹⁰⁷ Consider the results of a June 2014 poll which asked Americans about their views on their country's legacy of slavery and segregation. To the question, "Do you think the impact of slavery is a major factor, a minor factor, or not a factor in lower average wealth levels for blacks in the United States today?," 51% of white Americans responded "not a factor," 27% "a minor factor," and 14% "a major factor." For blacks, the response ratios were almost exactly flipped. A similar question asked about "discrimination against blacks in the past" being a factor in lower average black wealth levels. For whites, the split was almost even, with 29% choosing "a major factor" as their response, 32% "a minor factor," and 32% "not a factor." 62% of blacks replied "a major factor," 25% "a minor factor," and 9% "not a factor." YouGov Poll, May 23-27, 2014, http://cdn.yougov.com/cumulus_uploads/document/ckcdgrxspy/tabs_OPI_1_discrimination_20140527.pdf. For black/white responses to questions about whether the government should apologize and/or pay reparations to African Americans, see Michael C. Dawson and Rovana Popoff, "Reparations: Justice and Greed in Black and White," *Du Bois Review* 1 (2004): 47-91.

public and getting Congress to pass a reparations bill.¹⁰⁸ The slogan, “Reparations for political injustice!” is viable as a rallying cry, and it would necessarily involve educating the American public about individual state-sponsored injustices, their impact on blacks, and the ways in which state-sponsored injustices have built upon each other cumulatively.¹⁰⁹ The movement discourse could center on debunking the idea that black reparations are for slavery, and on teaching Americans about the political history of the past hundred years.¹¹⁰ Movement participants would no doubt encounter the usual objections: Isn’t inner city culture to blame, with its teenage moms, absentee fathers, and drugs? Hasn’t America already “paid up” with affirmative action and welfare? My hands aren’t dirty, so why should I be penalized? Airing and responding to these objections should have an educative effect. Of course, it would be naïve to imagine that the public discourse triggered by a social movement is anything like linear philosophical argumentation; it is inevitably a messy mixture of ideas and claims that are rational and irrational, realistic and exaggerated. Marching, shouting, and the cultivation of concrete events to become political symbols are all part of contentious politics.¹¹¹ But if reparations discourse can successfully adapt itself to contentious political methods, it has the potential to bring about moral learning and make a lasting impact on the beliefs and attitudes of the politically dominant class.

For a black reparations movement to achieve its aim in America, a unanimous consensus on the part of the present-day American people as to the rectitude of the cause is not necessary.

¹⁰⁸ Robinson, *The Debt*, 108.

¹⁰⁹ See Howard-Hassmann, “Getting to Reparations,” 825-827.

¹¹⁰ Elizabeth Anderson, *The Imperative of Integration* (Princeton: Princeton University Press, 2010), 99-102, has a good discussion of the moral authority of social movements.

¹¹¹ Contentious politics is the subject of Charles Tilly, *Social Movements, 1768-2004* (Boulder, CO: Paradigm Publishers, 2004).

(It is not likely, either.) There would just have to be enough public support for a majority of members of Congress to be willing to vote for a reparations bill without fearing that they will alienate their constituencies—or even better, in order to please their constituencies. There is already a reasonable and moderate bill that Michigan’s Representative John Conyers Jr. has proposed every Congressional session since 1989.¹¹² Famously, the bill never leaves committee. H.R. 40, referring to the unfulfilled Reconstruction promise to freed slaves of “forty acres and a mule,” proposes a commission to study proposals for black reparations.¹¹³ Internment reparations to Japanese Americans were preceded by a commission of this kind, and it would be logical for a social movement devoted to black reparations to rally around the passage of H.R. 40.¹¹⁴ The anonymous *Harvard Law Review* note advocates an H.R. 40 commission because the commissioners would be able to educate Americans about the effects of slavery and Jim Crow, which then would lead to “a strong moral and economic claim for reparations,” but this gets the order wrong on my view.¹¹⁵ Some serious work on the part of reparationists would be needed to educate the public regarding the effects of the state-sponsored injustice *before* an H.R. 40 commission would have a chance at being set up. This educative work would in turn greatly enhance an H.R. 40 commission’s legitimacy.

¹¹² “Issues: Reparations,” from website of Rep. John Conyers Jr., last accessed December 26, 2014, <http://conyers.house.gov/index.cfm/reparations>.

¹¹³ *Ibid.*

¹¹⁴ Here I am indebted to the article by Coates, “The Case for Reparations.” The wisdom of rallying around H.R. 40 did not sink in until I read Coates’ powerful essay.

¹¹⁵ “Bridging the Color Line,” 1706. But the note does support “grassroots political efforts” to emphasize the forward-looking nature of the black reparations claims. *Ibid.*, 1703.

