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A Liberal Theory of Reparation

By

Stephen Michael Roe Galoob

A dissertation submitted in partial satisfaction
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Committee in Charge:
Professor Christopher Kutz, Chair
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Abstract

A Liberal Theory of Reparation

by

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Doctor of Philosophy in Jurisprudence and Social Policy

University of California, Berkeley

Professor Christopher Kutz, Chair

This dissertation articulates a new account of how reparation works, a new framework for assessing theories of reparation, and a new argument for why states should make reparation for injustices.

Chapter 2, *How Does Reparation Work?*, starts from the idea that wrongs and injustices have normative significance, and reparation characteristically diminishes (and sometimes eliminates) this significance. How does reparation effect this change? On the predominant explanation, the compensatory conception, wrongs create debts and reparation ameliorates by satisfying these debts in whole or in part.

The compensatory conception is invalid. It cannot explain reparation's causal structure, or the way that a gesture's etiology (in particular, the attitudes it conveys and reasons for which it is made) matters to its ameliorative impact. In this chapter, I propose an alternative view, the relational conception. On this approach, wrongs and injustices impair relationships, and these impairments explain the functions of and impetus for reparation. Reparation works by changing how a wrong or injustice bears on relationships.

Chapter 3, *Theories of Reparation: A Framework*, offers a set of questions that can be used to evaluate any substantive theory of reparation (that is, an account of when and why states should make reparation for injustices). These questions include how reparation works, who may claim reparation, who may be expected to make reparation, how the passage of time and the collective nature of political injustices affect the case for reparation, whether the case for reparation is distinct from (or reduces to) other political considerations, and whether it is possible to differentiate the injustices that call for reparation from the ones that do not.

Chapter 4, *Assessing Theories of Reparation*, uses this framework to evaluate the most prominent existing theories of reparation. I contend that none of these theories is satisfactory. However, the failures of theories are instructive, and some of them have useful elements. In particular, legitimacy-based approaches show promise in offering both a compelling justification for why a state should make reparation and a descriptively accurate conception of how reparation works.

Chapters 5 and 6 articulate and defend the Liberal Theory of Reparation, a new theory of reparation for political injustices based on the philosophical liberalism of John Rawls. Chapter 5, *Why A Liberal Should Care About Reparation*, contends that, *contra* Rawls and most contemporary Rawlsians, reparation is a central topic for philosophical liberalism generally and the Rawlsian project specifically. Chapter 6, *The Liberal Theory of Reparation*, builds the Liberal Theory of Reparation out of Rawls's theories of justice and political legitimacy. Serious injustices can impair the kind of reciprocal justification that are the bedrock of the political relationship. Where injustices impair political relationships in this way, reparation is called for as a way of valuing those relationships. On the Liberal Theory, the commitment to reparation of these serious injustices is part of a broader commitment to justice. The Liberal Theory provides a compelling answer to all of the questions in the framework and can avoid or resolve all of the thorny issues that lead other theories to absurdity or implausibility.

Dedication

To Mindy, who constantly renews my commitment to make the world more just; and to Samuel and Isaac, who gives this commitment its point.

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Chapter 1- Introduction and Overview

Like every American city, Tulsa, Oklahoma bears scars of racial injustice. It is highly segregated along racial lines, and the economic opportunities of African-American Tulsans are significantly less than those for white Tulsans. Yet Tulsa was (and perhaps, is) marred by a special scar: the destruction of the Greenwood neighborhood in 1921.

Once, Greenwood was among the most prosperous African-American communities in the U.S. This prosperity owed in part to the unique geographical circumstances of Oklahoma, the last of the frontier states. The former Indian Territory was settled far later than any other state south of the Mason-Dixon line. As a result, Oklahoma lacked many of the formal, racialized hierarchies that characterized the South. As Ralph Ellison noted, life for an African-American in Oklahoma “lacked the intensities of custom, tradition and manners which ‘colored’ the institutions of the Old South.”¹ The Greenwood neighborhood exemplified this promise of African-American life. Nicknamed the “Negro Wall Street,” Greenwood was a racially segregated neighborhood and commercial district on Tulsa’s north side. In part, both the commercial vitality of Greenwood and its geographic compactness are the result of patterns of formal and informal mechanisms of racial segregation. “Hemmed in by [Tulsa’s] residential segregation ordinance, African Americans were generally barred from patronizing white-owned stores downtown — or ran the risk of insult, or worse, if they tried.”²

Greenwood was razed by an armed mob of white Tulsans between May 31 and June 1, 1921. The precursor to the riots was an alleged assault by Dick Rowland, a 17 year-old shoeshine boy, of Sarah Page, a teenaged elevator operator, in the Drexel Building in downtown Tulsa. After Rowland’s arrest, thousands of white Tulsans gathered outside the courthouse in preparation to lynch him. Lynching was a common method of mob justice in Southern states at this time. No African-American had ever been lynched in Tulsa, although there had been other high-profile lynchings in Oklahoma City and elsewhere.³ In order to stave off efforts to lynch Rowland, bands of armed African-American men gathered at the courthouse on the night of May 31. These efforts failed to disperse the lynch mob, but rather instigated a broader fear among white Tulsans of a “black uprising.” As one historian notes, “[t]he riot was not caused by black radicals; it was caused by lawless whites who wanted to keep blacks in their subordinate status.”⁴ Fighting broke out at the courthouse and quickly spread to the Greenwood neighborhood. White mobs set fire to many homes and office buildings in Greenwood and fired on those who fled. Eyewitness accounts indicate that the white mobs were supported by airplanes that likely came from the local National Guard unit.⁵ The violence ended midday on June 1, when troops from the Oklahoma National Guard dispersed the remaining rioters. By

¹ Quoted in Brophy (2003), at fn. 105.

² Ellsworth “The Tulsa Race Riots,” in Commission Report (2001), at 43.

³ *Id.*, at 61.

⁴ Brophy (2003), at 87.

⁵ Warner, “Airplanes and the Riots,” in Commission Report (2001), at 106-9.

that time, nearly all of the African-American citizens of Tulsa were either dead, in police custody, or away from the city. Over six thousand residents of Greenwood were detained, and hundreds more were killed. The precise number of dead and wounded from the riots is unknown, not least because both of the segregated hospitals that treated African-Americans were destroyed.

The injustice involved in the Greenwood riots is obvious. It is wrong to kill people and destroy their property. It is wrong for the state to participate in these injustices or fail to prevent private citizens from committing them. That these wrongs were perpetuated on the basis of race compounds their significance. The wrongs against the residents of Greenwood did not commence in the summer of 1921. They were part of a broader legacy of violence and disenfranchisement. Moreover, the injustices arising out of the Greenwood riots did not stop with the cessation of violence. Legal and political officials made concerted efforts to deprive the victims of the opportunity to seek legal redress.⁶ Any account of the injustice of the Greenwood riots must include this historical legacy and aftermath.

In 1996, the state of Oklahoma formed a commission to study the Greenwood riots. The commission's 2001 report provided an official recounting of the events, including estimates of the property destruction and deaths from the riots. The report recommended that the legislature make reparation in the form of direct payments to survivors and their descendants. The report also called for scholarships to students affected by the riots and the creation of an economic development enterprise zone for the Greenwood neighborhood. The Oklahoma legislature adopted the Commission's report and provided funding for some of the items recommended by the Commission. However, the legislature specifically declined to provide direct payments to survivors and descendants. A group of plaintiffs sued the city of Tulsa and state of Oklahoma, seeking as damages funds for health care and educational opportunities to be directed toward contemporary residents of Greenwood. However, the suit was dismissed as outside the statute of limitations.⁷ Reparations continue to be resisted by state and city officials and remain deeply unpopular among white Oklahomans.

The Greenwood case raises a variety of philosophically significant issues about the justification for reparation. Killing, displacement, and the destruction of property are wrong. Does the political importance of an injustice depend on whether the state perpetuates it directly? How do we disentangle the significance of the Greenwood riots from the broader history of racialized injustice in this country? Does the significance of the riots depend on whether anyone alive today experienced them?

The Greenwood case also invites questions about the significance of injustice matters and the possible effects of reparation. Beyond serving as a cautionary tale about racial segregation and mob justice, how do the Greenwood riots matter? Imagine that we lived in a more just world. Rather than the objectionable disparities that characterize our

⁶ These efforts are described at length by Brophy (2003).

⁷ *Alexander v. Oklahoma*, 382 F.3d 1206 (10th Cir. 2004).

current political and social arrangements, suppose that our political institutions were fairer and that more people had adequate opportunities to lead meaningful lives. In such a world, would the Greenwood riots matter as much, or at all? What difference would it have made if the Oklahoma legislature had provided reparations to victims of Greenwood and their descendants, or if any of the lawsuits on their behalf had succeeded?

Debates about reparation arise in a variety of contexts. Many (like the Greenwood case) involve historically distant injustices.⁸ In the United States, a paradigm case is reparation for the chattel slavery. However, reparations are proposed, debated, and (sometimes) made for a variety of other injustices. Elsewhere, debates about reparation invoke the sting of the Treaty of Versailles, the degradations of colonialism, the expropriation of territory from indigenous populations. In each of these debates, there are powerful arguments for and against reparation. It is often difficult to sort these contrasting claims, especially since any response implicates broader (and contested) political commitments.

Not all questions about the reparation of injustice are abstract or antiquarian. Many profound injustices are more recent, and others are ongoing. Our world is characterized by social and political arrangements that dramatically deviate from what justice requires. Our global system not only perpetuates vast inequalities, but also results in the deprivation of basic needs for billions of people. This system also lacks credible safeguards for the protection of fundamental human rights. Our patterns of consumption risk catastrophic climate change, which will dramatically worsen the lives of future generations. Each of these ongoing features of our world can plausibly be described as an injustice. If we are committed to justice, then we are committed to revising them. Yet is changing these aspects of our world (whether by ceasing the unjust practices or creating institutions that prevent them from happening in the future) sufficient to satisfy our commitment to justice? Might justice require us to make some further effort at redress?

This project has two aims. The first is to defend a particular way of conceiving what reparation is and does, which I call the *relational conception*. The second is to defend a particular theory of why (and when) reparation is called for as a response to injustice. Because my proposed theory draws from the philosophical liberal tradition exemplified by John Rawls, I call it the *Liberal Theory of Reparation*. The case for the relational conception can be made independently of the case for the Liberal Theory. Regardless of what else one thinks about the justification for reparation, the relational conception better captures the phenomenology of reparation than alternative accounts.

⁸ A note on terminology. My main focus is on reparation in the political context, rather than in the interpersonal context. I'll refer to the events that trigger debates about reparation in political contexts as "injustices," and in the interpersonal context as "wrongs." On the conception that I propose, wrongs and injustices follow the same basic dynamics and present similar questions about reparation. Thus, analyzing reparation for interpersonal wrongs can sometimes illuminate (and help resolve) difficult issues concerning reparation for political injustices. However, on some views, the reparation of wrongs fundamentally differs from the reparation of injustices.

However, the case for the Liberal Theory depends on the relational conception. One reason to favor the Liberal Theory is that many of the most prominent alternatives are incompatible with the relational conception, and thus cannot capture critical features of our normative world.

In the remainder of this introduction, I will say more about these two central ideas and introduce some of the main arguments of this dissertation.

The Relational Conception of Reparation

A conception of reparation describes what reparation does. Wrongs and injustices have normative significance. Each generates theoretical and practical reasons. Reparation should be understood in light of this normative significance.

To illustrate this point, consider the following case (which I discuss more extensively in chapter 2). My friend William steals my wallet, just to see if he can. In stealing my wallet, William wrongs me. William's misdeed can be appreciated in a variety of ways. Stealing wallets is both harmful and wrong. It also violates the consideration that friends owe to each other. After William steals my wallet, I have reasons to believe certain things about him (*e.g.*, that he is inconsiderate), to be angry with him, and to act in certain ways (*e.g.*, to relate William's inconsiderateness to our mutual acquaintances, and perhaps to refuse to assist him in the way that friends normally do). Suppose now that William makes a gesture of reparation: he sincerely apologizes, returns the contents of my wallet intact, and credibly commits to not repeating the wrong. If William's gesture is reparation, then it changes the normative significance of his wrong. This change happens because reparation ameliorates the wrong's significance. Amelioration is a vague notion, and different conceptions of reparation might define it differently. However, it is characteristic of reparation. If a gesture does not ameliorate (that is, if a wrong has the same practical or theoretical significance after a gesture as before), then that gesture is not reparation.

The same basic dynamic applies in political contexts. Here, too, injustices have normative significance. After the devastation effected by the Greenwood riots, African-American citizens of Tulsa (and not merely those who were deprived or resettled because of mob violence) had reason to distrust their fellow citizens, to be indignant at the treatment they received. Given the complicity of state and local officials, black Tulsans arguably had reasons not to comply with ostensibly just laws, or cooperate based on ostensibly just terms. Here, too, reparation characteristically ameliorates the significance of an injustice. An injustice matters less (or differently) after reparation than before. If a gesture made in response to an injustice does not have this ameliorative effect, then it is not reparation.

A conception of reparation, then, explains both how wrongs have normative significance and how reparation ameliorates this significance. Most philosophers and legal theorists adopt what I call the *compensatory conception* of reparation. On the compensatory conception, wrongdoing creates debts; calculating the amount of a debt

requires comparing the state of the world in which the wrong occurred with some other state; reparation satisfies these debts, in whole or in part; and the wrongdoer's reasons to make reparation are simply her reasons to pay her debts.

Many theoretical debates about reparation are, at bottom, ways of contesting the different elements of the compensatory conception. For example, questions about reparation for historical injustices often turn on whether debts descend across generations. These debates concern how literally to take the metaphor that wrongdoing incurs debts. Likewise, some criticize the call for reparation on the grounds that paying reparation can undermine more urgent matters of public policy. In effect, these debates ask why prioritize debts arising from injustices over other kinds of debts. Further, some contend (and others deny) that the so-called "non-identity" problem for comparing the actual state of the world with counterfactual states defeats the justification for the reparation of historically distant injustices. This debate arises from the notion that configuring a debt requires some sort of comparison between states of the world.

In chapter 2, I argue that the compensatory conception of reparation fails because it does not capture important features of our normative landscape. Among these is reparation's causal structure, or the degree to which a gesture's etiology affects its ameliorative impact. Reparation is a success term. Whether a gesture is reparation depends, among other things, on the attitudes that it conveys and the reasons for which it is made. The compensatory conception cannot capture this causal structure, so it is inadequate. If William returned my wallet with the contents intact, he satisfies any debt arising out of his wrongdoing and (arguably) fully compensates me. Yet if William returned my wallet in a particularly degrading or disrespectful way, then his gesture would fall short as reparation. It would not ameliorate the significance of his theft as much as it could (or, perhaps, at all).

The relational conception of reparation is an alternative to the compensatory conception. On the relational conception, wrongs are best seen as impairing relationships; the normative ideals of relationships determine the reparative burden; successful reparation has direct and indirect effects on the ways that wrongs impair relationships; and the wrongdoer's reasons to make reparation stem from her valuing these impaired relationships. The relational conception can both capture and elaborate the causal structure of reparation. Moreover, the relational conception is a general account of reparation. It explains how reparation ameliorates both interpersonal wrongs and political injustices. The relational conception can also explain the appeal of the compensatory conception. For certain types of relationships, providing full compensation normally entails that the originator has the attitudes and patterns of deliberation that required for successful reparation.

Evaluating Justifications for Reparation

Apart from the question of what reparation does, we can also ask about the conditions under which reparation is justified or required. A theory of reparation provides a systematic statement of these conditions, establishing when reparation is justified *prima*

facie. Such a theory also tells us who may claim (or demand) reparation and who may be fairly expected (or required) to make reparation. A theory of reparation may also provide guidance in particular cases, especially those (like Greenwood) where there is significant disagreement between those who favor and oppose reparation. However, it is possible for a valid theory of reparation to be indeterminate in particular cases.

In chapter 3, I articulate a framework for analyzing theories of reparation. This framework is a set of common questions that apply to any theory of reparation. It provides a basis for comparing theories that does not presuppose the truth of any particular approach. On this framework, an approach is described in terms of how it responds to a series of metatheoretical questions, as well as how it captures the normative phenomenology (that is, its compatibility with a plausible conception of how reparation ameliorates). The questions include who may claim reparation, who may be expected to make reparation, how the passage of time and the collective nature of political injustices affect the case for reparation, whether the case for reparation is distinct from (or reduces to) other political considerations, and whether it's possible to differentiate the injustices that call for reparation from the ones that don't.

In chapter 4, I use this framework to analyze three prominent theories of reparation. Corrective justice theories see the reparation of injustices as an independent requirement of justice. Rights-based theories justify reparation based on the rights of the victim or claimant. Legitimacy-based approaches justify reparation as a means to preserving the right to rule of political institutions. I argue that none of these approaches provides a fully satisfactory way of justifying reparation. However, each approach contains important insights that should be incorporated into the best theory of reparation.

The Liberal Theory of Reparation

In chapters 5 and 6, I propose a new theory of reparation for political injustices based on the philosophical liberalism of John Rawls. Philosophical liberals see political relationships as characterized by a specific ideal of political justification. Serious injustices can frustrate the realization of this ideal, and thus impair these relationships. Thus, both demanding and making reparation are ways of valuing impaired political relationships. This insight is the heart of the Liberal Theory of Reparation. Chapter 5 aims to show that reparation is a central topic for philosophical liberalism generally, and the Rawlsian project specifically. Chapter 6 harnesses the resources of Rawls's theory of justice towards crafting a theory of reparation.

Injustices arise in a variety of political contexts. Some are local. Others implicate a larger political order. Still others transcend political borders. Even controlling for the context in which they arise, some injustices are more severe than others. Every injustice is not unjust for the same reason, and not all injustices must be accounted for in determining what justice requires. The same basic model of impairment and forgiveness apply in political and interpersonal contexts. In both, the relationships impaired by wrongdoing provide the normative impetus for reparation. Impairment not only affects how victims can relate to wrongdoers, but also how victims and wrongdoers can relate to

others. Serious injustices can preclude the possibility of certain kinds of political relationships, just as serious wrongs can preclude the possibility of certain kinds of interpersonal relationships. Where wrongs impair relationships in this way, the wrongdoer's reparation is a way of valuing these impaired relationships. For the philosophical liberal, the commitment to reparation of serious injustices is part of a broader commitment to justice, which is the *sine qua non* of philosophical liberalism.