In the scholarly literature, reparations discourse often focuses on memory, chastising white Americans for “slavery denial,”¹¹⁶ for “willful national amnesia,”¹¹⁷ or for wanting to “erase slavery from the national conscience.”¹¹⁸ However, these sorts of claims are off base. The American people have not forgotten their country’s historical legacy of slavery and segregation. Rather, many whites have not thought deeply about this legacy as something that might still have a present-day impact, about how a system of racist laws might have effects beyond its formal duration, or about how racist laws might prevent persons marked by the ineradicable physical characteristic of skin color from assimilating into white American society as immigrant groups have done throughout history. Transforming Americans’ benighted attitudes towards poor African Americans would be the educative goal of a reparations social movement. Indeed, it is significant that affirmative action, again with its “bureaucratic virgin birth,” was not accompanied by popular mobilization. The backdoor policy only became a subject of public debate well after it was already underway. Even then, though op-ed writers never ran out of things to say about the subject, the beneficiaries of affirmative action never really took to the streets to advocate for their cause.

7.3 The Objection from Distributive Justice

At this point, it is worth considering an objection that cuts to the core of the black reparations claim. Some express the worry that black reparations would prioritize reparations claimants, whatever their socioeconomic class, to the poor. One answer to this has been

¹¹⁶ Charles J. Ogletree Jr., “Repairing the Past: New Efforts in the Reparations Debate in America,” *Harvard Civil Rights-Civil Liberties Law Review* 38 (2003): 279-320, 289.

¹¹⁷ Lawrie Balfour, “Unreconstructed Democracy: W. E. B. Du Bois and the Case for Reparations,” *American Political Science Review* 97 (2003): 33-44, 33.

¹¹⁸ Charles P. Henry, “The Politics of Racial Reparations,” *Journal of Black Studies* 34 (2003): 131-152, 132.

provided: a black reparations award would not be of material benefit to middle- and upper-class blacks;¹¹⁹ the whole point of reparations is to improve the situation of the truly disadvantaged.¹²⁰ But then it can be asked, why should the black poor get special treatment just because they are black? Blacks are a demographic minority in the United States, and in spite of having poverty rates that are twice that of whites, still are a minority of the nation's poor—around 23 percent.¹²¹ Theories of distributive justice claim that all disadvantaged persons are owed society's help. What disadvantaged blacks need, and what fairness demands, is anti-poverty programs and higher levels of redistribution in an inclusive distributive justice spirit.¹²²

Moreover, on some analyses, colorblind social programs are more realistically attainable than reparations. William Julius Wilson blames Americans' low support for redistribution on the unwillingness of the middle class to reduce its standard of living, and recommends colorblind policies that promote economic growth and full employment. Though some may worry about the color of poverty, Wilson repeatedly emphasizes that "the hidden agenda" motivating these policies is "to improve the life chances of truly disadvantaged groups such as the ghetto underclass by emphasizing programs to which the more advantaged groups of all races and class

¹¹⁹ I do, however, think that most middle- and upper-class blacks would benefit out of a sense of solidarity with the truly disadvantaged, and would feel morally vindicated in certain ways as well. The solidarity between middle- and upper-class blacks and the black poor is a major theme of Shelby, *We Who Are Dark*.

¹²⁰ Note that not all advocates of black reparations argue for a focus on the truly disadvantaged. See Boris Bittker, *The Case for Black Reparations* (Boston: Beacon Press, 2003). Granted, Bittker was writing a decade after the Civil Rights Act. But I think that reparations critics basing their arguments on distributive justice have a strong point on principle, though maybe not in practice, for reasons that I will argue in this section.

¹²¹ This statistic is for the year 2013. "Poverty Rate by Race/Ethnicity," Henry J. Kaiser Family Foundation, last accessed December 28, 2014, <http://kff.org/other/state-indicator/poverty-rate-by-raceethnicity>.

¹²² Richard Vernon, "Against Restitution," *Political Studies* 51 (2003): 542-557; Christopher Kutz, "Justice in Reparations: The Cost of Memory and the Value of Talk," *Philosophy & Public Affairs* 32 (2004): 277-312; Rhoda E. Howard-Hassmann, *Reparations to Africa* (Philadelphia: University of Pennsylvania Press, 2008); Nahshon Perez, *Freedom from Past Injustices: A Critical Evaluation of Claims for Intergenerational Reparations* (Edinburgh: Edinburgh University Press, 2012).

backgrounds can positively relate.”¹²³ Theda Skocpol similarly advocates universal programs that promote the interests and values of middle class whites.¹²⁴ A “broad political alliance” of middle class whites and the minority poor would create a force capable of upending the agenda of fiscal conservatives.¹²⁵ Social Security fits this model, and is widely seen as a success: “Americans will accept taxes that they perceive as contributions toward public programs in which there is a direct stake for themselves, their families, and their friends,” as Skocpol writes.¹²⁶ Even more forcefully, Paul Peterson argues that an excessive focus on race “led to a Civil War in the mid-nineteenth century and civil violence in the mid-twentieth,” thus “it is better that the significance of race in governmental decisions be disguised than made explicit.”¹²⁷

Some reparacionists might counter that universal programs do not require the state to be accountable to black reparations claimants, which only formal monetary reparations can provide. But that is not my response. There surely would be a way for the U.S. federal government to embark upon a sustained, radically redistributive, multifaceted anti-poverty program under the banner of distributive justice that all poor persons could benefit from, while at the same time, acknowledging that part of the program’s justification is the government’s accountability to blacks. Moreover, nothing about the idea precludes an educative reparations social movement: black reparations activists might reasonably advocate a radically redistributive anti-poverty program for all groups. And indeed, I would support a program like this if it were to become a

¹²³ Wilson, *Truly Disadvantaged*, 155.

¹²⁴ Theda Skocpol, “Targeting Within Universalism: Politically Viable Policies to Combat Poverty in the United States,” *Urban Underclass*, 411-436.

¹²⁵ *Ibid.*, 434.

¹²⁶ *Ibid.*, 432.

¹²⁷ Peterson, “Politically Correct Solution,” 16.

realistic political possibility—I would support it even if it was *not* accompanied by the state’s formal accountability.¹²⁸ Accountability is not an unqualified good, and it is not the highest-ranking good. The critique laid out in Chapter 2 of compensatory reparations, aimed at equalizing unjust historical inequalities, was not motivated by the idea that literal correction is inferior to accountability, but rather, that it is unrealistic. If distributive justice were capable of equalizing unjust inequalities, then it should be a top priority. However, I am deeply skeptical that the resources needed to implement a massive anti-poverty effort under a distributive justice banner would be allocated without the intervention of meaningful, deliberate reparative justice. The book *Why Americans Hate Welfare* is Martin Gilens’ response to Wilson, Skocpol, and other advocates of universal social programs.¹²⁹ Skocpol’s entire argument rests on the idea that universal programs have the greatest chance of winning middle class support, but when surveyed, middle class Americans say that the government should spend its resources helping the poor rather than the middle class.¹³⁰ And yet, Americans still hate welfare: in practice, social benefits programs aimed at helping the poor are tremendously unpopular. One common instinct to findings of this nature is the attribution of Americans’ opposition to redistribution to a strong individualistic ethos, but Gilens debunks this idea.¹³¹ An individualistic opposition to redistribution should apply across all situations, but the data show that “Americans *support*

¹²⁸ Not all reparationists would. “[A] program of black reparations,” as Bittker writes, “is a remedy for injustice, not a poverty program, and its objective would not be achieved by increasing public assistance or welfare benefits for everyone at the bottom of the economic ladder.” Bittker, *Case for Black Reparations*, 134.

¹²⁹ Gilens, *Why Americans Hate Welfare*, 41-45.

¹³⁰ *Ibid.*, 42.

¹³¹ *Ibid.*, Ch. 3, esp. 62-64.

government aid for those who are trying—but nevertheless failing—to make it on their own.”¹³² However, though Americans are not opposed to society’s helping those in need on principle, an overriding belief among Americans is that most people who receive public support do not really need it.¹³³ The trope of the black “undeserving poor” who aim to get by on the public dole because they lack a work ethic has always played a role in public debate concerning redistributive social programs, Gilens argues.¹³⁴ Journalists and politicians racialize poverty,¹³⁵ while whites greatly overestimate the portion of welfare recipients who are black.¹³⁶ The immediate picture of welfare fraud in the minds of many Americans is the black inner city “welfare queen.”¹³⁷ Why Americans hate welfare thus has everything to do with race: the “perception that blacks are lazy” is the “strongest determinant of whites’ beliefs about welfare recipients” and “a powerful influence on their preferences with regard to welfare spending,” as Gilens’ numbers show.¹³⁸ Indeed, the characterization of blacks as “intrinsically lazy” goes back

¹³² Ibid., 63.

¹³³ Ibid., Ch. 3, esp. 62-64.

¹³⁴ Ibid.

¹³⁵ Ibid., Ch. 5. The following observations are noteworthy: “From 1967, blacks averaged 57% of the poor people pictured in these three magazines [*Time*, *Newsweek*, and *U.S. News & World Report*—about twice the true proportion of blacks among the nation’s poor.” “Newsmagazine stories during 1972 and 1973 almost invariably referred to...the ‘welfare mess’... During 1972 and 1973 African Americans composed 76 percent of the poor people pictured in stories on...poverty-related topics.” “But poverty stories that focused on unemployment policy were illustrated predominantly with whites. The poverty-related coverage of unemployment in 1974 and 1975 dealt largely with government jobs programs and other efforts to ‘put America back to work,’ and only 37 percent of poor people pictured in these stories were black.” Ibid., 114, 122-124.