The Liberal Theory is based on philosophical liberalism generally, and contractualist liberalism in particular. By contractualism, I mean the tradition that finds its origins in the political philosophy of Jean-Jacques Rousseau and Immanuel Kant, and more recently in the work of John Rawls. Contractualist liberalism posits an ideal of the political relationship as one where the principles governing political cooperation meet certain standards of justification for everyone over whom they apply. Some injustices impair political relationships in a way that undermines the possibility of this form of justification. In these cases, reparation is instrumentally justified based on its tendency to repair these relationships and restore the possibility of liberal justification. Reparation does not necessarily repair these relationships, but rather removes impediments for the participants in these relationships to do so.

Before liberalism can be deployed to formulate a theory of reparation, though, it must be recruited. This is the task of chapter 5. Many liberals would resist this recruitment effort. Perhaps considerations related to injustices are the kinds of particularities that, for the liberal, must be abstracted from in order to establish fair principles of political cooperation. Perhaps also there is no need for a distinct theory of reparation because the significance of serious injustices can be accounted for within extant parameters of liberalism. The liberal might employ a reductionist strategy: concerns about reparation reduce to some broader concern about justice, for example concerning distribution of social resources or provision of opportunities to participate in political institutions. The Rawlsian liberal might also attempt to evade questions about reparation by denying that they are on the agenda for theorizing justice.

This resistance is inapt. Fundamental aspects of liberal project imply that some grievances arising out of injustices cannot be abstracted away in the formulation of principles of justice. In other words, none of the evasive or reductionist strategies protects against the threat that serious injustices pose to liberal justification. For a liberal, the commitment to mutual justification is key to ensuring that society is a fair system of social cooperation, one that is stable over time and for the right reasons.⁹ This commitment also undergirds the liberal principle of legitimacy, the inference that justified institutions have the right to rule.¹⁰ Some serious injustices change the normative circumstances of agents, generating reasons to reject principles of political cooperation regardless of their content or the process through which they are derived. These injustices affect whether it is possible or permissible for victims to accept terms of cooperation, as well as whether it is reasonable to expect that victims will relate to others in the way that

⁹ Rawls, JAF, at §2.

¹⁰ PL, at 137.

philosophical liberalism identifies. These injustices not only impair the political relationships between victims and wrongdoers, but also mar the political relationships that third parties can have with both. Therefore, the philosophical liberal needs a theory of reparation.

However, philosophical liberalism has powerful resources for fashioning such a theory. Chapter 6 is devoted to articulating this Liberal Theory of Reparation. When serious injustices impair political relationships, reparation is called for as a way of valuing these political relationships in light of their ideal of political justification. Reparation can directly change some reason-generating aspects of injustices, and it can indirectly change other aspects by facilitating (although not necessarily effecting) a political form of forgiveness.

The Liberal Theory can address and resolve all of the basic questions about reparation (described in chapter 3) that befuddle other approaches. For example, contractualist liberalism has built-in resources to address questions relating to historical and collective responsibility. That is, it can explain why those who did not perpetrate a wrong might nonetheless be expected or required to make reparation for it. It is fair to expect such citizens to make (or contribute to making) reparation as an implication of their valuing political relationships that are impaired by an underlying injustice. Liberalism's bedrock commitment to individual justification also offers a basis on which to determine which injustices call for reparation.

In each of these chapters, I raise a variety of real-world and hypothetical cases to illustrate my points. The Greenwood case is interwoven through these discussions. This emphasis might seem misplaced. The Greenwood case is a serious injustice, but there are far more serious injustices in our history. The Greenwood case does not present certain analytical issues in the clearest light possible.

In large part, my decision to focus on the Greenwood case is biographical. As a native Oklahoman, the Greenwood riots first inspired me to think about reparation and the philosophical questions that complicate redressing injustices. These issues generalize to the redress of all injustices. My analysis can at least clarify these questions, even if it does not (and cannot) resolve them.

Chapter 2- How Does Reparation Work?

Wrongs and injustices have normative significance. They generate reasons for action and belief. Reparation characteristically diminishes (and sometimes eliminates) this significance.

How, exactly, does reparation have this ameliorative effect? Many view reparation as a form of compensation for wrongs. On this *compensatory conception*, wrongs create debts. Reparation ameliorates by satisfying these debts in whole or in part.

I propose an alternative view, which I call the *relational conception*. On this understanding, wrongs impair relationships. These impaired relationships, in turn, explain the functions of and impetus for reparation. Reparation ameliorates by changing how a wrong or injustice bears on relationships.

This chapter has four parts. Part I explicates the compensatory conception of reparation. Part II argues that the compensatory conception fails because it cannot account for reparation's causal structure—the way that a gesture's intentional and expressive content determine its ameliorative effect (and, indeed, its status as reparation). This causal structure is a core conceptual feature of reparation, regardless of what else one thinks about the subject. Part III elaborates the relational conception of reparation in the context of interpersonal wrongs. Unlike the compensatory conception, the relational conception can account for reparation's causal structure. Therefore, the relational conception is a superior account of how reparation ameliorates. Part IV argues for the superiority of the relational conception to the compensatory conception in describing the reparation of political injustices.

I. The Compensatory Conception of Reparation

Many philosophers utilize the compensatory conception to explain reparation's characteristically ameliorative effect. Put broadly, the compensatory conception sees reparation as compensation for a wrong or injustice. This view has several important elements. First, the significance of wrongs is appraised in terms of debts.¹ The debt created by a wrong might be literal or metaphorical. Either way, this debt provides the impetus for reparation. When you have wronged someone, your reasons to make reparation parallel your reasons to repay your debts.² This debt model, in turn, explains a variety of structural features of reparation, like the person(s) to whom reparative gestures must be targeted. Efforts to repay your debt are ineffectual if they are not directed to the appropriate target (*i.e.*, your creditors). If you owe me five dollars, you do not discharge your debt by paying five dollars to someone else, even someone who is needier than I am. When you have wronged me, your reparative effort directed at someone else would not necessarily ameliorate the significance of your wrongdoing.

¹ See, e.g., McGary (2010), at 547; Thompson (2002); Coleman (1992), at 362; Lomasky (1991), at 26-7; Barnett (1977), at 291.

² See Feinberg (1978), at 102; Ripstein (2009), at 85.

Second, the compensatory conception utilizes a comparative inquiry to determine the reparative burden, or what full reparation requires. On the compensatory conception, the reparative burden is equivalent to the debt created by a wrong. Calculating this amount requires comparing the state of the world in which the wrong happened to some other state of the world. Usually, but not always, the comparison state is the closest counterfactual world in which the wrong did not happen.³ The reparative burden is the difference between how the victim fares in the occurrent state and would fare in the comparison state.

Third, the compensatory conception holds that tokens of compensation necessarily contribute to the satisfaction of the debt, and full compensation discharges this debt.⁴ Commentators offer different standards for determining the level of compensation sufficient for discharge. Some see it as restoring the *status quo ante*;⁵ restoring the “moral equilibrium”;⁶ “set[ting] things straight;”⁷ making it “as if [the wrong] never happened”;⁸ making the victim whole;⁹ ensuring that no one wrongfully benefits from the wrong;¹⁰ or elevating the victim to some level (*e.g.*, sufficiency or equality), the non-attainment of which is plausibly attributed to the wrong.¹¹ However this standard is described, to meet it is to satisfy the debt.¹² To satisfy the debt is to expiate the wrong, to drain it of normative significance.¹³

On the compensatory conception, then, wrongs create debts. Reparation ameliorates by satisfying these debts in whole or in part. The main components of this position can be presented as a series of answers to basic questions.

³ See Morris (1984), 175-8; Sher (2005), 184-6; Nozick (1974), 152-3; Cohen (2009); Herstein (2008), 511-2. Not all theories based on the compensatory conception require trans-world comparison. Some focus on historical comparisons. On these views, the relevant comparison state is the one prior to the wrong’s occurrence. *See, e.g.*, Lomasky (1991), 33-4; Simmons (1995a).

⁴ *See, e.g.*, Hershenov (1999), at 80; O’Neill (1987), at 75; Corlett (2003), at 170; Goodin (2013), at 489-90 (discussing “perfect partial corrective justice”); Gold (forthcoming), at III(a) (positing that inadequate allocations “are truly allocations back even when the fall short of their aim of making someone whole.”)

⁵ Lomasky (1991), 33-4.

⁶ Feinberg (1970b), 74.

⁷ *Id.*

⁸ Ripstein (2007), 1961-2.

⁹ Sanderson (2012), at 105.

¹⁰ Butt (2009), 123-30.

¹¹ Roberts (2006), at 419.

¹² The advocate of the compensatory conception might see certain cases in which this standard could not be satisfied. In such cases, however, reparation would (necessarily) reduce a wrong’s significance without eliminating it.

¹³ *E.g.*, Butt (2009), at 42-3 (“Once these rectificatory duties are met, the situation is clearly, in a sense, far from ideal, and is worse in a number of ways compared to the situation prior to the wrongdoing, but no agent possesses unfulfilled duties of justice in relation to another.”)

- (1) **What do wrongs do?** Wrongs create debts.
- (1a) **Why make reparation?** For the same reasons that you pay your debts.
- (2) **How to calculate the reparative burden?** Calculating the debt created by the wrong requires comparing the state of the world in which the wrong happened with some other state of the world.
- (3) **What does reparation do?** Reparation contributes to the satisfaction of the debt arising out of the underlying wrong, and full reparation satisfies this debt (thereby expiating the significance of the wrong).

Many substantive theories of reparation utilize the compensatory conception, and this view animates much legal thinking on the topic. Even some philosophical positions that explicitly distinguish reparation from compensation nonetheless adopt all of the components of the compensatory conception.¹⁴ In debates about particular injustices, the compensatory conception commonly undergirds the arguments of those who favor reparation and those who oppose it.¹⁵

II. Why the Compensatory Conception Fails: The Causal Structure of Reparation

The compensatory conception is inadequate as an account of how reparation ameliorates. This view neglects reparation's *causal structure*, or the way that a gesture's etiology determines its status as reparation. In this part, I highlight two aspects of this causal structure: successful reparation conveys or avoids conveying certain attitudes (the *expressive dimension*) and is based on appropriate reasons (the *intentional dimension*). An adequate conception of reparation should appreciate these dimensions. The compensatory conception cannot, so it is inadequate.

A. The Expressive Dimension of Reparation

Consider the following case.

Wallet Thief: My friend, William, steals my wallet from my jacket just to see if he can. Later, William breezily returns my wallet and its contents, telling me “no hard feelings.”

William's theft harms me. It also wrongs me, under any plausible theory of what makes actions wrong. William's gesture of returning my wallet fully compensates me,¹⁶ but it is deficient as reparation. It does not fully ameliorate the significance of William's theft,

¹⁴ See Boxill (2003).

¹⁵ For example, the main tenets of the compensatory conception are adopted by many proponents (*e.g.*, Sepinwall (2006); McGary (2010)) and opponents (*e.g.*, Kershner (2002)) of reparations for U.S. slavery.

¹⁶ Perhaps simply returning my wallet is not fully compensatory, for example because it does not reimburse me for my lost usage or the costs of protecting against future thefts. If so, then imagine that William's gesture reimburses me for the additional costs required for full compensation, whatever they are.

and may even exacerbate it. The expressive dimension of reparation explains, at least in part, why William's gesture is deficient. Several philosophers have recognized that the attitudes expressed or conveyed by a gesture are important to its status as reparation.¹⁷ My goal in this section is to provide a more general explanation of the importance of these expressions.

As a preliminary matter, we can roughly distinguish success and perfection conditions of reparation.¹⁸ Success conditions are the requirements for a gesture to be genuine reparation; perfection conditions describe reparation *par excellence*. A gesture that lacks one or more perfection conditions fails to ameliorate an underlying wrong to the greatest possible extent. By contrast, a gesture that fails to satisfy one or more success conditions is not reparation at all. Such a gesture does not ameliorate (and may even exacerbate) the significance of a wrong.

The claim that reparation has an expressive dimension means at least three things. First, the expression of certain attitudes can be a success condition of reparation. A gesture that does not convey these requisite attitudes is not genuine reparation. Second, the non-expression of certain attitudes can be a success condition of reparation. In other words, a gesture that conveys certain attitudes might not be genuine reparation, regardless of what other attitudes it conveys. Third, the expression (or non-expression) of certain attitudes might be a perfection condition of reparation. A gesture that does not convey these attitudes would still be genuine reparation, but its ameliorative effect would be blunted.

The Wallet Thief case illustrates this expressive dimension of reparation. In stealing my wallet, William deprives me of something valuable. He also indicates that he cares little about me and about our friendship, perhaps even that he does not understand the point of friendship. William's gesture of redress confirms his disrespectful attitudes and lack of understanding. It is, at a minimum, imperfectly ameliorative. It might not ameliorate at all.

The deficiencies of William's gesture illuminate a broader notion that I will call the ***non-replication requirement***: a gesture is deficient as reparation if it replicates the wrongmaking features of an underlying wrong. The non-replication requirement provides a first approximation of reparation's expressive dimension. If an underlying wrong conveys the wrongdoer's disrespectful attitudes about the victim and these attitudes help explain the wrongfulness of the wrong, then a gesture conveying the same or similarly disrespectful attitudes will ameliorate the significance of a wrong imperfectly, if at all. In Wallet Thief, William's gesture runs afoul of non-replication, and this violation explains at least part of why his gesture is deficient. Non-replication is sometimes a success

¹⁷ See, e.g., Satz (2005), at 183; Walker (2010), at 530; Shiffrin (2009), at 335; Radzik (2009), ch. 4; Von Platz & Reidy (2006), at 362; Valls (2005), at 126-7.

¹⁸ Hanoch Sheinman (2011) 11-12 utilizes these terms in connection with promises.

condition, sometimes a perfection condition. In any event, I take non-replication to be an uncontroversial starting point for articulating reparation's expressive dimension.¹⁹

The compensatory conception cannot account for the expressive dimension of reparation generally, or the importance of non-replication in particular. Compensation concerns the satisfaction of debts, not how this satisfaction occurs. In general, the attitudes expressed by a gesture do not affect whether it succeeds as compensation. Compensation seems to have no requisite or disqualifying expressions. Many tokens are fully compensatory despite conveying demeaning attitudes toward their recipients. In *Wallet Thief*, William's gesture is fully compensatory and has all the collateral consequences of full compensation. For example, after William returns my wallet, I could not sue him for conversion. William might still be subject to punishment, but he does not owe me anything because he has annulled my losses. Thus, reparation and compensation diverge along this expressive dimension. The attitudes expressed in a gesture do not matter to its success as compensation, yet they are crucial to whether it succeeds as reparation. Because of this divergence, we should reject component (1) of the compensatory conception.

The defender of the compensatory conception could dispute these conclusions by seeing the expression of certain attitudes as part of what is owed in compensation. Bernard Boxill, among others, defends such an approach, which I will call "symbolic compensation."²⁰ Boxill advances a Lockean argument for reparation that straightforwardly adopts the main tenets of compensatory conception.²¹ For Boxill, the victim of a wrong is owed satisfaction of debts incurred as a result of a wrong. Satisfying these debts requires not only material transfers, but also apologizing, conceding responsibility for wrongdoing, and pleading for forgiveness.²²

Yet the "symbolic compensation" approach fails, in a way that illustrates larger difficulties with the compensatory conception. For one thing, the "symbolic

¹⁹ The basic expressive requirements for reparation might well be more demanding than non-replication. For example, some would see the wrongdoer's repudiation of the underlying wrong as a requirement of genuine reparation. See Dan-Cohen (2007), at 122; Radzik (2009), at §3.4; Shiffrin (2009), at 336. However, these specifications might be controversial. I will focus on non-replication here because it seems less controversial.

²⁰ Others who take this "symbolic compensation" approach include Roberts (2002); Hill (2002), at 399; McGary (2003).

²¹ For Boxill, reparation is a subset of compensation for harms suffered "as a result of others' transgression...." Boxill (2003), at 64. These harms create debts, which are not satisfied by the mere cessation of the harming activity. *Id.*, at 69. Rather, these debts can be satisfied only through compensation that brings the victim to "the level of well-being he would have enjoyed had he not been harmed." *Id.*, at 67. Each of these tenets applies to both the "counterfactual" and "inheritance" arguments for reparation that Boxill describes. *Id.*, at 67-8.

²² Boxill (2011) ("[A]pology and concession of wrong doing is essential to reparation for it is essential to the object of reparation which is to return the injured person to the position of respect he had before he was wrongly injured.") Elsewhere, Boxill argues that a reparative gesture must include "an acknowledgment on the part of the transgressor that what he is doing is required of him because of his prior error." Boxill (1972), at 118-9.

compensation” approach has internal problems. This approach posits that attitudes are part of the debt created by a wrong and conveying these attitudes is a way to fulfill one’s reparative burden. Yet attitudes are not directly subject to our will, and so do not seem like the kinds of things that can be owed.²³ Moreover, to preview an argument discussed more extensively below, the goal of discharging your debt seems like the wrong kind of reason for having or conveying specific attitudes about someone.

Further, the expressions that Boxill identifies as required for reparation (*e.g.*, acknowledging responsibility, proffering apology, pleading for forgiveness) are descriptively inadequate. There are some cases where these attitudes can be inferred from the proffer of full compensation, so explicitly conveying them is not necessary for a gesture to be reparation. There are other cases where the expression of these attitudes is not necessary at all.²⁴ Moreover, Boxill’s identification of these attitudes is *ad hoc*, and there are many wrongs for which the expression of these attitudes would be insufficient.²⁵ Furthermore, a gesture that conveyed these attitudes while conveying other, disrespectful ones might fail or fall short as reparation.²⁶ The “symbolic compensation” approach cannot easily explain this possibility: if a wrongdoer owes certain attitudes to a victim, then a gesture expressing these attitudes would seem to satisfy this debt, regardless of what else it conveys.