¹³⁶ Ibid., 138-140.

¹³⁷ Ibid., 67.

¹³⁸ Gilens, *Why Americans Hate Welfare*, 167. For more on “blacks are lazy,” see Jones, *American Work*, 385; Elizabeth Anderson, “The Social Epistemology of Morality: Learning from the Forgotten History of the Abolition of Slavery,” *The Epistemic Life of Groups: Essays in Collective Epistemology*, ed. Miranda Fricker and Michael Brady (Oxford: Oxford University Press, forthcoming).

to the early days of the American republic, and was used to justify slavery.¹³⁹ Whites who are suspicious of redistributive government programs feel *precisely* that there exists some sort of “hidden agenda” to help unemployed African Americans at the industrious wage-earner’s expense.

My hypothesis is this. So long as whites benignly (or hypocritically, as the Ellison quote that began this chapter seems to argue) attribute present-day black disadvantage to laziness and self-defeating cultural practices on the part of those who live in the inner city, there will be no large-scale programs whose hidden or unhidden agenda is to raise up the truly disadvantaged. White Americans’ beliefs about the reasons why blacks are disproportionately poor will continue *ad infinitum*, though ways of talking about “black culture” may become more and more coded as time wears on.¹⁴⁰ In such a climate, arguments from distributive justice that put all disadvantaged persons on an equal plane of moral desert are moot. But when it comes to debunking stereotypical, ahistorical explanations about the enduring disadvantages in poor black communities, monetary reparations are our best chance. This is because of what would be needed to achieve it—a committed black reparations social movement dedicated to educating Americans about the impact of racially unjust laws—and because of what the American government’s meaningful accountability would signify. As discussed in Chapter 2, the House and Senate have already issued apologies to blacks.¹⁴¹ A reading of American history wherein the political policies and practices of the U.S. government are responsible for enduring black disadvantage is

¹³⁹ Eugene Genovese, *Roll, Jordan, Roll: The World that Slaves Made* (New York: Random House, 1972), 298.

¹⁴⁰ See Wilson’s discussion of the reception to the Moynihan Report. Wilson, *Truly Disadvantaged*, 4-8, 15, 20). Cf. Daniel Patrick Moynihan, *The Negro Family: The Case for National Action* (Washington, DC: Office of Planning and Research, United States Department of Labor, 1965).

¹⁴¹ H. Res. 194, 110th Cong. (2008); S. Con. Res. 26, 111th Cong. (2009).

unambiguous in the text. However, many Americans do not know about the apologies. No doubt this is in part because the apologies were an elite effort, and not accompanied by an educative social movement capable of destabilizing racialized cultural depictions that perpetuate the stereotype of inner city blacks as the undeserving poor. No doubt this is in part because the apologies were not accompanied by reparations: talk is cheap, and we live in an age where there is a lot of talk. The power of the message notwithstanding, each apology was little more than a briefly newsworthy event. But if the American government were to pay reparations, and in doing so, meaningfully expressed its accountability to blacks for their subjection to a system of racist laws for most of American history, this would be a political event of enormous magnitude and a historical moment. One can only imagine the headlines across the globe: “AMERICAN GOVERNMENT PAYS REPARATIONS FOR LAWS ALLOWING SLAVERY, SEGREGATION, AND SUBSEQUENT ABUSES.” What political officials use their power to do is self-legitimizing; the law is unparalleled in its normative force and influence. The moment that America pays reparations would be continually available as a point of reference when subsequent debates over social policy hit up against racialized ideas about the undeserving poor. It is moreover possible to envisage that future generations will be socialized into a rather different understanding of American history than the one most people today subscribe to: blacks who live in concentrated poverty deserve the public’s attention, support, and empathy because their situation was borne out of racist political policies.

Of course, one of the things that may be fueling the distributive justice critique of black reparations is a concern about identity politics. A common refrain in social policy debates is that reparations claims are motivated by blacks placing undue blame on whites, the “convenient but nonexistent enemy,” playing the victim in order to exploit the lingering vestiges of racial

inequality.¹⁴² Even if one is not especially concerned about the psychological impact of the victim identity, one may still favor distributive justice due to the white *perception* that blacks are opportunistically dredging up the past, and the effect that this has on race relations.¹⁴³ I have argued time and again that political injustice is not the same as societal discrimination or chauvinism on the part of the politically dominant class—though there is an important way in which majoritarian attitudes can fuel the injustice of the state, we lose the ability to talk about the abuse of political power, and to say that there is something unique about the law and political authority, in making societal prejudice and state-sponsored injustice one and the same. It is, however, up to reparationists to convince Americans that blaming the (political) system is not opportunistic, but rather accurate, and that present-day white Americans are not being accused of having caused black disadvantage through their own racism. Once again, as Chris Rock reminds us, white people have gotten a whole lot nicer—this message should be proclaimed loudly by reparationists.¹⁴⁴ As for the other prong of the “playing the victim” critique, that reparations would be psychologically detrimental to poor blacks, I am dubious. Though much ado has been made about “oppositional culture” among inner city black teenagers, Jennifer Hochschild’s research shows that most poor blacks say that blacks *themselves* are responsible for their unequal

¹⁴² Hochschild, *Facing Up to the American Dream*, xvii. The “playing the victim” objection is the focus of Charles J. Ogletree Jr., “The Current Reparations Debate,” *U.C. Davis Law Review* 36 (2003): 1051-1072; see also Lawrie Balfour’s discussion in “Reparations After Identity Politics,” *Political Theory* 33 (2005): 786-811; and Howard McGary, “Achieving Democratic Equality: Forgiveness, Reconciliation, and Reparations,” *Journal of Ethics* 7 (2003): 93-113, esp. 100-101. Cf. John McWhorter, *Losing the Race: Self-Sabotage in Black America* (New York: Simon & Schuster, 2000); David Horowitz, *Uncivil Wars: The Controversy over Reparations for Slavery* (San Francisco: Encounter Books, 2002).

¹⁴³ See Glen C. Loury, “Transgenerational Justice—Compensatory Versus Interpretive Approaches,” in *Reparations: Interdisciplinary Inquiries*, ed. Jon Miller and Rahul Kumar (Oxford: Oxford University Press, 2007), 114-129.

¹⁴⁴ Frank Rich, “In Conversation with Chris Rock,” *Vulture*, November 30, 2014, <http://www.vulture.com/2014/11/chris-rock-frank-rich-in-conversation.html>.

status.¹⁴⁵ (Well-off blacks, by contrast, “see more racial discrimination than poor blacks, see less decline in discrimination, expect less improvement in the future, and claim to have experienced more in their own lives.”¹⁴⁶) Hochschild’s analysis is not specifically focused on political injustice, but it does suggest that poor blacks do not have a tendency to blame their situation on factors outside their control. Though reparations may change this, the change could go in either direction, and we do not actually know what the effect would be on the self-perception of poor blacks. An idea that conservative critics of reparations hardly ever discuss, however, is the idea that direct monetary reparations to blacks would render the victim card unplayable, since the government has already meaningfully demonstrated its accountability.¹⁴⁷

Let us close by addressing the concern that began this section—namely, the worry expressed by advocates of race-neutral distributive justice that it is not only politically unwise, but unfair to prioritize reparations claimants to other socioeconomically disadvantaged groups, even if the reparations claimants are poor. I have argued that if not for white paranoia about hard-earned salaries being used to bankroll blacks who are unwilling to work, Americans would be much more supportive of redistribution. This means that the racialized idea of the undeserving poor is a major impediment to redistributive social programs that would benefit other groups. This is not to put forth a blanket endorsement of all the usual social policies supported by Democratic politicians: the point is rather that, whatever form redistribution takes, white Americans’ attitudes towards blacks are determinative of white Americans’ attitudes towards the

¹⁴⁵ Hochschild, *Facing Up to the American Dream*, 83-84, also 106-108. Also see Anderson, *Imperative of Integration*, 82. Cf. the essays collected in *Minority Status, Oppositional Culture, and Schooling*, ed. John U. Ogbu (New York: Routledge, 2008).

¹⁴⁶ Hochschild, *Facing Up to the American Dream*, 73.

¹⁴⁷ See Roy L. Brooks, *Atonement and Forgiveness: A New Model for Black Reparations* (Berkeley: University of California Press, 2004), 202-203.

idea of redistribution, so all groups whom distributive justice theorists worry would lose out if there were black reparations are already losing out from a distributive justice point of view.¹⁴⁸

Moreover, almost no place in the country is one hundred percent African American, though many areas are extremely segregated. Economists have recently found that segregated, low-mobility communities hamper mobility even for individuals who do not belong to the group that is predominant in an area.¹⁴⁹ This finding suggests that a white or Latino person living in a poor, majority black neighborhood experiences the effects of state-sponsored injustice. He might live in this neighborhood for any number of reasons, but if his living there adversely affects his future mobility, as the economists predict it will, then he becomes ensnared in a web of the injustice of the state. In this light, it seems that a monetary reparations award to blacks as a group should be overinclusive in its use, used to benefit all truly disadvantaged persons who live in areas that are predominantly poor and African American. Even more strongly, it is reasonable to criticize a group that gets too caught up in identity politics, and to say that the spirit of reparative justice spirit would be comprised if a pre-Kindergarten program or an economic development fund excluded non-blacks living in black neighborhoods. These sorts of considerations were at play in the case of the Florida Seminole, who historically owned slaves. “Black Seminoles” were