The “symbolic compensation” approach also misconstrues why expressions matter for reparation. The expressive dimension of reparation concerns not merely the attitudes conveyed by a gesture, but also the beliefs underlying these attitudes. A gesture that conveys otherwise appropriate attitudes can be deficient if these attitudes are based on objectionable beliefs. In the *Wallet Thief* case, one might think that the expressive requirements for reparation include William’s conveying regret about the wrongdoing and his commitment to the non-recurrence of the wrong. Suppose that William comes to have these attitudes based on his belief that stealing wallets from dupes like me is simply not worth the hassle. William’s gesture conveys the requisite attitudes, but it retains some of the objectionable beliefs that (in part) explained the wrongness of his theft. Given the requirement of non-replication, a redressive gesture based on such objectionable beliefs would be deficient, its ameliorative impact at least blunted. Yet on the “symbolic compensation” approach, such a gesture would not be defective. William would owe me certain attitudes to discharge his debt, and he would have provided them. The “symbolic

²³ See Hieronymi, (2006).

²⁴ For example, a wrongdoer’s acknowledging responsibility might be irrational in a case where the wrong was causally overdetermined. Likewise, the expression of regret that is implicit in apologizing might be irrational where the wrong is identity-fixing. In such a case, to say that one regrets that the injustice happened would be tantamount to regretting one’s own existence. It is difficult to see how regretting one’s existence could be a general requirement of ameliorating the significance of wrongs.

²⁵ For example, these attitudes seem insufficient in the *Wallet Thief* case, since they don’t directly implicate the friendship that William’s wrongdoing impairs.

²⁶ For example, a program of slavery reparations that acknowledged white Americans’ responsibility for the institution of slavery, proffered an apology for that institution, and pled for the forgiveness of the descendants of the slaves might fail as reparation if it conveyed respectful attitudes about contemporary African Americans, while denying their applicability to those who were enslaved.

compensation” approach fails because expressing certain attitudes about the victim is not a way for a wrongdoer to escape arrears.

The compensatory conception cannot appreciate the expressive dimension of reparation, and the “symbolic compensation” approach does not make up for this defect. Because there is an expressive dimension to reparation, we should reject tenet (1) of the compensatory conception.

B. The Intentional Dimension of Reparation

We can appreciate another defect in the compensatory conception by altering the facts of the Wallet Thief case.

Con Man: William is a con man. Just to see if he can, William steals my wallet from my jacket. My wallet, however, has very little cash in it. William returns my wallet and conveys respectful attitudes toward me as part of a larger plan to regain my trust and steal my wallet again on payday (when it will contain more cash).

Here, William’s gesture clearly does not succeed as reparation. It does not ameliorate (and if anything exacerbates) the significance of his initial theft. This example highlights reparation’s intentional dimension: your reasons for action matter to whether your gesture succeeds as reparation. In Con Man, William’s reasons for action are illicit. In general, gestures made for illicit reasons are not genuine reparation.²⁷

However, a gesture can fail to satisfy this intentional dimension of reparation even if it arises from morally licit reasons. Consider another scenario.

Servile Wallet Thief: My friend, William, steals my wallet from my jacket just to see if he can. William’s and my mutual friend Theresa tells William that, in order to remain friends with her, he must fully compensate me in a way that conveys respectful attitudes toward me. Solely in response to Theresa’s demand, William makes a gesture of redress that conveys respectful attitudes.

William’s gesture in this case annuls my losses stemming from the theft and (arguably) satisfies the expressive requirements of reparation. Moreover, unlike in the Con Man case, William’s gesture is based on licit reasons. William makes redress in order to satisfy his friend Theresa, and it is often morally permissible (if not required) to act in ways that will satisfy one’s friend.

Yet there is a defect in William’s gesture, one that at least blunts its ameliorative impact. William does the right thing (annulling my losses and conveying respect for me)

²⁷ The claim that William’s intentions affect whether his action is reparation does not entail that his intentions affect the moral permissibility or value of his action. William’s gesture might fail as reparation, yet still be morally permissible or have some moral value. It just wouldn’t ameliorate.

for inappropriate reasons. To put this concern more broadly, something like the “wrong kind of reasons” problem²⁸ seems to apply to reparation. This problem arises, among other places, in discussions of “fitting attitudes” accounts of value, which define value in terms of reasons to value. Some reasons to value an object have nothing to do with the object’s value. These are the wrong kind of reasons for valuing an object.²⁹ Mark Schroeder argues that the “wrong kind of reasons” problem applies more broadly to any activity that is subject to standards of correctness.³⁰ For Schroeder, these standards of correctness give rise to sets of reasons that are shared by all participants in the activity. Only the reasons within this set are the right kind of reasons. However, some (generally licit) considerations might motivate performance of an action, despite being outside this shared set of reasons for the activity. These are the wrong kind of reasons.

The Con Man and Servile Wallet Thief cases indicate that reparation has correctness standards. Con Man indicates that illicit reasons are the wrong kind of reasons for reparation. Servile Wallet Thief indicates that licit, but inappropriate reasons can be the wrong kind of reasons for reparation. Thus, the intentional dimension of reparation requires that someone’s reasons for making redress be both licit and appropriate. Here, too, it is possible to distinguish between success and perfection conditions. Acting for certain reasons might blunt a gesture’s ameliorative impact. Acting for other reasons might disqualify a gesture as reparation, negating (and perhaps reversing) its ameliorative effect.

What, then, are the appropriate reasons for making reparation? Given the intricacy of certain wrongs and diversity of contexts in which wrongs occur, it is difficult to provide a general specification of the correctness standards for reparation. However, non-replication seems relevant to specifying the appropriate reasons for reparation, just as it provided an initial baseline for appraising reparation’s expressive dimension. In general, a gesture is imperfect reparation if it replicates the wrongmaking features of an underlying wrong. On many theories, your reasons for action can affect the normative significance of your actions.³¹ In some cases, your reasons for action themselves might be wrongmakers (as when you act on illicit reasons). In other cases, particular features of your reasons for action (like their insensitivity to the victim) might explain the wrongfulness of your action. Non-replication holds that a gesture is deficient as reparation if it replicates these intentional wrongmakers.

²⁸ Darwall (2006), at 15-16; Hieronymi (2005).

²⁹ See Rabinowicz & Toni Ronnøw-Rasmussen (2004). “Wrong kind of reasons” problems also arise in cases involving evidential vs. pragmatic reasons for belief (like Pascal’s wager) and cases involving reasons to intend that depend on reasons to act vs. reasons that depend on the benefits of intending (like Gregory Kavka’s toxin puzzle). Way (2012), at 490-1.

³⁰ Schroeder (2010), at 36.

³¹ This proposition is meant to accommodate a range of views about the moral significance of intention, including not only views that see intention as directly relevant to an action’s moral permissibility (*e.g.*, Sverdlik (1996); Liao (2012)) or moral value (*e.g.*, Markovits (2010)), but also views like T.M. Scanlon’s that see intention as affecting the meaning or significance of an action, but deny its general relevance to permissibility. Scanlon (2008), ch. 1-2.

Non-replication can explain why the gesture in Subservient Wallet Thief goes astray. In this case, one of the wrongmaking features of William's initial theft was its disregard of me. What I might have thought or felt didn't matter to William. In making redress at the behest of our mutual friend Theresa, William's gesture replicates this disregard. "That your friend wants you to do something" is not an illicit reason for action. In many contexts, it is both appropriate and compelling. However, my grievance doesn't matter directly to William, but rather derivatively via his concern for Theresa. Given this disregard, I might well presume that if Theresa had not demanded that William return my wallet, he would not have done so. William's gesture is made for the wrong kind of reasons, then, because it replicates a normatively significant feature of his underlying wrong—namely, the disregard of me.

Compensation does not seem to have an intentional dimension. Recall that, on the compensatory conception, the case for making reparation parallels (or, perhaps, just is) the case for repaying your debts. However, your reasons for repaying a debt to someone do not usually determine whether your payment satisfies or contributes to the satisfaction of your debt. Your gesture can satisfy your debt even if you act for entirely self-interested reasons, according to which your creditor matters only derivatively based on your self-interests. Arguments for reparation based on the compensatory conception therefore cannot appreciate these "wrong kind of reasons" problems, much less explain what are the right kinds of reasons for making reparation. In sum, there is an intentional dimension of reparation and component (1a) of the compensatory conception does not capture it. Thus, we should reject this component, and the compensatory conception more broadly.

The discussion so far has sketched some of the causal structure of reparation. For a gesture to be reparation, it must be made by the right agent(s) acting for the right kinds of reasons and must convey the right attitudes. A gesture that fails in any of these respects is at best imperfect reparation, and it might not be reparation at all. By contrast, a gesture can be perfectly compensatory regardless of the attitudes it expresses or the reasons for which it is made. The compensatory conception fails, then, because it does not appreciate this causal structure of reparation.

This failure is instructive. A plausible conception should not only capture reparation's causal structure, but also provide an explanation of which expressions and intentions are important. Such a framework should capture the importance of non-replication, and it should fill in the expressive and intentional dimensions of reparation. The relational conception articulated in the next part can fulfill these tasks.

III. The Relational Conception of Reparation

On the relational conception, reparation is part of a dynamic of blame and forgiveness. A single wrong can impair the relationships of victims, wrongdoers, and third parties. Reparation ameliorates by (indirectly and directly) changing the way that the wrong bears on these relationships. This view can be summarized using the same schematic used above:

- (1) **What do wrongs do?** Wrongs impair relationships.
- (1a) **Why make reparation?** Because you value (or have reason to value) relationships (with victims or third parties) that are impaired by your wrongdoing.
- (2) **How to calculate the reparative burden?** What reparation requires is a function of the degree to which a wrong impairs relationships.
- (3) **What does reparation do?** Genuine reparation answers the charge that grounds blame and changes the reasons to forgive the wrongdoer. Perfect reparation both answers the charge that grounds blame and removes barriers to forgiveness to the greatest possible extent.

Something like the relational conception undergirds several recent substantive theories of reparation.³² In the next two sections, I elaborate and defend components (1) and (1a) of the relational conception in the context of interpersonal wrongs.³³ In Part IV, I extend these insights to the context of political injustices. Along the way, I contrast the relational conception with the compensatory conception, showing how the former can capture the causal structure of reparation that evades the latter.

A. Wrongs Impair Relationships

On the compensatory conception, the significance of wrongs is modeled in terms of debts. On the relational conception, by contrast, wrongs matter because of how they impair valuable relationships. Recently, several philosophers have argued for this way of understanding the significance of wrongs and injustices.³⁴ In this section, I elaborate T.M. Scanlon's relational impairment account.³⁵

Scanlon distinguishes blameworthiness and blame. Blameworthiness is a question of meaning: "to claim that a person is blameworthy for an action is to claim that the action shows something about the agent's attitudes toward others that impairs the relations that others can have with him or her." Blameworthiness is thus an impersonal judgment about the significance of an action in light of applicable norms. Blame, by contrast, is a more second personal response, one that both implicates and depends on the responder's relationships with others. To blame someone is "to judge him or her to be blameworthy and to take your relationship with him or her to be modified in a way that this judgment of impaired relations holds to be appropriate."³⁶ This revisionary effect on our relationships is what distinguishes blame from more generalized forms of

³² See, e.g., Shiffrin (2009); Kutz (2004); Kumar & Silver (2004); Walker (2006); Radzik (2009).

³³ I don't address component (2) directly here, although I defend it implicitly in the discussion of RAVR (and the contrast with "symbolic compensation" views) below. I don't address component (3) in this chapter. However, I address both of these components more extensively in chapters 5 and 6.

³⁴ See, e.g., Walker (2006); Radzik (2009); Murphy (2010).

³⁵ Scanlon (2008), ch. 4.

³⁶ *Id.*, 128-9.

disapproval.³⁷ Relationships, in other words, both explain what blame is and give blame much of its bite.

Scanlon's account applies to blame in both interpersonal and moral relationships.³⁸ In both of these guises, the "normative ideal" of a relationship guides judgments of blameworthiness and blaming. A relationship's normative ideal specifies "what must be true in order ... to have a relationship of this kind, and ... how individuals who stand in this relation should, ideally, behave toward one another, and the attitudes they should have."³⁹ In addition to these general characteristics of a relationship type, the normative ideal of a relationship can also depend on specific characteristics of a relationship token. For example, histories of encounter can also ground normative expectations between relatives,⁴⁰ and for Scanlon blame is in part a response to the violation of normative expectations. Thus, histories of encounter should also be included within the normative ideal of a relationship for the purposes of determining which actions are blameworthy.⁴¹ To determine whether an action is blameworthy, then, we can calculate a relationship's normative ideal by consulting both the normative expectations arising out of the ideal of a relationship-type and those arising out of the specific patterns of interaction between relatives.

For Scanlon, blame depends (*inter alia*) on the normative ideal of a relationship, and different relationships have different normative ideals. For example, friendship is a thick relationship that requires you not only to have certain standing intentions, attitudes, and dispositions to act towards your friend, but also that they present themselves in the right ways. If you lack these intentions, attitudes, and dispositions towards another person or have them in the wrong way, then your friendship with her is impaired (or, perhaps, you are not really friends with her). By contrast, the moral relationship is generic, so its normative ideal is thinner and more abstract. According to Scanlon, the default moral relationship is one of "mutual regard and forbearance,"⁴² characterized by, among other things, the commitment to act in ways that are justifiable to others.⁴³ When you act in a way that is licensed by principles that a person affected by your actions could reasonably reject, your action conveys disrespect for that person. This disrespect is inconsistent with the ideal of the moral relationship. For Scanlon, the moral relationship has both unconditional aspects (like the commitment to act in ways that are justifiable to others) and conditional ones (like the readiness to make agreements with someone and the general intention to help him with his projects at low cost to oneself).⁴⁴ Furthermore,

³⁷ *Id.*, at 153, 167.

³⁸ *Id.*, at 139.

³⁹ *Id.*, at 133.

⁴⁰ Kolodny (2010), at 49-50.

⁴¹ Scanlon (2008), at 134, 178.

⁴² *Id.*, at 141.

⁴³ *Id.*, at 140; *see also* Scanlon (1999), 162-5.

⁴⁴ Scanlon (2008), at 143-4.

many specific relationship types (like friendship) presuppose that all relatives have relatively unimpaired moral relationships. Blaming someone for a moral wrong does not consist in revising the unconditional aspects of the moral relationship toward that person.⁴⁵ Rather, moral blame consists in revising the conditional aspects of the moral relationship, as well as ruling out those types of relationships with the target that “presuppose adequate moral relations.”⁴⁶

To illustrate account of how wrongs might impair relationships, consider the Wallet Thief case. William and I stand in a variety of relationships with each other, including both friendship and the moral relationship. William’s action is inconsistent with the ideal of friendship: stealing my wallet violates the kind of special concern or regard that friends have for each other. It is also inconsistent with the ideals of the moral relationship. I would have good reason to reject any principle that permitted William to steal my wallet just because he felt like it. Thus, in response to William’s theft, it is appropriate for me to morally blame him and to modify my friendship with him. This latter modification might take the form of ending our friendship, restricting my vulnerability and sensitivity to William, or refraining from aiding or considering William in the ways that friendship requires. From the standpoint of the moral relationship, stealing William’s wallet just to see if I could would not to be an appropriate form of blame, since William would have good reason to reject any principle that licensed this kind of action. However, blame might take the form of revising my willingness to help him at low cost to myself or ceasing to interact with him in ways that presuppose an unimpaired moral relationship.

Seeing the effect of wrongs as impairing relationships helps explain the important social aspects of blame.⁴⁷ Wrongs matter to people other than victims and wrongdoers. In wronging a victim, a wrongdoer can express attitudes that impair her relationships with third parties. Anyone can judge a wrongdoer to be blameworthy for such actions. However, the appropriate form of blame varies based on the responder’s position vis-à-vis the wrongdoer and the wrong.⁴⁸ Someone’s wrongdoing can provide his relatives with special reasons for revising their relationships with him. Likewise, certain forms of blame are made appropriate by one’s relationships with the victim. The strength of these reasons depends on the relationships at stake, as well as how seriously the wrong deviates from the ideal of these relationships. Take the Wallet Thief cases. In light of his theft, anyone can judge that William is morally blameworthy and that his actions express attitudes that are inconsistent with the norms of friendship. As the victim of William’s wrong, I have special reasons to revise (and perhaps end) my friendship with him. Theresa, William’s

⁴⁵ Scanlon’s identification of conditional and unconditional aspects of the moral relationship is analogous to Linda Radzik’s distinction between moral status (the capacity to make or demand moral justifications) and moral standing (one’s “reputation [within the moral community] as a morally good and trustworthy person”). On Radzik’s view, wrongdoing can jeopardize the wrongdoer’s moral standing (which is conditional), but it cannot deny her moral status (which is unconditional). Radzik (2009), at 82.

⁴⁶ Scanlon (2008), at 143.

⁴⁷ See Radzik (2009), at 22 and ch. 3.

⁴⁸ Scanlon (2008), at 178; Kutz (2000), at 17.

and my mutual friend, can judge that William has wronged me and violated the norms of friendship through his theft. This judgment provides Theresa with special reasons for revising her friendship with William: namely, that William does not understand or value the norms of friendship, or that he is not trustworthy or morally virtuous in the ways presupposed by the ideal of friendship. Theresa's relationship with me also provides her with special reasons to revise her relationship with William. The normative ideal of friendship (and many other thick relationships) often requires revising your relationships with those who have wronged your relatives. By declining or refusing to make this revision in her relationship with William, Theresa might express attitudes that impair her friendship with me (*e.g.*, that my grievances don't matter very much to her). The social implications are different still for a third party with no specific ties to either the victim or wrongdoer. Such a third party could judge a wrongdoer to be blameworthy, and this judgment would provide agent-neutral reasons to blame the wrongdoer. This kind of blame might consist in foreclosing the possibility of relating to the wrongdoer in ways that presuppose unencumbered moral relations. For example, in response to William's theft, a stranger might blame him by writing him off as a potential friend or partner as well as through withdrawing a default posture of good will toward him.⁴⁹

In this section, my goal has been to elaborate how the significance of wrongs can be appraised in terms of relational impairment. Scanlon and others have defended the relational impairment model as an account of the phenomenology of moral blame, arguing for its superiority to other candidates (including the debt model). Not everyone accepts that the significance of wrongs is best modeled in terms of relational impairment.⁵⁰ I won't rehearse these critiques or defenses here, except to say that I find the rebuttals more persuasive than the critiques. The remainder of my argument in this part presumes that the significance of interpersonal wrongs is best modeled in terms of relational impairment.