¹⁴⁸ In the past few years, political scientists have empirically demonstrated how public support for the Affordable Care Act is racialized. See Benjamin R. Knoll and Jordan Shewmaker, “‘Simply un-American’: Nativism and Support for Health Care Reform,” forthcoming in *Political Behavior*, published online December 21, 2013, <http://link.springer.com/article/10.1007/s11109-013-9263-z/fulltext.html>; Angie Maxwell and Todd Shields, “The Fate of Obamacare: Racial Resentment, Ethnocentrism and Attitudes about Healthcare Reform,” *Race and Social Problems* 6 (2014): 293-304. Michael Tesler, “The Spillover of Racialization into Health Care: How President Obama Polarized Public Opinion by Racial Attitudes and Race,” *American Journal of Political Science* 56 (2012): 690-704, demonstrates that President Obama’s figurehead role has exacerbated the racialization of healthcare, as compared to debates during the Clinton era.

¹⁴⁹ Raj Chetty, Nathaniel Hendren, Patrick Kline, Emmanuel Saez, “Where is the Land of Opportunity? The Geography of Intergenerational Mobility in the United States,” NBER Working Paper No. 19843, issued in January 2014, <http://www.nber.org/papers/w19843>, 3 *et passim*.

granted tribal membership at an unknown date.¹⁵⁰ But in 2001, when the Seminole received reparations for the annexation of most of Florida in 1823, tribal leaders decided that the sum should be divided among only those who descended from the 1823 tribal members, which in turn pitted black Seminoles against “blood” Seminoles.¹⁵¹ Since some degree of identity politics is difficult to avoid when it comes to individual awards, this perhaps suggests that a group award may have been more appropriate. But either way, the Seminole should have been maximally inclusive about who counts as a reparations recipient; explaining reparative justice decisions that arise from a principle of maximal inclusiveness involves giving reasons that cannot be “reasonably rejected,” to use T.M. Scanlon’s language.¹⁵² And so, if a black reparations award were used to replicate the Harlem Children’s Zone program on the South Side of Chicago, it might be reasonable to focus only on the poorest areas, but not to exclude a poor non-black family.¹⁵³ Identity politics concerning who is and who is not a group member is precisely the sort of thing that makes some wary about the idea of monetary redress, but black reparations activists can try to put these worries to rest by committing to maximal inclusiveness at the outset in making the case for reparations.

¹⁵⁰ See William Glaberson, “Who Is a Seminole, and Who Gets to Decide?” *New York Times*, January 29, 2001, <http://www.nytimes.com/2001/01/29/us/who-is-a-seminole-and-who-gets-to-decide.html>.

¹⁵¹ Ibid.

¹⁵² T. M. Scanlon, *What We Owe to Each Other* (Cambridge, MA: Belknap Press of Harvard University Press, 2000).

¹⁵³ It would be acceptable to exclude the portions of Hyde Park where families of University of Chicago professors live, or setting income caps to determine eligibility for a program.

7.4 Conclusion

I have written about the role that a black reparations movement would have to play in achieving reparations and in ensuring that their educative function is meaningful and lasting. By way of conclusion, it bears mentioning that there already is a black reparations movement, an organization called the National Coalition of Blacks for Reparations in America (N'COBRA). At first the U.S. federal government was the focus of a slavery reparations lawsuit organized by N'COBRA members, but when the case was dismissed, it turned its attention to legal action against private companies whose histories revealed ties to slavery. Most prominently, a 2002 lawsuit was filed against Aetna, FleetBoston, and CSX: Aetna was listed as a defendant because it insured slaveholders for the lives of slaves; FleetBoston's corporate lineage revealed early links to the slave trade; and finally, slaves were used to build CSX rail lines.¹⁵⁴ This lawsuit too was dismissed, but not without a victory for the activists. Aetna issued an apology and the state of California created a "Slavery Era Insurance Registry."¹⁵⁵ State law requires an insurance company wanting to do business in California to disclose the names of any slaves for whom a slaveholder took out a life insurance policy, and submit insurance documentation concerning slaves found in its archives to the registry, which is available to the public.¹⁵⁶ Various kinds of disclosure laws have since been passed in the states of Illinois and Iowa, as well as in Detroit,

¹⁵⁴ Darryl Fears, "Seeking More Than Apologies for Slavery," June 20, 2005, *Washington Post*, <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/19/AR2005061900694.html>. See also Margalynne Armstrong, "Reparations Litigation: What About Unjust Enrichment?" *Oregon Law Review* 81 (2002): 771-782, 774, 777-778, and Paige Fogarty, "Speculating a Strategy: Suing Insurance Companies to Obtain Legislative Reparations for Slavery," *Connecticut Insurance Law Journal* (2002-2003): 212-241, esp. 220-224.