B. Reparation as Valuing Relationships

Why make reparation? The compensatory conception sees a wrongdoer's reasons to make reparation as equivalent to her reasons to pay her debts. Yet this standard is too capacious. There are a variety of perfectly good reasons to pay your debts that would be inappropriate reasons for making reparation. A gesture is deficient as reparation (its ameliorative impact at least blunted and perhaps nullified) when it is made for inappropriate reasons. Thus, a satisfactory answer to the question will point to reasons that are both motivationally efficacious and appropriate. On the relational conception, a reason for a wrongdoer to make reparation is that she values relationships impaired by her wrongdoing. In general, valuing these impaired relationships provides both an efficacious and appropriate reason to make reparation.

Let's first clarify what it means to value a relationship. According to Samuel Scheffler, valuing involves "a distinctive fusion of reason and emotion," which is

⁴⁹ See Scanlon (2013)

⁵⁰ Critics include Wolf (2011); Wallace (2011); and Sher (2013).

comprised of “a syndrome of interrelated dispositions and attitudes, including, at least, certain characteristic types of belief, dispositions to treat certain kinds of considerations as reasons for action, and susceptibility to a wide range of emotions.”⁵¹ We can value many different kinds of things, like our children, paintings, sports teams, and fresh air. The specific dispositions and attitudes that constitute valuing vary across different objects of value. Niko Kolodny offers a compelling account of what it means to value a relationship. For Kolodny, to value a relationship “finally” is to take it as a basic source of reasons, which creates both instrumental and non-instrumental reasons for action.⁵² The ideals of many thick relationships (like friendship) require this kind of valuation, although they might also allow for non-final valuation in some circumstances. For these thick relationships, if you do not ever take your relationship as a direct source of reasons, then you don’t value it. Valuing a thick relationship like friendship also requires having certain emotional dispositions and first-personal beliefs about the value of your relationship and your relative.⁵³ If your relationship and relative do not generate these dispositions and/or beliefs, then you do not value it or her.

We can extend Kolodny’s logic to appreciate another aspect of valuing relationships: the impetus to seek the removal of impairments. For example, when your friendship is impaired by wrongdoing, to value this friendship is to take yourself to have compelling reasons to effect the removal of these impairments. Where your friendship is impaired and you do not take yourself to have these reasons, then you do not value this relationship. Valuing such a relationship also seems to entail having specific dispositions about its impairment. For example, if you are not distressed at the impairment of your friendship, then you do not value the relationship.

This extension helps explain what are appropriate reasons for reparation. On the relational conception, the normative and psychological impetus for a wrongdoer to make reparation is explained by her valuing relationships that are impaired by her wrongdoing. The psychological dispositions constitutive of valuing these relationships provide the motivation for making reparation. The wrongdoer’s non-instrumental reasons to seek the removal of impairments provides the justification for reparation. Thus, we have an initial formulation of an efficacious and appropriate reason for reparation: if your wrongdoing impairs your valuable relationships with the victim, then your valuing these impaired relationships gives you reason to make reparation.

This initial formulation might raise a worry about contingency: does it make the case for reparation depend too much on whether a wrongdoer actually values her relationships with the victim? Sometimes, a wrongdoer seems to have compelling reason to make reparation even though she does not actually value the relationships impaired by her wrongdoing. Consider the Wallet Thief case. Perhaps William’s actions were his way of ending our friendship. If William does not value our friendship, then the initial formulation might imply that William has no reason to make reparation. This implication

⁵¹ Scheffler, (2011), at 32.

⁵² Kolodny (2003), 150-1.

⁵³ *Id.*

would be problematic because it would allow wrongdoer to change the normative impetus to make reparation by ceasing to value her relationships with those she has wronged. Yet, in the Wallet Thief case, that William doesn't value his friendship with me does not seem to change the case for his making reparation.

To avoid this worry, we can refine the initial formulation to include the spectrum of relationships that are impaired by wrongdoing. Call this the "social effects" fix, since it includes the social implications of wrongdoing as part of someone's reasons to make reparation. As the Wallet Thief cases suggest, your wronging a victim also impairs your relationships with third parties (for example, by exhibiting attitudes toward the victim that are inconsistent with normative ideal of your relationships with those third parties). Wrongdoing might also impair the wrongdoer-third party relationship through an indirect route: where the victim and third party stand in a thick relationship with each other, then impediments arising out of your wronging the victim can carry over to impair your relationship with the third party. Both of these social effects are realized in the Subservient Wallet Thief case. William's theft impairs his relationship with me directly and (because of the disrespect it reveals and the thickness of friendship) indirectly impairs his relationship with Theresa. Thus, on the social effects fix, William's valuing his relationship with Theresa would give him reason to make reparation, even if he did not value his relationship with me.

In discussing the social effects fix, it is important to distinguish claims about the strength and appropriateness of reasons. That William values his relationship with Theresa provides him with *compelling* reason to make redress to me. However, it does not necessarily follow that concern for third-party relationships is an *appropriate* reason (*i.e.*, one that would satisfy reparation's intentional dimension). Whether valuing one's relationship with a third party provides an appropriate reason for redress depends on the kinds of relationships implicated by wrongdoing and the particular significance of the wrong itself. For thinner relationships, a gesture moved by concern for relationships with third parties seems consistent with reparation's intentional success conditions. However, where thicker relationships are involved, concern for third-party relationships is less likely to provide the right kinds of reasons for reparation. We can explain this deficiency in terms of the normative ideal of these thicker relationships. In order for you to value a thick relationship like friendship, your relationship and your relative must provide non-derivative reasons for you to act. In the Servile Wallet Thief case, for example, William's concern for his relationship with our mutual friend Theresa seems like an inappropriate reason for him to make redress. William values his friendship with derivatively, which runs afoul of the ideal of friendship.

The social effects fix does not eliminate all of the worry about contingency. Perhaps the wrongdoer is a psychopath and attaches only instrumental value to all of his relationships. The initial formulation might imply that such a psychopathic wrongdoer would lack a compelling reason to make reparation. But this isn't so. The psychopath's failure to value these impaired relationships would not entail that he lacks reason to value them (and thus to make reparation). Rather, it suggests that many gestures of redress he makes will be deficient, since they will be done for the wrong kind of reasons. The result

is that the psychopath will have compelling reason to make reparation, but no gesture of redress that he makes will (fully) succeed as reparation.⁵⁴

Another concern is that the social effects fix seems to condone reparative gestures that run afoul of the intentional dimension of reparation. For example, as discussed above, a basic requirement of the intentional dimension is non-replication: where an action is wrong in part because it exhibited disregard for the victim, then the reasons that motivate reparation will not replicate this disregard. This requirement seems to be violated where redress is based solely on a wrongdoer's valuing relationships with third parties, since the victim would not figure directly into the wrongdoer's reasons for making reparation. A wrongdoer's making redress solely to remove impairments to her relationships with third parties effectively cuts the victim out of her deliberation. Yet such a gesture might satisfy the initial formulation, since it would be done in order to remove the impairments to a valuable relationship that arise out of wrongdoing.

To avoid this *reductio*, we need to add a proviso that precludes inappropriate modes of valuing a relationship from generating appropriate reasons for reparation. In some cases, a wrongdoer might be moved to make redress because she values an impaired relationship, but her gesture might nevertheless be deficient as reparation because she does not value this relationship in the right way (and therefore runs afoul of the expressive and intentional dimensions of reparation). The proviso, then, is that a gesture succeeds as reparation only if valuing an impaired relationship is consistent with the normative ideal of that relationship. For example, in the Servile Wallet Thief case, William makes redress because he values his relationship with Theresa. This gesture satisfies the initial formulation, since William's action is an outgrowth of his valuing a valuable relationship (his friendship with Theresa), even though William only assigns derivative value to his relationship with me. Yet this pattern of valuation is inconsistent with the ideal of friendship, where valuing requires the attribution of non-derivative significance. As discussed below, William's gesture might not have misfired if our relationship had been a thinner one for which assigning derivative significance is consistent with the normative ideal. Alternatively, William's gesture would not have been deficient if I (and our friendship) had figured more directly as a reason for William's action. Nonetheless, William's gesture does not satisfy the intentional dimension and so is deficient as reparation. Although William values our friendship, this valuation is inconsistent with friendship's ideal.

⁵⁴ This plausibility of this result rests on the existence of relationships that one has compelling reason to value, even though one does not actually value them. For example, some wrongdoing impairs the wrongdoer's moral relationship, which one is "morally required to maintain." Radzik (2009), at 81. Given this requirement, it would be irrational for the wrongdoer not to value the moral relationship. The wrongdoer would have reason to remove impairments from this relationship (or, in Radzik's phrase, to atone), independently of whether she appreciates these reasons. On many views, justifying the coercion of someone requires pointing to reasons or obligations that that person has. *E.g.*, Buchanan (2002), at 703-4; Estlund (2009), at 43-44. If so, then these reasons to maintain the moral relationship could be invoked to justify coercing the wrongdoer into making redress. However, as I discuss below at n. 65, redressive gestures made in response to such coercion would seem to violate reparation's intentional dimension.

From the initial formulation, then, we can incorporate the social effects fix and the proviso to arrive at a refined formulation.

Reparation as Valuing Relationships (RAVR): your valuing relationship(s) with the victim or others that are impaired by your wrongdoing provides you with reason to make reparation, so long as your valuing is consistent with the ideal(s) of the impaired relationship(s).

RAVR picks out a motivationally efficacious reason for making redress. To value a relationship is to have compelling reasons to remove impairments from it. RAVR also identifies a reason for reparation that is generally appropriate. The attitudes you express in a gesture and your reasons for action matter because they (partly) constitute valuing a relationship. When you make a redress in a way that conveys attitudes inconsistent with a relationship's ideal, your gesture is not an instance of valuing that relationship. Likewise, your reasons for action matter for reparation because they are constitutive of valuing a relationship. In many cases, to value a relationship is to take it as providing reasons for action. When you do not take your relationship as providing such reasons for action, then your gesture is not an instance of valuing the relationship. This conclusion follows from the broader requirement of non-replication: you cannot (fully) ameliorate the impairments on a relationship through a gesture that replicates the features of wrongdoing that gave rise to these impairments.

RAVR can explain where the compensatory conception of reparation goes astray. The compensatory conception would count as reparation many gestures that do not arise from (and are inconsistent with) valuing the relationships impaired by wrongdoing. In the *Wallet Thief* and *Servile Wallet Thief* cases, for example, William's gestures are inconsistent with his valuing our friendship. In the *Wallet Thief* case, if William had valued his friendship with me, then he would not have demeaned me in making redress. In the *Servile Wallet Thief* case, if William had valued his friendship with me, then my grievances (and our relationship) would have figured more fundamentally into his reasons for action.

RAVR can also explain why the compensatory conception appears to get some cases right. In particular, the compensatory conception reaches the correct verdict when wrongdoing implicates thin relationships, like the contractual relationship. Part of what makes a relationship thin is that valuing it does not have elaborate expressive or intentional success conditions. In other words, a wider variety of expressions and intentions are compatible with valuing thin relationships than with thicker ones. Yet to say this is not to deny that some reasons for action or expressions of attitudes are incompatible with valuing even thin relationships. Thus, despite their apparent overlap of these two frameworks, the compensatory conception does not get all of these cases right; and even when the compensatory conception does appear to get the cases right, the relational conception still provides a better explanation.

To illustrate these points, consider an analogue to the *Servile Wallet Thief* case:

Breach: W has a contract with V to produce widgets. W breaches a contractual obligation to V just to see if he can. Later, out of concern for his reputation with T, W willingly pays the damages specified in the W-V contract.

W's action in this case is consistent with RAVR, and my intuition is that W's gesture ameliorates the significance of the breach as much as paying damages can do.⁵⁵ That W acts out of concern for T (and that V figures only derivatively in W's reasons for action) does not make W's gesture defective. W's gesture would not have ameliorated the significance of his breach any more if the W-V relationship had figured more directly into W's deliberation. Part of the explanation here is the thinness of the ideal of the contractual relationship. One can value a contractual relationship while not being vulnerable to one's relative, without taking the relationship as a basic source of reasons, and without being disposed to seek the removal of impairments. Moreover, it seems plausible that the ideal of the contractual relationship allows for the kind of instrumental valuation that W engages in. For wrongs that solely implicate thin relationships, then, the relational conception is capacious in much the same way that the compensatory conception is: a wide variety of reasons can appropriately motivate reparation.

However, even in cases involving thin relationships, the relational conception and compensatory conception are not equivalent. Even though RAVR might be capacious in thin relationships, there are still intentional requirements for reparation. Not just *any* reason for making redress will do. Consider the following analogue to the Con Man case:

Con Man Breach: W has a contract with V to produce widgets. W breaches a contractual obligation to V, just to see if he can. However, W is a con man, and his purpose in entering the contract is to defraud V by breaching the contract. V has little cash on hand for W to abscond through breaching the contract. W pays the damages specified by the W-V contract as part of a plan to regain V's trust and breach the contract again at a time when V will have more cash on hand.

Even though the contractual relationship is thin and allows a variety of reasons for action consistent with valuing, there is something amiss in W's redressive gesture. W's illicit reasons for making redress explain why. The compensatory conception cannot accommodate this explanation, since on this view one's reasons for action do not affect a gesture's status as reparation. Even for wrongs involving thin relationships, there are still important differences between the compensatory conception and the relational conception. The latter can spot deficiencies in gestures based on illicit reasons that the former cannot. However, this discussion introduces an important point that will be developed more in the next part: where a wrong implicates thinner relationships, a wider variety of reasons for action seem capable of satisfying reparation's intentional dimension.

⁵⁵ I bracket questions about whether breach of contract is itself a moral wrong and, if so, how much paying damages can ameliorate the significance of that wrong. Compare Shiffrin (2006) with Bedke (2011).

To summarize the main arguments of this part, the relational conception shows how reparation ameliorates interpersonal wrongs. RAVR explains a core part of how reparation ameliorates. It identifies a reason to make redress that, in general, is both motivationally efficacious and appropriate. RAVR allows the relational conception (unlike the compensatory conception) to account for the causal structure of reparation, as well as the importance of non-replication. Moreover, RAVR provides a way to fill in the expressive and intentional dimensions of reparation. The normative ideal of a relationship establishes which expressions and intentions are required for successful reparation. When, for example, a wrong impairs a friendship, the attitudes and reasons required to make a gesture reparation are informed by the attitudes and reasons constitutive of valuing a friendship.

IV. Reparation and the Political Relationship

So far, I have argued for the relational conception of reparation in the context of interpersonal wrongs. Yet many contested debates about reparation concern political injustices like slavery, colonialism, expropriation, and genocide. A critic might charge that the relational conception does not apply to these contexts, or that the compensatory conception better explains how reparation ameliorates here. Defending the relational conception requires showing first that reparation has a causal structure in political contexts; and second, that the compensatory conception cannot account for this causal structure, while the relational conception can. I defend both of these claims in turn.

First, the reparation of political injustices has a causal structure. Above, I explored two aspects of reparation's causal structure: the expressive and intentional dimensions. Both of these dimensions apply to the reparation of political injustices. Many commentators posit an expressive dimension to the justification of political actions, arguing that the attitudes conveyed by a political action matter to whether it is justified.⁵⁶ Regardless of what one thinks about this connection between political actions and conveyed attitudes generally, it seems applicable to reparation. To illustrate this point, consider A. John Simmons's argument for property reparations to Native Americans. Simmons contends that reparations for expropriation are justified as a way of giving Native Americans their "fair shares" of the holdings of which they were deprived by American settlers.⁵⁷ One possible Lockean objection to such a gesture is that the dispossessed Native Americans had no analogous conception of property and, as a result, were not willing to downsize their holdings to make room for everyone else. To overcome this objection, Simmons contends that Native American conceptions of property should be viewed as the product of "a kind of nonculpable moral ignorance," which does not limit their rights to holdings.⁵⁸

⁵⁶ See Feinberg (1970b), ch. 4; Anderson & Pildes (1999).

⁵⁷ Simmons (1995a), at 173-184.

⁵⁸ *Id.*, at 180-1.

The scheme that Simmons envisions might strike you as deficient. One way to explain this deficiency is that the scheme violates non-replication. The proposed program would convey that the Native American form of life was benighted because it lacked an individualized conception of property rights.⁵⁹ Yet something like this attitude was conveyed by the dispossession policies to which reparation would respond. The replication of these disrespectful attitudes explains the seeming deficiencies of the scheme. By comparison, a scheme that did not convey a similar attitude about Native Americans would not be deficient along these lines. If this example is convincing, then the reparation of political injustices appears to have expressive success conditions, including some (like non-replication) that also apply to the reparation of interpersonal wrongs.