¹⁵⁵ "Testimony at the Chicago City Council Hearing on the JP Morgan Chase Manhattan Bank Merger," *Racism.org*, last accessed December 27, 2012, http://racism.org/index.php?option=com_content&view=article&id=536:repara30&catid=117&Itemid=140.

¹⁵⁶ "Slavery Era Insurance Registry," website of the California Department of Insurance, last accessed December 27, 2012, <http://www.insurance.ca.gov/0100-consumers/0300-public-programs/0200-slavery-era-insur/>.

Cleveland, Philadelphia, and several California cities wishing to broaden the reach of their state's insurance company disclosure law to all firms with historical connections to slavery.¹⁵⁷

Wachovia has admitted that its subsidiaries used slave labor to build railroads and accepted slaves as remuneration when borrowers defaulted, issuing a report and an apology.¹⁵⁸ J.P.

Morgan admitted to accepting slaves as remuneration for loan defaults as well as collateral on loans—for which it both apologized and voluntarily set up a scholarship fund worth \$5 million for black Louisianan students.¹⁵⁹ Finally, universities, most notably Brown, have voluntarily launched investigations and issued reports concerning their historical reliance on slave trade money.¹⁶⁰

There are points of contrast between the sort of work that the accountability-based theory of reparations calls for in the African American case, and N'COBRA's efforts in the past fifteen years. Targeting corporations for their involvement in slavery is not the same as targeting the U.S. federal government for an entire historical trajectory of injustice against blacks. To be fair, Deadria Farmer-Paellmann, an N'COBRA member who led the charge in the Aetna, FleetBoston, and CSX lawsuit, has stated that she “began focusing on corporations and private estates that were built on slavery, as targets for reparations demands” as a result of the “legal

¹⁵⁷ Carolyn Tyler, “SF Passes Company Slavery Era Disclosure,” *KGO-TV/DT*, October 31, 2006, <http://abclocal.go.com/kgo/story?section=news/local&id=4715192>.

¹⁵⁸ Katie Benner, “Wachovia Apologizes for Slavery Ties,” *CNN Money*, June 2, 2005, http://money.cnn.com/2005/06/02/news/fortune500/wachovia_slavery.

¹⁵⁹ Ken Magill, “From J.P. Morgan Chase, an Apology and \$5 Million in Slavery Reparations,” *New York Sun*, February 1, 2005, <http://www.nysun.com/business/from-jp-morgan-chase-an-apology-and-5-million/8580>.

¹⁶⁰ Brenda A. Allen et al., *Slavery and Justice: Report of the Brown University Steering Committee on Slavery and Justice*, October 2006, Brown University, http://brown.edu/Research/Slavery_Justice/documents/SlaveryAndJustice.pdf.

hurdles in litigating against the federal government, including sovereign immunity.”¹⁶¹ When Farmer-Paellmann originally came up with documentation revealing Aetna’s historical involvement in slavery, this was rightly characterized as a discovery; there was never any resentment against Aetna on the part of blacks until the slave life insurance policies began to receive media attention. The risk, however, is that this approach prioritizes symbolic conquests to lasting material improvements for the truly disadvantaged, and moreover that it involves shaming companies rather than educating Americans. The educative aspect is important. While many blacks have the sense that life under the American government has been unfair, missing from the American consciousness is how the present-day racial landscape has been shaped by the post-slavery legal system, and how segregation and anti-miscegenation laws prevented disadvantaged African Americans from integrating in the way that immigrant groups have and continue to be able to do. Alas, Charles Ogletree has characterized N’COBRA as not seeking “the endorsement of the majority of the American population or even the majority of the African American population.” “Reparations advocates are deeply committed to the goal of reparations for descendants of African slaves, and do not believe that popular acceptance of the effort can or should drive the movement,” Ogletree writes.¹⁶² Without an appeal to the American consciousness, without aiming for popular acceptance of black reparations, the movement is robbed off much of its potential impact and power.

“Four hundred years of sinning cannot be canceled out in four minutes of atonement,” as Martin Luther King Jr. wrote in *Why We Can’t Wait*.¹⁶³ Four minutes of atonement, however,

¹⁶¹ “Testimony at the Chicago City Council Hearing.”

¹⁶² Charles J. Ogletree Jr., “Tulsa Reparations: The Survivors’ Story,” *Boston College Third World Law Journal* 24 (2004): 13-30, 14.

¹⁶³ King, *Why We Can’t Wait*, 160.

has power beyond when the timer stops. One of the promises of black reparations lies in the unique nature and power of the state as the source of legitimacy and authority. There can be no greater testimony to the truth of the idea that the history of the black inner city—and indeed, the entire African American historical trajectory—is deeply political than the state’s accountability to blacks. The moment that reparations are paid will be remembered as one of the significant events of American history, a perpetual font that is able, again and again so long as is necessary, to discredit stereotypical renderings of black culture and character that serve to rationalize the blatant racial inequalities in our midst. I do not dispute that there may be backlash in the short-term, and I do not dispute that the battle will be hard-won. But this is a small price to pay for coming to account with the unconscionable abuse of power that has determined the contours of our nation’s racial landscape.