The reparation of political injustices also seems to have an intentional dimension. For example, many theorists concerned with public justification see the reasons for political actions as crucial to the justification of political arrangements and policies.⁶⁰ Regardless of what one thinks about this proposition generally, reasons for action appear capable of blunting or nullifying a gesture's ameliorative impact. The *Con Man* and *Servile Wallet Thief* cases illustrated this point in the interpersonal context. The former case suggests that actions done for illicit reasons are deficient as reparation, and the latter indicates that actions done for licit but inappropriate reasons are deficient. For a political analogue, consider J. Angelo Corlett's argument about reparations for dispossession of Native Americans and U.S. slavery. Corlett sees the impetus for reparations as so powerful that, if the U.S. government does not make reparations, then

a case must be brought to the International Criminal Court in order to try the United States for crimes against Humanity. And should the United States ignore such an indictment, or refuse to pay the reparations imposed on it by the ICC... then an international coalition of countries can and should impose diplomatic and, if necessary, [coercive] measures against the United States for as long as it takes to bring the United States to justice.⁶¹

Corlett argues that these coercive measures should convey that "either the United States submits to the demands of compensatory justice... or it faces the likely doom of its economy, which will in turn lead to the demise of its political clout globally and its society in general."⁶²

Assume that Corlett's account of the dynamics of international law and arguments about the strength of the case for reparations are sound. Even so, the scheme that Corlett describes seems deficient, and this deficiency can be explained in terms of reparation's

⁵⁹ Assume for the sake of argument that this characterization accurately describes Native American property systems.

⁶⁰ See generally Chambers (2010).

⁶¹ Corlett (2010), at 213.

⁶² *Id.*, at 215.

intentional dimension. Adhering to the (*ex hypothesi*) legitimate coercive demands of other states is often a compelling justification for state action. However, redress made solely to stave off ruinous economic sanctions seems to violate the intentional dimension for the same reasons that, in the Servile Wallet Thief case, William's returning my wallet to appease Theresa was deficient: namely, that the reasons for making the gesture replicate at least one of the objectionable features (*i.e.*, disregard) of the underlying wrong. The recipients of redress under Corlett's scheme could object: "You paid us to stave off a threat to the U.S. government. We didn't really matter, just as our ancestors didn't really matter." The intelligibility of this objection might at least blunt the scheme's ameliorative impact.

By contrast, consider an alternative scheme where redress made as part of a broader public commitment to atone for the wrongs of slavery. Say that this alternative scheme was the outgrowth of a public recognition and response to the grievances of claimants, rather than (as under Corlett's scheme) a response to threats by third parties. Suppose also that, in its treatment of claimants, this alternative scheme took pains not to replicate the disregard that characterized the treatment of slaves. In the alternative scheme, then, the grievances of claimants would figure directly as a reason for making redress. Of course, neither scheme is likely to be realized any time soon in our world. However, despite this remoteness, it seems plausible that the alternative scheme would ameliorate the significance of slavery more than Corlett's proposal. If so, then the reparation of political injustices has an intentional dimension that is characterized (at least partly) by a requirement of non-replication.

The compensatory conception fails to explain how reparation ameliorates the significance of political injustices. This view cannot appreciate the many ways that a gesture can fail or fall short as reparation. It lets in too many gestures based on inappropriate reasons, and it rules out too few gestures that are accompanied by disrespectful attitudes or beliefs. Indeed, some advocates of the compensatory conception embrace a kind of agnosticism about the design of reparations programs, according to which the institutional mechanisms for effectuating reparation are evaluated based on how efficiently they distribute redress to the claimant population.⁶³ On this agnostic or instrumentalist logic, if we hold the amount of resources available for redress constant, the more efficiently that a program distributes these resources, the greater the program's ameliorative impact. Yet such agnosticism implicitly denies that the ameliorative impact of a program can depend on the attitudes or beliefs conveyed by an institutional mechanism. Moreover, some proponents of the compensatory conception explicitly deny that the reasons for which a gesture is made matter in determining its status as reparation

⁶³ Posner & Vermeule (2003), at 725. This irrelevance of expressions to reparation is an implication of the consequentialist logic about the institutional design of compensation programs, according to which the design of an institution is justified in terms of how well it accomplishes an overarching goal. See Reiff (2005); Arneson (2003). This consequentialist logic would deny that the mechanisms for implementing a redressive program could determine the program's success as reparation. Yet, based on reparation's causal structure, the manner of implementation is often constitutively important. A program of redress that expresses certain kinds of degrading attitudes about its recipients might not just be a poor reparation program, but not reparation at all.

of a political injustice.⁶⁴ Based on these commitments to institutional agnosticism and the ameliorative irrelevance of intentions, the compensatory conception would not be able to explain the seeming defects in the schemes that Simmons and Corlett describe.

By contrast, the relational conception can capture reparation's causal structure and explain what seems to go wrong in these schemes. Suppose that the normative ideal of the political relationship is relatively thick (although not nearly as thick as friendship). If so, then this relationship has expressive and intentional success conditions. Valuing the political relationship requires adhering to these requirements. Grievous injustices impair the political relationship in many ways, including by conveying attitudes and exhibiting patterns of deliberation that are inconsistent with this relationship's ideal. These injustices provide victims (and others) with reasons not to interact with wrongdoers in the ways characterized by the ideal of the political relationship. A gesture of redress that conveys disrespectful attitudes or disregards the claimant's grievance might annul losses associated with an injustice, yet fail to change all (or any) of the ways that the injustice impairs political relationships. Indeed, some such gestures might compound these impairments by ratifying impairment-inducing elements of the underlying injustice.

The relational conception can illuminate the defects in Simmons's proposed scheme. Simmons's proposal appears inconsistent with RAVR, since the provision of redress seems to convey disrespectful attitudes that are arguably inconsistent with the ideal of the political relationship. Expropriation conveyed that the Native American way of life was deficient, and Simmons's proposed scheme would replicate these attitudes. If valuing the political relationship provides the impetus for making reparation, then redressive gestures should not convey attitudes that are inconsistent with the ideal of this relationship. Redressing an injustice while replicating disrespectful attitudes about the targets of redress is no way to value a political relationship.

The relational conception can also explain where Corlett's proposal seems to go awry. Corlett's scheme would also run afoul of RAVR. The targets of redress would figure only derivatively into the wrongdoer's reasons for action. Such disregard seems inconsistent with the normative ideal of the political relationship, under which the grievances of Native Americans and African-Americans should have non-derivative significance. To attribute only indirect significance to these claimants is to fail to value the political relationships with them.⁶⁵

⁶⁴ See, e.g., Vermeule (2012); Hill (2002), at 398

⁶⁵ This point raises a larger question of whether every gesture of redress made in response to coercive threats is deficient along the intentional dimension. If so, then many seemingly paradigmatic instances of reparation (e.g., monetary transfers made as the result of a successful lawsuit, as were sought in the Greenwood case) would seem at best to be imperfect reparation.

I cannot fully address this issue here, but the success of such gestures seems to depend on the specification of the relationships at issue. Making redress solely in response to a coercive threat would be a way of valuing a relationship derivatively: the wrongdoer's relationship with the coercer would matter directly, while her relationship with the victim matters only via concern about the third-party coercer. For some kinds of thin relationships, attributing such derivative significance can be consistent with valuing the relationship. For example, as described above, one does not seem to violate the ideal of the contractual relationship if the other parties to the contract figure only derivatively into one's reasons for action. Paying

Of course, you might not agree that the schemes that Simmons and Corlett envision are deficient. Yet taking this view would not require abandoning the relational conception. Indeed, the relational conception can plausibly explain why people might disagree about whether these proposed schemes would be genuine (or perfect) reparation: namely, because of a deeper disagreement about how to specify the ideal of the political relationship. Suppose one took a Lockean-inspired view that the normative ideal of the political relationship is thin, characterized mostly by a commitment to protecting the negative rights of relatives and ensuring that these rights are redressed when violated. Such a view would deny that expressing certain attitudes or acting for particular kinds of reasons is a requirement of valuing the political relationship. Both Simmons and Corlett see the ideal of the political relationship in these thin terms, more or less. If (as Simmons argues) the ideal of the political relationship consists mainly in protecting rights⁶⁶ and ensuring fair shares of property,⁶⁷ then the attitudes conveyed in a gesture of redress would not seem to matter so long as the gesture protects or vindicates rights. Likewise if (as Corlett contends) vindicating rights is the most important aspect of the political relationship,⁶⁸ then we might not object to a policy that vindicated rights for reasons that did not directly implicate the rightsholder. Thus, on a thin construal of the political relationship, one could deny that either Simmons's or Corlett's scheme runs afoul of RAVR. Indeed, if one construes the political relationship thinly, then the expressive or intentional dimensions do not appear to be centrally important to the reparation of political injustices.⁶⁹ This denial allows the relational conception to explain the appeal of the compensatory conception. Many libertarians and classical liberals see the vindication of violated rights as a central component of the political relationship.⁷⁰ Much of what it

contractually specified damages solely out of concern for preserving one's reputation in the marketplace does not obviously violate RAVR.

For thicker relationships, however, attributing derivative significance is more problematic. Because one of the requirements for valuing a thick relationship is taking one's relative and one's relationship as a basic source of reasons, a redressive gesture in which these matter only derivatively would seem to run afoul of RAVR. To the extent that the political relationship is construed thickly, then, the relational conception of reparation appears somewhat revisionist: reparation of injustices made in response to court order would appear to violate RAVR and thus ameliorate imperfectly (at best).

⁶⁶ Simmons (1995b), at 5.

⁶⁷ Simmons (1995a), 160-172.

⁶⁸ Corlett (2010), ch. 5.

⁶⁹ Recall that non-replication sees a redressive gesture as deficient if it replicates wrongmaking features of the underlying wrong. On a thin construal of the political relationship, the violation of rights explains the why policies like expropriation and slavery are unjust. By implication, the attitudes expressed by these policies or reasons for which they were undertaken would not figure in the evaluation of redressive gestures because these are not wrong-making features of the underlying injustice.

⁷⁰ This connection does not seem accidental. Some of the clearest exponents of the compensatory conception also defend a thin view about the ideal of the political relationship. *See, e.g.*, Nozick (1974); Lomasky (1991); see also Butt (2009) (articulating main components of compensatory conception as implied by a libertarian construal of the international political relationship). Both Nozick and Lomasky utilize the appeal of the compensatory conception as a premise in their arguments in favor of construing the political relationship thinly.

means to value the political relationship, then, is to ensure the compensation of rights violations. Much, but not all. The vindication of rights would not be the only determinant of a gesture's success as reparation. For example, redressing political injustices for illicit (rather than licit but inappropriate) reasons would still seem deficient.⁷¹ On a thin construal of the political relationship, then, the compensatory conception seems close to the relational conception, but the two views are not equivalent.

Whether Simmons's or Corlett's proposal succeeds turns on whether the political relationship is construed thickly (in which case the proposals are likely defective) or thinly (in which case they might not be). In this chapter, it's not my goal here to establish which way of these constructions is best. This question underlies many of the oldest and most disputed topics in political philosophy.⁷² Rather, regardless of how one construes the ideal of the political relationship, the relational conception is superior to the compensatory conception as a description of how reparation ameliorates the significance of political injustices.

V. Conclusion

In this chapter, I have made three main points. First, reparation is a success term. Genuine reparation ameliorates the normative significance of a wrong or injustice. The causal structure of reparation is crucial to explaining how reparation ameliorates. A gesture is at least deficient as reparation (and perhaps not reparation at all) if it conveys inappropriate attitudes or is done for inappropriate reasons.

Second, recognizing this causal structure weighs against the compensatory conception of reparation. Although predominant, the compensatory conception offers an implausible account of what wrongs do and how reparation ameliorates. It fails to recognize the deficiency in a gesture that is fully compensatory but nevertheless conveys inappropriate attitudes or is based on inappropriate reasons. Reparation is more than compensation occasioned by a wrong or injustice.

Third, the relational conception provides a better way to think about how reparation ameliorates the significance of interpersonal wrongs and political injustices. On this view, reparation is part of a dynamic of blame and forgiveness that implicates valuable relationships. In general, that a wrongdoer values relationships impaired by her wrongdoing gives her a compelling and appropriate reason to make redress. These

⁷¹ Imagine a political analogue to the Con Man and Con Man Breach cases described above, where redress was made in order to perpetuate a political arrangement in which victims or their descendants are subservient. *See* Winter (2010), at 800-1 (noting the possibility that victims of an injustice might see "redress [as] a cunning and assimilative neo-colonial device"). Even on a thin reading of the political relationship, it's plausible that such a gesture would not fully ameliorate (and might compound) the significance of slavery. The compensatory conception is incapable of explaining how a redressive gesture might have these effects. However, the relational conception could straightforwardly explain them: such a gesture would ratify features of the underlying injustice that impaired the political relationship in the first place.

⁷² I will, however, wade into this morass in chapters 5 and 6 by defending a theory of reparation based on Rawls's (relatively thick) construal of the political relationship.

relationships both provide the normative impetus for reparation and help fill out which expressions and reasons are required for a gesture to ameliorate.

Chapter 3- Theories of Reparation- A Framework

A theory of reparation is, at bottom, an answer to the question “Why make reparation?” It explains why reparation is justified *prima facie*, as well whether reparation is justified to particular claimants, by specific payers, and in response to specific injustices. A theory of reparation also invokes a conception of reparation—that is, a story about how reparation ameliorates the significance of the wrongs or injustices to which it responds.

There are a variety of theories of reparation. Each gives a different answer to the question “Why make reparation?” For any injustice, different theories might reach different verdicts about whether reparation is justified. Likewise different theories might reach the same verdict about whether reparation is justified, but disagree about why. Sometimes adherents to the same theory will disagree about whether it justifies reparation in a particular case.

How do we decide which approach is best? It’s not enough to assess theories based on the answers they provide in particular cases. Much of what we a theory to do is to provide these kinds of answers, so taking this casuistic approach risks begging the question.¹ Likewise, it seems possible for a valid theory of reparation to be revisionist, recommending skepticism about the justification of reparation in entire classes of cases where reparation seems intuitively to be called for. It would be hasty to rule out such revisionist theories in advance. Perhaps our intuitions are mistaken.

The main goal of this chapter is to establish a framework for comparing various theories of reparation. Under this framework, a theory is redescribed in terms of how it answers a series of fundamental questions. The questions I focus on aren’t the only possible questions, nor are they necessarily the most contested. However, they provide a neutral way to elaborate core issues in theoretical debates about reparation. At the meta-theoretical level, each of these questions is important, even though there might be disagreement about how some of them should be answered.

Any theory of reparation faces a number of big questions. The framework that I offer here focuses on six kinds of questions: justification, conception, history, collectivity, demarcation, and distinctiveness. In what follows, I will show that these questions are important, independently of what we think are the right answers. Some of these questions are widely discussed among legal theorists and philosophers. Others are more neglected. Every theory of reparation confronts these questions, either by resolving them or else by explaining why they do not matter. Because these questions are ubiquitous, the framework provides a way to compare every extant theory of reparation.

I. Justification

¹ Indeed, one might find much theorizing about reparation dissatisfying or incomplete because the theories themselves are little more than efforts to reverse-engineer a favored conclusion in a particular case. For a similar diagnosis, see Torpey & Burkett (2010), at 460

In the broadest sense, the issue of justification asks the question “Why make reparation?” The “why” here is normative, rather than explanatory. An answer to this question specifies the features of a wrong or injustice that provide the normative impetus for reparation. I’ll call the most basic answer to the question “Why make reparation?” the *prima facie* or **facial justification** for reparation. A good account of facial justification will capture the urgency that is typically associated with valid claims to reparation. It will, in the terminology introduced in chapter 2, be capable of appropriately motivating agents to make redress. That is, it will identify a compelling reason for a properly deliberating agent to redress a wrong or injustice, even though doing so might be quite costly. Also, the gestures that it motivates won’t be obviously deficient—in other words, these gestures won’t violate reparation’s intentional or expressive dimensions, and thus ameliorate imperfectly (if at all). Finally, a good account of the facial justification for reparation will provide a gauge of the normative impetus for reparation relative to other applicable normative forces. Such a gauge is essential to resolving what John Rawls called the “priority problem,”² which here requires determining how the commitment to reparation fits with other normative commitments.

Establishing when reparation is justified involves a number of other issues besides facial justification. One such issue is what I’ll call **claimant justification**. An account of claimant justification provides a principled explanation of who may claim reparation, or (equivalently) the agents toward whom reparative efforts may appropriately be directed. Given an injustice that calls for reparation *prima facie*, there are a variety of ways to specify which claimants may appropriately claim reparation. Perhaps, on what Janna Thompson calls the “exclusion principle,” an individual or collective may claim reparation “only if they were the ones to whom the injustice was done.”³ Although Thompson and others see the exclusion principle as a basic tenet of reparative justice,⁴ this principle might be scrutinized further. How do we establish the person(s) to whom an injustice was done? What is it about being in this class that grounds a claim to reparation? An account of claimant justification will provide answers to these questions.

The exclusion principle is a narrow way of specifying claimant justification. According to it, reparation can only be justified if the claimant was the victim of the injustice.⁵ It is possible to articulate less restrictive standards for claimant justification. Perhaps reparation may be claimed by or directed toward someone who is disadvantaged by an injustice, regardless of whether she was a victim of it. Likewise, if an injustice was perpetrated against people on the basis of their membership in a group, then perhaps all extant members of that group may appropriately claim reparation. Perhaps both victims and their descendants can appropriately claim reparation, on the argument that claims for reparation can be passed down from a victim to her descendants and the assumption that these claims would have been passed down.

² TJ, at §8.

³ Thompson (2001), at 116.

⁴ E.g., Brooks (2006), at 155.

⁵ An advocate of the exclusion principle might see the justification in directing some forms of redress toward the descendants or relatives of a victim, but deny that these redressive efforts would be reparation.

On the other hand, it is possible to articulate a standard of claimant justification that is narrower than the one implied by the exclusion principle—that is, to see victimization as necessary but not sufficient for claimant justification. Perhaps not all victims of an injustice may appropriately claim reparation. This possibility raises another important question concerning claimant justification: namely, whether someone’s claim to reparation may be affected by facts about her that aren’t directly related to the injustice. For example, an agent’s complicity in an underlying injustice or involvement with perpetuating similar injustices might seem to defeat her claim to reparation based on victimization. Likewise, an agent’s wrongdoing subsequent to an injustice might undermine her claim to reparation for the underlying injustice.⁶ Finally, some argue that an agent’s abandonment of a claim to reparation (or even her failure to prosecute it) could bear on the justification of reparation directed at her.⁷ A satisfactory account of claimant justification, then, needs to establish how widely to draw the class of valid claimants, why these claimants (and not others) have valid claims to reparation, and which (if any) of a claimant’s actions can affect the validity of her claim to reparation.

Another set of issues involves the justification for expecting or demanding particular agents to make or contribute to the making of reparation. Call this the issue of *payer justification*. Here, too, the exclusion principle provides a starting point for analysis. Thompson provides the following corollary to the exclusion principle: “only perpetrators... should be... required to make recompense” for an injustice.⁸ If anyone bears responsibility for making reparation, the perpetrator of the injustice would seem to. However, the exclusion principle might be vexing here, just as on the question of claimant justification. It can be very difficult to articulate who (exactly) perpetrates an injustice. Moreover, the exclusion principle can’t merely be assumed as a basic component of reparative justice, since it is possible to articulate standards for payer justification that are both broader and narrower than the one offered by the exclusion principle.

This issue of how broadly to draw the class of potentially responsible payers raises a more fundamental question: What grounds responsibility for making reparation in the first place? To clarify what’s at stake in this question, consider David Miller’s distinction between “outcome responsibility” and “remedial responsibility.” For Miller, an agent is outcome responsible for an action when it is fair to “attribut[e] [the] consequences [of the action] to her in such a way that, other things being equal, the resulting benefits and burdens should fall to her.”⁹ An agent has remedial responsibility

⁶ See, e.g., Kershner (2002), at 261-2.

⁷ Margalit & Raz (1990), at 459 (arguing that prescription applies to claims of restitution in order to “prevent the revival of abandoned claims, and to protect those who are not personally to blame from having their life unsettled by claims of ancient wrongs, on the ground that their case now is as good as that of the wronged people or their descendants”).

⁸ Thompson (2001), at 116.

⁹ Miller (2001), at 244-5. Miller’s notion of “outcome responsibility” resembles what T.M. Scanlon calls “responsibility as attributability” for an action, under which it is appropriate to take an action as a basis for the moral appraisal of an agent. Scanlon (1999), at 248. For Miller, outcome responsibility is narrower than

when, given a “person or group of people who are suffering harm of some kind,” it is “her job... to put that situation right.”¹⁰ A theory of reparation might see outcome responsibility as necessary for remedial responsibility. But, on such an approach, further questions arise about when it is fair or appropriate to attribute outcome responsibility for an injustice to an agent. This question parallels debates about free will, determinism, and the possibility of moral responsibility. Outcome responsibility for an injustice might be based on an agent’s causal contribution to the perpetuation of the injustice.¹¹ If so, then there is a question about whether responsibility correlates with contribution, or else is jointly shared among all those who contribute. Alternatively, perhaps outcome responsibility for an injustice requires that an agent have exercised some control over the underlying wrong¹² or to have had the opportunity to avoid authoring the outcome for which responsibility is in question.¹³ These standards for attributing outcome responsibility differ in how widely they draw the class of potentially responsible agents. Views that base outcome responsibility on mere causal contribution delimit a broader class of payers than those requiring control or the opportunity to avoid.

On the other hand, not all accounts of payer justification presuppose the attribution of outcome responsibility. Some deny that outcome responsibility is either necessary or sufficient for remedial responsibility. On these positions, one can be expected to make reparation for injustices that she did not participate in, contribute to, or even endorse. The viability of these positions depends on how plausibly they elaborate the requirements of remedial responsibility. Some see benefitting from an injustice as sufficient to trigger remedial responsibility.¹⁴ Others see membership in a group that perpetuated an injustice as sufficient for attributing remedial responsibility, even if an agent was not alive (and does not endorse) the injustice. On such views, the justification of expecting an agent to make reparation might be straightforward (that remedial responsibility is constitutive of group membership)¹⁵ or indirect (that attributing remedial responsibility to individuals is justified by principles of democratic politics).¹⁶ Perhaps some other kind of connection to a wrong is sufficient to justify the expectation that an

“bare causal responsibility” for an action (according to which responsibility is based on causal contribution), but narrower than “moral responsibility” (which requires both outcome responsibility and a licensing of moral assessment like blame). Miller (2001), at 245-6.

¹⁰ *Id.*, at 246. Miller’s distinction between outcome responsibility and remedial responsibility roughly tracks Scanlon’s distinction between responsibility as attributability (which is a precondition for moral assessment) and “substantive responsibility” (which “express substantive claims about what people are required... to do for each other”). Scanlon (1999), at 248.

¹¹ *See, e.g.*, Feinberg (1970a) at 222.

¹² *E.g.*, Miller (2007), at 93 (“[F]or responsibility to be attributed, the outcome must be under the agent’s control...”).

¹³ *E.g.*, Brahm & van Hees (2012), at 603, 607 (articulating view on which “one can only be morally responsible if one had reasonable opportunity not to be so”)

¹⁴ *E.g.*, Butt (2009), at 120.

¹⁵ *E.g.*, Sepinwall (2006); Pasternak (2011).

¹⁶ Stiliz (2010).

agent will make or contribute to making reparation. Further, the various positions on remedial responsibility might be combined into an account of payer justification.¹⁷ For now it's enough to note that accounting for payer justification requires articulating a basis for an agent's remedial responsibility for an injustice, which may or may not depend on her outcome responsibility for the injustice.

So an answer to the question "Why make reparation?" will address the three modes of facial, claimant, and payer justification. Let's say that reparation for an injustice is *ultimately justified* when all three of these modes are satisfied: that is, that an injustice generates good *prima facie* reasons for reparation, the claimant has a valid claim, and the payer can reasonably be expected to make (or contribute to making) reparation. It is possible that these three modes come apart in entire classes of cases, such that reparation cannot be ultimately justified. For example, perhaps an action or policy is an injustice that could justify reparation in the abstract, but no one has a valid claim to reparation. Or perhaps an injustice calls for reparation, but no one may reasonably be expected to make it.¹⁸ Consider a narrow reading of Thompson's exclusion principle on which only those who experienced an injustice could be victims, and outcome responsibility is necessary for payer justification. On this narrow reading, one could argue that even if the Greenwood riots justify reparation *prima facie*, they do not justify reparation to anyone born after 1921 (since these potential claimants were not victims), nor could they justify expecting or requiring any living person to make reparation (since any living person who was alive at the time of the riots would have been a child, so presumably ineligible for outcome responsibility).

Reaching such a skeptical conclusion for entire classes of cases might strike some as counterintuitive. However, at least at this stage of the inquiry, we should avoid ruling out a theory of reparation solely because of its skepticism. Perhaps the theory out of which the skeptical conclusion follows is correct, and our intuitions about the possible justification of reparation are erroneous. If so, then the advocate of the skeptical position might be correct, although she would owe an explanation for why our intuitions are wrong.

II. Conception

Every theory of reparation is based on or presupposes a conception of reparation—that is, a story about how wrongs or injustices have significance and how reparation ameliorates this significance. An adequate conception of reparation captures the relevant normative phenomenology. Some theories of reparation are compatible with multiple conceptions, but others are wedded to a particular story about how reparation works. A theory is deficient if its conception can't accurately describe our normative world.

¹⁷ For example, David Miller offers a "connection theory" on which an agent's connection to wrongdoing grounds her remedial responsibility. Miller (2007), at 99. Miller's approach is pluralist, since it allows that this connection can be satisfied in a number of ways. *Id.*, at 99-100.

¹⁸ See, e.g., Kukathas (2006), at 330.

How do we know that a conception offers an accurate portrayal of our normative world? I will focus here on what, in chapter 2, I called the causal structure of reparation: the way that a gesture's etiology affects its status as reparation. Previously, I argued that this causal structure includes both expressive and intentional dimensions. In other words, the attitudes conveyed by a gesture and the reasons for which it is made can determine how much (if at all) the gesture ameliorates the significance of a wrong or injustice. Gestures that express inappropriate attitudes or are done for inappropriate reasons are deficient, and might not be reparation. Also, I offered non-replication as a starting point for the expressive and intentional dimensions of reparation: a gesture is deficient as reparation if it replicates wrongmaking features of the underlying wrong. Thus, where the expression of certain attitudes or specific features of an agent's deliberation help explain the wrongfulness of the underlying wrong, a gesture of redress that replicates these attitudes or patterns of deliberation will ameliorate imperfectly, if at all. An adequate conception of reparation needs to appreciate that reparation has a causal structure, as well as that these expressive and intentional dimensions are part of that causal structure. It should also help fill in the expressive and intentional dimensions beyond the basic requirement of non-replication.

There is more to telling a plausible story about how reparation ameliorates than this causal structure.¹⁹ Furthermore, the causal structure might have additional elements besides these two dimensions. For example, Thompson's exclusion principle suggests the structural requirement that a token of redress must originate from a wrongdoer in order to ameliorate in the way that reparation does. However, the causal structure generally, and the expressive and intentional dimensions in particular, seem central to the phenomenology of reparation. We should reject any story about how reparation ameliorates that can't appreciate why the causal structure matters to amelioration, as well one that cannot explain why tokens of redress that violate this structure are deficient.

In chapter 2 I examined two different conceptions of reparation: the compensatory conception and the relational conception. The compensatory conception construed the ameliorative effect of reparation according to the following schematic:

- (1) **What do wrongs do?** Wrongs create debts.
- (1a) **Why make reparation?** For the same reasons that you pay your debts.
- (2) **How to calculate the reparative burden?** Calculating the debt created by the wrong requires comparing the state of the world in which the wrong happened with some other state of the world.
- (3) **What does reparation do?** Reparation contributes to the satisfaction of the debt arising out of the underlying wrong, and full reparation satisfies this debt (thereby expiating the significance of the wrong).

¹⁹ Focusing solely on causal structure is sufficient to assess most of the extant theories of reparation. However, in chapter 4 I raise a number of other phenomenological aspects of reparation, including the requirement of sensitivity to the claimant's grievance.

The compensatory conception was unable to capture the causal structure of reparation. It could not explain why or how the attitudes a gesture expresses and the reasons for which it is made can matter to its success as reparation. The relational conception offered a different set of answers to these questions:

- (1) **What do wrongs do?** Wrongs impair relationships.
- (1a) **Why make reparation?** Because you value (or have reason to value) relationships (with victims or third parties) that are impaired by your wrongdoing.
- (2) **How to calculate the reparative burden?** What reparation requires is a function of the degree to which a wrong impairs relationships.
- (3) **What does reparation do?** Genuine reparation answers the charge that grounds blame and changes the reasons to forgive the wrongdoer. Perfect reparation both answers the charge that grounds blame and removes barriers to forgiveness to the greatest possible extent.

I argued that the relational conception could not only explain why expressions and intentions matter, but also fill in which expressions and intentions might be success or perfection conditions of reparation. I do not take these efforts to have established that the relational conception is the best story of how reparation ameliorates. Other conceptions of reparation that I have not yet considered might capture the normative phenomenology better than the relational conception.²⁰ Rather, I note only that the relational conception can accommodate reparation's causal structure, while the compensatory conception cannot. Thus, for the purposes of our analysis, a theory of reparation compatible only with the compensatory conception is defective because it offers an implausible picture of our normative world.

To summarize these first two elements of the framework, a viable theory of reparation will provide an account of why, to whom, and from whom reparation is justified, as well as offering a story about how reparation works. We can evaluate theories by the plausibility of their implicit conceptions of reparation, specifically whether these stories can capture the causal structure of how reparation ameliorates.

III. Collectivity

Grievous injustices inevitably implicate both groups and institutions. An injustice like Greenwood could only be effected by people working together. Institutional frameworks are also necessary to perpetuate such injustices over time. Thus, any theory of reparation confronts a series of questions about how responsibility is and should be distributed within and among groups or institutions. Questions arising out of collectivity are central to much of the philosophical discussion of reparation.²¹ The collective nature

²⁰ Indeed, I analyze such an alternative in chapter 4, which I call the conformity conception, in connection with John Gardner's version of the corrective justice approach.

²¹ *E.g.*, Ivison (2000); Hughes (2004); Sepinwall (2006); Silver (2006); Thompson (2006); Abdel-Nour (2003); Pasternak (2011); Stilz (2010).

of political injustices might affect both the claimant and payer justification for reparation, as well as the way that reparation operates.²² Let's explore each of these issues in turn.

Many political injustices are perpetrated against groups. How (if at all) does this affect those who may claim reparation? One possible response is that collective victimization expands the class of those who have valid claims to reparation. For example, if the exclusion principle is true (on which only victims of an injustice may claim reparation) and the Greenwood riots are construed as having victimized the specific residents of the Greenwood neighborhood, then it follows that only those who were actually residents of that neighborhood at the time of the riots could claim reparation. There are few alive today who were alive then, and fewer still every day. However, a collective construal of victimization allows for the expansion of those who could claim reparation. Perhaps the riots are best seen as having been perpetrated against all African-Americans who were alive in 1921. If so, then every African-American alive at the time would be justified in claiming or demanding reparation. Perhaps we can interpret the riots to have been perpetrated against African-Americans as such, rather than the specific African-Americans in Greenwood. If so, then the temporal limitation might not apply to claimant justification: reparation might be claimed or demanded by people who were not alive at the time of the riots. Alternatively, one might think that the collective nature of the victimization restricts claimant justification to collective agents (like African-American Tulsans, or African-Americans in general).²³ Moreover, perhaps the collective nature of injustices cannot plausibly justify reparation to collective agents because such agents could not be injured by an injustice.²⁴ So it is an open question whether the collective nature of the perpetration of injustice expands the boundaries of justifiable claimants beyond those against whom an injustice was directly perpetrated, or (alternatively) contracts it by limiting claimants to collective agents.

Many discussions of the significance of collective victimization either assert or presume something like Thompson's exclusion principle, which requires identity between claimants and victims.²⁵ However, if we deny the exclusion principle (that is, if we allow that reparation can be justified for claimant who were not victims), then it is unclear whether the nature of collective nature of victimization matters at all to the ultimate justification for reparation.

²² I won't explore here how the collective perpetration or victimization of injustices affects the *prima facie* case for reparation. It seems to me an open question whether wrongs perpetrated by collectives can be analogized to wrongs perpetrated by individuals and, if so, whether the former are inevitably worse than the latter. However, as discussed below, political injustices seem to be inherently collective because they necessarily implicate political institutions. Thus, there are no intelligible non-collective analogs to political injustices.

²³ *E.g.*, Simmons (1995a).

²⁴ Kershnar (2002), at 256 (denying that "blacks qua group have a legitimate claim to compensation" because groups are not the kinds of entities whose lives could go "better or worse.")

²⁵ *E.g.*, Butt (2009), at 176; Herstein (2008).

Political injustices not only involve collective victimization, but also collective perpetration. Indeed, collective perpetration seems to be a conceptual requirement of political injustices. Wrongs can be perpetrated collectively or individually. To take up the example from chapter 2, it is possible for William to steal my wallet by himself, or in league with his confederates. The same is not true for injustices. If, as Rawls and others have argued, justice is an institutional phenomenon,²⁶ then injustice is also necessarily an institutional phenomenon. A wrong might be perpetrated by an isolated individual, but a wrong only becomes an injustice within a particular institutional setting.²⁷ To be sure, many injustices (like the Greenwood riots) are perpetrated by collectives—either by collective agents or by individuals acting together. But even those that aren't perpetrated in this way still implicate collective agency via political institutions. For every injustice, we can locate some institutional component, even if that component merely involves the failure to prevent or intervene in a harm or wrong.

The Greenwood case illustrates this inherently collective nature of the perpetration of injustices. Among historians and legal scholars, one of the most controversial issues is the extent to which state and local officials were involved in the violence. The rioters obtained many of their munitions from the local National Guard facility. There is “no question that airplanes were in the air... during and after” the riots,²⁸ although there is dispute about whether these planes were used to firebomb the Greenwood area or merely to coordinate the attacks²⁹ and provide police reconnaissance.³⁰ National Guard units both disarmed African-Americans in Greenwood and detained nearly all of the African-American residents of Greenwood in holding centers.³¹ Police officials deputized many of the rioters, who were (by implication) killing and looting under the aegis of state authority.³² As a juridical matter, discerning the involvement of state and local officials in the riots and their aftermath matters for determining whether the statute of limitations barred the plaintiffs' legal claims.³³

However, these questions are not central to philosophical analysis of this case, or for analyzing reparation for political injustices more generally. Even if no officials had participated in or facilitated the riots, to call these events an injustice is to implicate collectives in some way. The relevant institutions (like the police and the National Guard) did not prevent the gathered mobs from escalating into rioting, nor did they intervene

²⁶ Rawls, TJ, at 3; Waldron (2004b), at 271. Brian Berkey labels this position “institutionalism about justice.” Berkey (forthcoming)

²⁷ In chapter 1, I stipulated that wrongs were distinct from injustices. What follows is an attempt to substantiate that stipulation.

²⁸ Warner, “Airplanes and the Riots,” in Commission Report (2001), at 103.

²⁹ Brophy (2003), at 46-7.

³⁰ Warner, “Airplanes and the Riots,” in Commission Report (2001), at 107.

³¹ Gobel, “Final Report of the Oklahoma Commission to Study the Tulsa Race Riot of 1921”, in Commission Report (2001), at 12.

³² Brophy (2003), at 59.

³³ Alexander v. Oklahoma, 2004 U.S. Dist LEXIS 5131, *22-28 (N.D. Okla. 2004).

sufficiently to stop them. This failure implicates political institutions in the injustice: we can either deny that the doing-allowing distinction applies to states³⁴ or else see the “doing” here as the failure to discharge its duty of protection. For the purposes of determining payer justification, then, the failure of these institutions to protect the residents of Greenwood justifies holding a collective payer responsible.