Chapter 8

Conclusion

In *The Color of Our Shame*, Christopher Lebron discusses a metaphor for democracy, that of being out at sea, and realizing that the ship is unlikely to make it to its destination. “What to do?” Lebron writes. “It is not as if one is going to go back to the point of origin sacrificing how far one has gone already. Once one has departed from a starting place that cannot meet our needs, on whatever grounds, it is incumbent that we move forward.” The ship must be repaired:

We continue building the ship at sea.... We build and patch mid-voyage.... We cannot abandon it for we all will drown. We improve it along the way, in fits and starts, with success and sometimes clumsily. I want to say, this is much the way a democracy works.”¹

It seems reasonable to consider the government’s unaccountability at the times when it matters the most morally as a fundamental flaw in the design of the ship. It is not the only flaw, but it is a critical one. In the preoccupation with the different parts of the vessel being evenly distributed and balanced against each other, the ship was designed with a hole in it. We Americans have been trying to patch up this hole over the course of the twentieth century and into the twenty-first. We have done so clumsily and on an as-needed basis, putting a plank here and a plank there, without ever really registering the size of the hole, or what its presence suggests of the ship.

For Lebron’s words conjure a rather different ship-at-sea metaphor, that of the Lockean tyrant-captain who sails to Algiers, where those aboard are fated to be made into slaves. In many ways the rhetorical climax of the *Second Treatise of Civil Government*, the imagery is used to

¹ Christopher J. Lebron, *The Color of Our Shame: Race and Justice in Our Time* (Oxford: Oxford University Press, 2013), 141.

illustrate the antithesis of rule according to the *salus populi* principle, and the epitomic situation in which the right of rebellion might be exercised.² A phrase that Locke employs in describing the ill-omened passengers' growing awareness of where they are headed, "a long Train of Actings shew the Councils all tending that way," prefigures what he says outright in the chapter that follows, "Of the Dissolution of Government":

But if a long train of Abuses, Prevarications and Artifices, all tending the same way, make the design visible to the People, and they cannot but feel what they lie under, and see whither they are going; it is not to be wondered, that they should then rouse themselves, and endeavour to put the rule into such hands which may secure to them the ends for which government was at first erected...³

For Americans, these are familiar words, in sentiment and part in diction.

As we know, the inhabitants of the Thirteen Colonies fought off the "absolute Despotism" of the British crown in the name of equality and unalienable rights. They proceeded to create a new constitutional order that legally sanctioned the enslavement of human beings.

With all the moral learning that has taken place in the interim, we egalitarian democrats have perhaps become a bit soft. When we consider the political injustices of America's short history in a sympathetic way, we are quick to talk about memory and identity, and all agree that, yes, historical consciousness *is* important to marginalized groups, and that we should do all the things that we, as a nation, can do to honor deserving memory-based claims. But the American aversion to political injustice, the deeply principled rejection of arbitrary rule, predates contemporary memory discourse, and finds its roots in our nation's founding. It is fitting that the leaders of a new country established under such rebellious circumstances would frame a constitutional order in view of safeguarding individual rights from the invasion of a too-powerful

² John Locke, "Second Treatise," in *Two Treatises of Civil Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), §210.

³ *Ibid.*, §225.

government—knowing from their own firsthand experience that “the injury of the private rights of particular classes of citizens, by unjust and partial laws” was forever a political possibility.⁴

When the members of the National Ex-Slave Mutual Relief, Bounty and Pension Association and the Big Foot’s Claims Council each went to Washington with their weighty grievances at the beginning of the twentieth century—not so very long ago—they did so as individuals who would not tolerate injustice, and who believed that they were entitled, given what America had been through and what it stood for, to have their grievances aired and responded to. They were not planning a rebellion. They just wanted civil justice. But those who occupied the ranks of government, in their benightedness and in their hypocrisy, were too morally insensate to give these and other worthy claims a fair hearing. Members of our generation should to be on guard against repeating the same mistakes.

Would routinely paying reparations for illiberal, undemocratic political policies and practices on its own be enough for the lofty ambitions of liberal democracy to be achieved? The answer is surely no. But a willingness to pay reparations for our not-so-distant systems of unjust and partial laws, and for discrete wrongs given the law’s sword and shield, is a harbinger of how far the great democratic ship can go, and how tethered it is to its starting place.

⁴ Alexander Hamilton, “Federalist, No. 78,” in *The Federalist Papers*, ed. Clinton Rossiter (New York: Signet Classic, 2003), 469.

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