How does the inherently collective nature of injustices affect those who may be expected or demanded to make reparation? One set of questions concerns vicarious responsibility, specifically the fairness of holding some people responsible for the wrongs of others. Vicarious responsibility would violate the exclusion principle, since it would allow that non-wrongdoers could be expected or demanded to contribute to making reparation. The difficulties posed by vicarious responsibility vary based on the criteria for remedial responsibility. If attributing remedial responsibility to an agent presupposes that the agent was outcome responsible for an injustice and we take a particularly demanding view about the requirements of outcome responsibility (*e.g.*, that outcome responsibility requires control), then the collective nature of political injustices would reduce the scope of those who may be held remedially responsible. If (as I have argued) a political injustice necessarily implicates institutions, then demands for reparation could only be addressed to those who could have been expected to control the institutions that are implicated in the injustice. On the other hand, given a laxer position about the requirements of outcome responsibility (*e.g.*, that outcome responsibility applies to everyone who makes a causal contribution to or benefits from the perpetuation of a political injustice) or position which denies that remedial responsibility must track outcome responsibility at all, the collective nature of political injustices would expand the class of justified payers. So the significance of collective perpetration varies across different accounts of payer justification—in particular, based on whether the exclusion principle applies.

We can sidestep these worries about expecting individuals to contribute to reparation by seeing collective agents as the responsible payers, with individuals having derivative responsibility in virtue of their connection to the collective agent. This strategy would avoid some of the problems arising out of the exclusion principle: this principle would be satisfied because the (collective) agent who perpetrated the wrongdoing would be the one held responsible for making reparation. A theorist might utilize this approach to increase the potential class of payers, as well as to avoid the skeptical conclusion regarding many historical injustices.

³⁴ See Braithwaite & Pettit (1990), at 62-3; Sunstein & Vermeule (2005). Consequentialists about political morality might deny that the doing-allowing distinction applies to states as part of a general skepticism about the significance of the distinction. See Enoch (2007). A variety of non-consequentialist positions about justice might also reject the applicability of the distinction to states. For example, the “pervasive effects” of the basic structure of society on the life prospects of citizens might obviate the difference between a state’s doing an unjust policy that undermines the fundamental interests of citizens and allowing private orderings that threaten these same interests. Rawls, TJ, at 82; *see also* Reidy & Von Platz (2006), Lu (2011), at 269. A non-consequentialist political theory might also allow that, although the doing-allowing distinction applies to states in some form, it does not change the permissibility of actions by state agents in the same way that it does for those of individual agents. *See* Lee (2011).

The viability of this strategy seems to require a plausible account of group agency or joint action, an explanation of when (or whether) it is justifiable for groups or collectives to be held responsible for the perpetration of injustices in the same way that individuals are held responsible for perpetrating wrongs. Yet introducing issues about the metaphysics of group agency or joint action can further complicate efforts to answer the question “Why make reparation?” The skeptic might accept that injustices necessarily implicate political institutions, while denying that group agency is tenable in entire classes of cases. For example, in the Greenwood case, the skeptic might deny that the contemporary state of Oklahoma or city of Tulsa that would make redress is identical to the collective agent who bears remedial responsibility for the riots. If the exclusion principle applies, then this lack of identity between wrongdoer and payer would undermine the payer justification for reparation—that is, the case for expecting the collective agent to make or contribute to making reparation. My goal here isn’t to resolve any of these issues regarding collective identity and payer justification. Rather I point out that, even though the articulation of collective agents as payers is intended to avoid justificatory problems arising out of vicarious liability, invoking this concept threatens to introduce new problems or distractions.

The collective nature of injustice also bears on the appropriate conception of reparation—that is, the story of how injustices matter and how reparation changes their normative significance. The prospect of injustices perpetrated by or against groups (as well that injustice and reparation both necessarily implicate political institutions) complicates any story of how reparation ameliorates.

There are a variety of ways to appreciate these complications, but I’ll focus on the how the inherently collective nature of political injustices might affect the specification of reparation’s causal structure. Recall that, on the description of the causal structure above and in chapter 2, reparation has both expressive and intentional dimensions. Whether a gesture succeeds as reparation depends on which attitudes it conveys and for which reasons it is done. The involvement of collectives raises at least three complications for elaborating this causal structure. First, one might deny that collective agents can have or express attitudes.³⁵ Likewise, one might argue that collective agents cannot act for reasons in the way that individual agents can.³⁶ These possibilities would weigh against there being *any* intentional or expressive requirements to reparation for political injustices. Second, one might allow that collective agents can convey attitudes and act for reasons, but see complications in discerning the expressive or intentional content of collective agents. Individual members of a group might disagree about why or whether to make reparation, and a collective agent’s reasons for action or expression of attitudes might not be a straightforward function of the motivations or attitudes of individual members.³⁷ Moreover, even if these first two complications are resolved, one

³⁵ *E.g.*, Kutz (2000), at 196; Held (2002), at 164 (“Though a case can be made that a corporation, through its calculations, can have beliefs and can reason, and though it certainly can make decisions, almost no one will argue that a corporation has the capacity to have emotions.”)

³⁶ McKenna (2006).

³⁷ See Griswold (2007), ch. 4.

might think that reparation has different expressive or intentional requirements when it involves collective agents than when it involves individual agents. For example, some views might allow that collective agents can convey certain attitudes, but deny that they can intelligibly have or convey attitudes (like regret) that require more complex mental states. However, if these more complex attitudes are (at least sometimes) required in order for a redressive gesture to be reparation,³⁸ then it follows that collective agents could never make genuine reparation.

The inherently collective nature of political injustices can complicate the tasks of justifying reparation and explaining how reparation works. Collective victimization might expand the class of agents who may claim reparation, or not. Collective perpetration might expand the class of potential payers, or not. Collectivity might change the requirements for reparation to ameliorate, or not.

IV. History

Many injustices for which reparation is debated occurred in the past, often in the distant past. Questions related to historical distance can further complicate efforts to describe when reparation is justified and how it works.

Historical distance presents both epistemic and normative questions related to justification. Epistemically, many theories of reparation depend on the truth of certain facts, *e.g.*, about how the victim of a wrong was faring prior to the wrong or would have fared if not for the wrong. The passage of time might affect the confidence with which we can know the answers to these questions.³⁹ It might also affect our understanding of the value of claims for reparation.⁴⁰ On many theories (especially those based on the compensatory conception), justifying reparation requires knowing the answers to these kinds of questions. If so, then the epistemic barriers created by the passage of time could confound any attempt to establish the claimant justification for reparation, thereby supporting skepticism about whether reparation for these wrongs could ever be ultimately justified.

The passage of time might also affect the normative impetus for reparation more directly. For example, historical distance might undermine the facial justification for reparation. Given two similar wrongs, the case for reparation of the more distant wrong might seem less urgent than reparation for the more immediate one. It is plausible that, *ceteris paribus*, the normative impetus for reparation was stronger in the immediate aftermath of the Greenwood riots than it is today.

Some offer more sustained arguments about why this normative impetus for reparation fades over time. For example, Jeremy Waldron's influential "supersession thesis" contends that the passage of time and overall beneficial changes in circumstances

³⁸ See the discussion of Boxill's "symbolic compensation" approach in chapter 2.

³⁹ *E.g.*, Sher (1979); Morris (1984); Waldron (1992), at 9-10; Chowdry & Mitchell (2007).

⁴⁰ Cowen (1997); Cowen (2006).

can render an injustice normatively inert.⁴¹ Waldron argues that all entitlements are sensitive to circumstances. Where an injustice violates someone's entitlement, the violated entitlement would ground a claim for reparation. Yet the validity of this entitlement (and the claim to reparation that it grounds) depends on the circumstances at the time of the injustices, as well as subsequently. An injustice is superseded when a subsequent beneficial change in circumstances renders the initial violation justified.⁴² Waldron argues that a superseded injustice cannot ground claims to reparation, although it might nevertheless retain other kinds of political significance.⁴³

Not everyone sees distance as diminishing the facial justification for reparation. Indeed, some argue that the passage of time either makes no difference to or exacerbates the case for reparation by compounding what is owed.⁴⁴ Likewise, some see the passage of time as creating a new wrong—namely, the failure to meet reparative responsibilities related to an injustice.⁴⁵ This secondary injustice might compound the significance of the underlying injustice, such that there is a stronger case for the reparation of distant injustices than more recent ones.

Historical distance might also matter to payer justification, the fairness of holding someone responsible for making reparation. In part, the challenge here stems from the exclusion principle and concerns about vicarious liability: the more distant an injustice is, the less likely it is that the person making redress will have been a perpetrator. On this issue questions about collective responsibility and historical responsibility intertwine, with group agency used to assuage doubts about vicarious responsibility.⁴⁶ Those who favor reparation might look to attribute responsibility to political institutions, whose identities might (depending on the account of group agency) continue over time. As such, holding political entities responsible for making redress would not raise the same worries about vicarious responsibility as holding some people responsible for the wrongs of predecessors.

The passage of time might also change who may demand reparation—that is, the claimants to whom reparation could be justified. We might grant that a victim of wrongdoing has a claim to reparation and that a wrongdoer is responsible for fulfilling this claim, yet wonder whether these claims can be passed down. On Thompson's exclusion principle, redress made by descendants of wrongdoers and aimed at descendants of victims would not be reparation. The exclusion principle thus sees historical distance as a conceptual barrier to the ultimate justification of reparation: if claimants must be identical to victims and payers identical to wrongdoers, then reparation cannot be justified for distant wrongs when victims and wrongdoers are no longer living.

⁴¹ Waldron (1992).

⁴² *Id.*, at 20-26.

⁴³ Waldron (2004a), at 244-5.

⁴⁴ *See, e.g.*, Herman (2007), at 357 n. 49; Booth (2011), at 757.

⁴⁵ Sher (2005); Boxill (2003).

⁴⁶ *See, e.g.*, Sepinwall (2006).

So a theory of reparation needs to address how historical distance affects justification. It might deny that reparation for distant injustices is ever called for. A theory might reach this skepticism in at least two ways. First, the passage of time might change (or expiate) the normative significance of an injustice, as on Waldron's supersession argument. Second, the passage of time might bring about the reduction or elimination of victims and wrongdoers, thereby (on Thompson's exclusion principle) defeating claimant or payer justification. Either way, if the skeptical conclusion applies, then reparation for distant injustices cannot be justified. If a theory resists this skeptical conclusion, then it needs to explain why.

Distance might also affect our understanding of how reparation works. Here, it is useful to invoke P.F. Strawson's distinction between participant reactive attitudes (like resentment and indignation), which presume an engagement with and vulnerability to their object, and "objective" attitudes, which "cannot include the range of reactive feelings and attitudes which belong to involvement or participation with others in interpersonal human relationships."⁴⁷ Part of the normative significance of an injustice is that it licenses reactive attitudes toward the perpetrator and the misdeed. The victim of an injustice may appropriately feel resentment or indignation about her mistreatment. However, it is arguable that, as the distance from an injustice increases, the attitudes it licenses come to resemble objective attitudes rather than participant attitudes.⁴⁸ Yet on many descriptions, one of the main points of reparation is to address the reactive attitudes arising out of an underlying wrong or injustice. For example, Adrienne Martin argues that resentment of wrongdoing is a response to the judgment that the wrongdoer is inadequately committed to the norms violated in the wrongdoing. Reparative gestures (like apologies) undercut the justification for this reactive attitude by "answer[ing]" the charges inadequate of inadequate interpersonal commitment are licensed by the wrongdoing.⁴⁹ However, if historical distance renders reactive attitudes inappropriate, then there is no charge for reparation to answer. By implication, one of the key tasks of reparation would be beside the point in the case of distant injustices. At the very least, how reparation ameliorates distant injustices would differ from how it ameliorates more recent injustices. If so, then we would expect the best (comprehensive) conception of reparation to appreciate this difference.

⁴⁷ Strawson (1962).

⁴⁸ Wolf (2009); Fricker (2010). This argument that historical remove changes the appropriate response to wrongdoing resembles what Bernard Williams called the "relativism of distance." Williams (1986), at 162. For Williams, moral appraisal requires the possibility of confrontation: judging particular outlooks as wrong or (perhaps) unjust requires that they be "real options" for us, as well as that we be able to think of the societies in which these outlooks were deployed in "realistic[] and concrete[]" terms. *Id.* When our only confrontation with an outlook is "notional," then to utilize paradigmatically moral forms of assessment is to engage in an inappropriate form of moralizing. *Id.*, at 161. For Williams, historical distance is the paradigmatic (indeed, only) way to trigger the relativism of distance: distant ethical outlooks are not real options for us because there is "no route back" from current state of reflectiveness to the unreflective state of the past societies in which these outlooks arose. *Id.*, at 163-4. Thus, Williams's argument goes even further than the thesis under consideration here, since it would (in Strawsonian terms) render both participant and objective attitudes inappropriate as responses to distant injustices.

⁴⁹ Martin (2010), at 545, 547.

So questions related to history, like those related to collectivity, complicate any effort to explain why reparation is justified and what reparation does. Different approaches might resolve these challenges in different ways. These issues have been central to philosophical debates about reparation, perhaps because they so closely resemble the kinds of obstacles that apply to juridical claims for the redress of injustices (such as the statute of limitations or the state action requirement). However, as I argue more extensively in chapter 6, it is not clear that either collectivity or history deserves its centrality. It might be that, once we figure out the best way to think about reparation, these issues resolve themselves.

V. Distinctiveness

Next I'll focus on two other sets of questions about reparation that, while analytically important, have been given far less attention than questions related to collectivity and history. The question of *distinctiveness* asks how (if at all) reparation is distinguished from other political commitments or goals. Reductionist accounts deny that there is any conceptual distinction between reparation and other commitments. The reductionist holds that the significance of injustices reduces to some other kind(s) of consideration(s). The reductionist also posits that the amelioration of an injustice characteristic of reparation can be achieved by meeting some other goal (like the equalization of distributive shares or the establishment of just political institutions). By contrast, a non-reductionist strategy denies that the significance of injustices can be fully reduced to other political commitments, or else denies that achieving some other goal can ameliorate the significance of an injustice in exactly the way that reparation can.

Let me explain both reductionist and non-reductionist positions more carefully using the Greenwood case. One prominent set of demands for reparations here is for redistribution of social resources to the victims of the riots and their descendants. The thinking is that the victims and their descendants are (on average) badly off, and that the riots are causally implicated in these circumstances. Yet one might wonder whether the latter provision of the argument does any work. On any plausible theory of distributive justice, the badly-off residents of the Greenwood neighborhood would have compelling claims to more social resources than they currently receive, and perhaps to the same kinds of resources and programs that are demanded as reparation. Does framing the demand for these resources and programs in terms of reparation add anything to the argument? Is this framing merely a device to motivate others to live up to meeting their commitments of distributive justice? As a related matter, we might wonder whether claims for reparation would have salience in society characterized by a just distribution of resources (however that distribution is defined). In such a society, the policies demanded as reparation might deviate from a just distribution of resources. What would follow if, in making reparation, we would effect an unjust (or less just) distribution?

Broadly, there are two ways of answering these questions related to distinctiveness. The reductionist denies that reparation is an analytically distinct topic. For the reductionist, the question "Why make reparation?" can be reformulated in terms of some other question of political morality, such as "Why distribute resources fairly?" or

“Why protect rights?” The reductionist is thus an eliminativist about reparation: if a society achieves its broader goals about justice (*e.g.*, fairly distributing resources, securing fundamental rights), then the impetus for reparation is eliminated.⁵⁰

One might argue for reductionism in a number of ways. For example, a reductionist might redescribe the significance of injustices in other terms. This is the strategy of forward-looking theories of justice, such as consequentialism or so-called “luck egalitarianism.” Luck egalitarianism is the view that social opportunities should be sensitive to individual choices, but insensitive to bad brute luck.⁵¹ The luck egalitarian might see the point of thinking about justice as establishing prospective conditions for fair interactions among free people.⁵² To realize these conditions, the luck egalitarian corrects for certain unfair discrepancies in natural and social endowments. For the luck egalitarian, to attribute significance to historical injustice is to take a backward-looking orientation, which is fundamentally inconsistent with how justice should be theorized. In other words, historical injustices have no distinctive significance; focusing on them misses the point of thinking about justice. Leif Wenar finds it obvious that anyone who valued distributive justice would not dislodge his preferred distributive principle in order to make reparation, if in doing so “the world would become distributively less just.”⁵³ Faced with the tremendous opportunities of a just society, perhaps only a small person would insist on pressing her particular grievances (and only a narrow theory would insist on responding to these). The luck-egalitarian might grant that, while past injustices do not directly affect what justice requires, they could matter indirectly if they generate discrepancies in social endowments.⁵⁴ However, this significance is not analytically distinctive: for the luck egalitarian, *anything* that depresses social endowments matters. There is no important difference between depressions caused by injustices and those caused by misfortunes outside of an agent’s control. Moreover, an implication of the luck egalitarian view is that, if an injustice cannot be connected to an extant discrepancy in social endowments, then it lacks normative significance.

Reductionism might also be deployed as part of formulating an abstract theory of justice. This type of reductionism is roughly the approach of John Rawls. Rawls acknowledged that past injustices might have a derivative sort of significance, focusing attention on topics that should be addressed by principles of justice.⁵⁵ For example, that

⁵⁰ Walt (2006).

⁵¹ *See, e.g.*, Dworkin (2000), at 74-5.

⁵² *See, e.g.*, Tan (2011), at 397.

⁵³ Wenar (2006), at 402.

⁵⁴ Pierik (2006); Spinner-Halev (2012a), at 40 (“If the political community is obliged to all who have insufficient health care, income and/or wealth, or if large amounts of poverty concentrated in particular groups is unhealthy for a democracy, then what is gained by calling the remedy for certain injustices a matter of reparation?”) Another way of assigning indirect significance to injustices is to see them as being what Dworkin calls “soft parameters” on a valuable life: while they are undoubtedly bad for people, one can have a worthwhile existence despite them. Dworkin (2000), at 262-7.

⁵⁵ TJ, at §§ 25, 39; PL, at 17-18; see also Pogge (2004), § 2.1 (arguing that past injustices can matter by providing “historical knowledge and understanding” about which injustices are possible).

there have been numerous injustices involving the exclusion of groups from political processes might prompt concern for ensuring that political liberties have fair value. Likewise, reflecting on the wars of toleration might lead us to emphasize religious tolerance as a fundamental virtue of citizenship. However, such injustices (like other contingent features of our identities or particular commitments) do not fundamentally affect which principles should govern our society and need not be specifically accounted for in our establishing fair terms of political cooperation. This derivative significance perhaps explains why, for Rawls, reparation is not an analytically distinct topic. When injustices matter, it is because they implicate some other component of justice (*e.g.*, the protection of equal and basic liberties, the provision of fair equality of opportunity, or the achievement of distributive justice).

The reductionist strategy is thus a deflationary account of reparation. Reductionist approaches are not really theories of reparation, since they deny that there is anything to theorizing about reparation. The reductionist need not deny that injustices have normative significance. Rather, she need only deny that we need a theory of reparation to explain how (if at all) to respond to injustices.

On the other hand, some views resist this assimilation of reparation to other modes of justice. These non-reductionist strategies see reparation as an analytically distinct topic. They deny that the question “Why make reparation?” can be redescribed in terms of other political commitments like distributive justice or the protection of rights. The most prominent example of a non-reductionist strategy is Aristotle’s distinction between distributive justice (with its concern for assigning benefits and burdens to a population according to some criterion that determines merit) and corrective justice (with its goal of annulling wrongful losses and gains, thereby restoring the initial equality between parties that is disrupted by wrongdoing).⁵⁶

A defender of non-reductionism about reparation faces a number of challenges. One challenge is to provide some argument against reduction. Meeting this challenge requires explaining why achieving just political institutions would not eliminate the significance of past injustices.

Another challenge is to explain how commitments of reparation interact with other commitments of justice, like the protection of rights and achievement of distributive justice. The task here is not only to show whether reparation has priority over distributive justice (or vice versa), but also to depict how these commitments might interact. Even if reparation is distinct from other political commitments, is it nonetheless possible that meeting these other commitments might affect the normative impetus for reparation? For paradigmatic injustices like U.S. slavery or Native American expropriation, many of those who might plausibly claim reparation are far worse off they would be in any just society. The same is true for many who might plausibly claim reparation for the Greenwood riots. Would the case for reparation of any of these injustices be weaker if contemporary political institutions were not so unjust, if the putative claimants were not

⁵⁶ EN.V.1130a14-1133b28.

so badly off? If so, then reparation and distributive justice would be distinct, but interrelated. The non-reductionist would need to provide an explanation of whether (and, if so, how) this relationship is possible—that is, how meeting distributive justice might reduce the normative salience of reparative commitments, even though the latter are independent of the former.

Thus, any theory of reparation must establish whether reparation is distinct from other topics about justice. If an approach to thinking about reparation is reductionist, then it is not a theory of reparation. At this stage in the inquiry, I leave open whether reductionism or non-reductionism is correct—that is, whether we actually need a theory of reparation to account for and respond to the significance of injustices.

VI. Discrimination

Our history is rife with injustices. It is possible that making reparation for all of them would exceed our current levels of resources, or at least dramatically alter the shape of our world. Jeff Spinner-Halev, for example, argues that “[i]n a world full of past injustices, any argument that suggests the importance of historical injustice must have an account of which injustices from the past should be of concern today.”⁵⁷ I call this question of how (if at all) to differentiate the injustices that call for reparation from the ones that don’t the question of *discrimination*. A theory of reparation is either discriminatory or non-discriminatory. A discriminatory theory offers principled basis for establishing which injustices that call for reparation. A non-discriminatory theory denies that such criteria are defensible.

There are many possible ways for a theory of reparation to differentiate the injustices that call for reparation from those that don’t. For example, it might discriminate based on severity, holding that severe injustices call for reparation and less severe injustices do not.⁵⁸ It might discriminate based on historical distance, contending that more recent injustices call for reparation and more distant ones don’t.⁵⁹ Alternatively, a theory might discriminate based on whether an injustice has continuing effects. For example, Spinner-Halev identifies certain wrongs as “enduring injustices,” in which the causal inference from past injustice to a currently unjust state of affairs is straightforward and this pattern is likely to persist without intervention.⁶⁰ Spinner-Halev contends that only enduring injustices call for reparation; injustices that do not persist over time (and, presumably, historical injustices whose effects are not felt today) do not call distinctly for reparation.⁶¹

⁵⁷ Spinner-Halev (2012b), at 325. *See also* Perez (2011).

⁵⁸ Brooks (2006), at 142; Corlett (2005), at 581-2; Winter (2007a), at 390 (“[O]nly the most horrific of historical injustices—and only those performed comparatively recently—have reparative plausibility.”)

⁵⁹ Thompson (2002), at 77.

⁶⁰ Spinner-Halev (2007); (2012b).

⁶¹ Spinner-Halev (2007), at 578.

Still another way of discriminating among injustices is based on the degree to which an injustice represents a departure from the ground rules of politics. For example, consider Christopher Kutz's argument about why expropriation of private property under Communist regimes in Eastern Europe does not ground claims for "the total monetized value of the loss suffered by the former property owner."⁶² Some theories of political legitimacy assign political institutions wide latitude to make policies, even though these policies might otherwise appear to be injustices (for example, by depriving people of their rights to inherit or descend property). For Kutz, such a policy of expropriation might be viewed as an injustice, but nevertheless "within the limits of political experimentation."⁶³ These kinds of injustices do not compel reparation. We can generalize Kutz's argument into a broader criterion for discrimination: injustices that occur within the margin of error for political institutions do not call for reparation, while injustices that exceed this ambit do.

Any discriminatory approach faces the challenge of articulating criteria of discrimination that are both principled (rather than *ad hoc*) and plausible. These criteria must be compatible with the relevant standards of facial justification for reparation. In other words, the answer to the question "Which injustices call for reparation?" must fit well with the answer to the question "Why make reparation?" For example, discriminatory criteria inspired by Thompson's exclusion principle might sort the injustices that warrant reparation from those that don't based on claimant justification. Suppose that there are two (equally significant) injustices, A and B. Some victims of A are still living, but no victims of B are still alive. The exclusion principle says that reparation can only be directed at the victims of a wrong. Thus, discriminatory criteria based on this principle might yield the conclusion that reparation for A is justified, while reparation for B is not justified.⁶⁴ Discriminatory criteria based on the exclusion principle would be principled, since they would be derived from a structural requirement of reparation. However, it is unclear whether they would also be plausible. For example, discrimination based on the exclusion principle might imply that a wrongdoer could extinguish the normative significance of an injustice (and thus undercut any obligation to make reparation) by killing the remaining victims of that injustice. Yet it seems obvious that such a policy would exacerbate the significance of the underlying injustice. However, this objection does not seem insurmountable for the advocate of discrimination based on the exclusion principle.⁶⁵ Moreover, this counterintuitive implication does not generalize to all criteria that discriminate based on considerations other than justification.⁶⁶

⁶² Kutz (2004), at 292.

⁶³ *Id.*, at 302.

⁶⁴ We can extend this logic to the discriminatory criteria that Spinner-Halev proposes by changing the scenario such that A has contemporaneous effects, while B does not.

⁶⁵ For example, the defender of the exclusion principle might expand the class of those victimized by an injustice beyond the class of those who were killed by the policy.

⁶⁶ It does not, for instance, apply to the criteria offered by Spinner-Halev or Kutz.

There is a more important (and more general) objection to discriminatory criteria, which I will call the *paradox of discrimination*. Any such criteria will allow that some injustices do not call for reparation. Yet the following precept seems plausible: to say that an action is an injustice is to imply that it calls for reparation, where “calling for” means that it both renders reparation intelligible and substantially increases the normative impetus for making reparation. Aside from being plausible, this precept seems necessary to avoid taking the kind of reductionist position about reparation described above.⁶⁷

The paradox of discrimination, then, has three components:

- (1) A and B are both injustices;
- (2) Based on criteria of discrimination, A calls for reparation, but B does not call for reparation;
- (3) Injustices necessarily call for reparation.

The paradox arises because a discriminatory theory is committed to the truth of (2), and (1) and (3) are independently plausible; (1) and (2) are inconsistent with (3); and (2) and (3) are inconsistent with (1).

This paradox of discrimination can be denied or avoided in several ways. One tactic is to deny (3)—that is, to accept that some injustices do not call for reparation, even *pro tanto*. This is Spinner-Halev’s tactic: on his view, injustices that do not have enduring effects do not call for reparation.⁶⁸ This tactic also captures the thrust of Waldron’s supersession thesis: superseded injustices are injustices, but they do not ground claims for reparation.⁶⁹ It is consistent with both of these positions that a wrong or injustice can have some normative significance short of calling for reparation. However, it might also be argued (especially on Waldron’s criteria) that such injustices lack normative significance altogether, given their intimate connection to a widespread improvement of the world. An advocate of this tactic needs to explain how an injustice might not call for reparation or (more broadly) how an injustice could become normatively inert, while remaining an injustice.⁷⁰ If a theory of reparation is non-reductionist, then taking this route might also require explaining how the denial of (3) does not entail reductionism.

Another tactic for resolving the paradox is to identify criteria of discrimination referenced in (2) in a way that does not violate (3). An advocate this tactic might argue that (2) is improperly formulated: the question should not be whether an injustice substantially increases the normative pressure to make reparation, but instead whether an injustice compels reparation. On this strategy, one could admit that both A and B call for

⁶⁷ If the fact that an action is an injustice were insufficient to explain why reparation is called for, then there would be an explanatory gap. Some other considerations besides the fact of injustice (like harm or disadvantage) are what make the case for reparation. The case for reparation would seem to reduce to these other considerations, which is exactly what the reductionist argues.

⁶⁸ Spinner-Halev (2007), at 578.

⁶⁹ Waldron (2004a), at 245

⁷⁰ I defend something like this argument in elaborating the Liberal Theory of Reparation in chapter 6.

reparation, but argue that additional features of A (which are not realized in B) compel reparation for A and do not compel reparation for B. Kutz utilizes essentially this strategy. He argues that expropriation policies of Communist regimes were unjust, but (because they were within the bounds of political experimentation) not so unjust as to compromise the legitimacy of post-Communist regimes. Therefore, these policies do not necessarily call for reparation.⁷¹ Presumably policies that were beyond the pale (like forced migration or resettlement) would call for reparation. The advocate of this tactic would still need to establish how an injustice could increase the normative pressure for reparation without thereby compelling reparation.

Still another approach is to bite the bullet by accepting (2) and (3), while denying (1). The advocate of this approach might construe claimant justification as integral to facial justification. Where no one may validly claim reparation for an injustice, then the act at issue is not an injustice. However, this approach seems like an excessively juridical account of the normative phenomena. It might suggest that, if no one has standing to complain about an action, then the action itself cannot have been an injustice. However prevalent this logic is in legal reasoning, it doesn't capture our practices of normative appraisal very well.

In sum, then, every discriminatory theory faces the paradox of discrimination, and there are considerable challenges to any resolution of this paradox. By contrast, a non-discriminatory approach posits that all injustices merit reparation. Such theories avoid the paradox of discrimination by denying premise (2), that there are criteria for distinguishing those injustices that call for reparation from those that do not.

One example of a non-discriminatory theory is John Locke's articulation of a "right of reparation." For Locke, the right of reparation follows from the natural right of self-defense:

Besides the Crime which consists in violating the Law and varying from the right Rule of Reason, . . . there is commonly injury done to some Person or other, and some other Man receives damage by his Transgression, in which Case he who hath received any damage, has besides the right of punishment common to him with other Men, a particular Right to seek Reparation from him that has done it.⁷²

According to Bernard Boxill, this Lockean right of reparation applies equally to all transgressions that result in harm to a victim, and equally against all transgressors.⁷³ On this view, there is no need to discriminate among injustices that impose harm. Nor is there any basis for doing so, since the normative impetus for making reparation (namely, the violation of the victim's natural rights) is the same. The Lockean might well prioritize the injustices that deserve reparation first based on some other criterion (like the severity

⁷¹ Kutz (2004), at 294, 302.

⁷² Locke, (1988) Ch. 2, §§ 10-11.

⁷³ Boxill (2003), at 65, 73-4.

of the threat to the victim's natural rights), but she does not deny that injustices of lower priority call for reparation at all.

Another non-discriminatory theory is Robert Nozick's argument for rectification, which is an element of his broader Entitlement Theory of justice. For Nozick, justice involves a principle of acquisition, which establishes how unowned things come to be owned; a principle of transfer, which establishes how things that are owned by one person can be owned by another; and a principle of rectification, which establishes what ought to be done regarding holdings that arise from violation of the principle of acquisition (and, presumably, the principle of transfer).⁷⁴ Satisfaction of these three principles is sufficient to establish the justness of a distribution.⁷⁵ Although Nozick does not fully specify the principle of rectification, he essays that any such specification will "use[] historical information about previous situations and injustices done in them... and information about the actual course of events that flowed from th[e] injustice[]" to establish what holdings would have been like if the injustice had not taken place.⁷⁶ The entitlement theory requires redistribution in light of this standard, whatever it is. Nozick's ultimate goal is to articulate a procedural theory of justice, under which the legitimacy of holdings can be established solely by reference to the process through which those holdings were acquired. Injustices in acquisition (and presumably in transfer) taint the legitimacy of current holdings. Because of this delegitimizing effect, all such injustices call for rectification.⁷⁷ Thus, Nozick's theory does not easily allow for differentiating the injustices that call for reparation from the ones that do not.⁷⁸

Non-discriminatory theories avoid many of the pressing questions that confront discriminatory theories, but they face their own challenges. One such challenge is akin to the charge of demandingness that is often leveled against certain consequentialist and perfectionist moral theories. Such theories are sometimes claimed to be excessively demanding because they require and forbid too many activities that should be morally optional.⁷⁹ The demandingness objection states that "otherwise appealing moral principles are objectionable for imposing extreme demands on complying agents."⁸⁰ A

⁷⁴ Nozick (1974), at 151-2.

⁷⁵ *Id.*, at 153.

⁷⁶ *Id.*

⁷⁷ See Davis (1976), at 839 ("[O]wing to the inductive nature of the definition of entitlement [in Nozick's theory], if there has been a single [unrectified] injustice in the history of a state, no matter how far back, the state will not be able to achieve a just distribution of goods in the present."); Butt (2009), at 49 (arguing that Nozickian rectification would undermine all current holdings, given difficulty of Nozick's theory in discerning which holdings came about because of injustice)

⁷⁸ One could postulate a discriminatory version of Nozick's argument by positing that only some injustices have the delegitimizing effect that Nozick envisions. However, this argument would be inconsistent with Nozick's broader procedural theory of justice. The criteria for discrimination under the Liberal Theory that I defend in chapter 6 will combine Kutz's notion of the range of political experimentation with something like Nozick's concern about the delegitimizing effect of injustices.

⁷⁹ Scheffler (1982).

⁸⁰ Murphy (2000), at 16.

moral theory might be too demanding if it too stringently “narrow[s] the range of morally acceptable courses of action open to an agent” or imposes costs of satisfying its requirements that are too incompatible with an agent’s capacities or interests.⁸¹ A theory might also be too demanding if, in order to comply with it, agents would have to give up the most morally valuable aspects of their lives, such as their ground projects or special relationships.⁸² The demandingness objection is supposed to provide a metatheoretical basis for rejecting a moral theory: if a moral theory demands too much, then we need to look for another theory.⁸³ As such, advocates of the moral theories to which the demandingness objection might apply (like consequentialism) often attempt to formulate those theories so as to avoid the objection.⁸⁴ However, others deny that demandingness provides a basis for rejecting a moral theory.⁸⁵ Rather, they argue that “morality demands what it demands, and if people find it hard to live up to those demands, that just shows that people are not, in general, morally very good.”⁸⁶

A non-discriminatory theory of reparation faces similar questions about demandingness. Given the ubiquity of historical injustices, providing reparation for all of them would require dramatic changes to our existing ways of life. Meeting these commitments might require jettisoning key political values, like the cultivation of cultural institutions. It might prohibit a variety of actions (like limited forms of partiality towards relatives or compatriots) that are usually seen as morally permitted. It might require disrupting the expectations regarding their holdings that many people have. Moreover, given the enormity of past injustices, making full reparation for all of them might require dismantling extant institutions that are widely beneficial and highly justified. Some see this disruptiveness as so problematic as to motivate the need for supplementary principles that would delimit reparation’s demands.⁸⁷

However, not all theorists are troubled by demandingness. For example, J. Angelo Corlett sees reparation as justified based on the violation of rights. Corlett acknowledges that, if his argument for reparation is plausible, then all significant injustices ground *prima facie* claims for reparation.⁸⁸ For Corlett, the two most significant such injustices in U.S. history involve the expropriation of Native Americans and the enslavement of African-Americans; however, by implication, all other rights violations would also call for reparation. Corlett calculates that “the United States owes at least \$100,090,000,000,000” in reparation to Native Americans, solely based on the violations of their property rights; reparation for other rights violations against Native Americans,

⁸¹ Scheffler (1994), at 98.

⁸² Williams (1973).

⁸³ Scheffler (1994), ch. 6-7.

⁸⁴ *E.g.*, Murphy (2000); Mulgan (2005).

⁸⁵ *See, e.g.*, Sobel (2007); Goodin (2009).

⁸⁶ Scheffler (1994), at 17.

⁸⁷ *E.g.* Butt (2009), at 49-50; Waldron (1992), at 16.

⁸⁸ Corlett (2003), at 153.

he argues, “could easily rise into the trillions.”⁸⁹ He also estimates that trillions more are owed for reparations to African Americans.⁹⁰ For Corlett, there is “no question” that fulfilling these reparative obligations would entail that “the United States could no longer survive as it does now.” Yet, he concludes, national survival is a question of social utility, and so irrelevant to judging the force of the case for reparation.⁹¹ Corlett, then, sees demandingness as a feature, rather than a bug, of his theory of reparation.

Yet there is reason not to be so sanguine about this kind of demandingness, especially if (as on Corlett’s view) reparation is justified based on a concern for rights. For Corlett, the point of reparation is to vindicate rights that were violated by injustices. Corlett’s argument entails that extant political institutions would need to be dismantled in order to fulfill these reparative burdens. Yet these institutions might themselves be effective in protecting rights, especially when compared with alternatives. Dismantling these institutions might lead to more violations of rights in the future. As such, Corlett’s argument would seem to invite a paradox: in the name of vindicating rights, we might be required to dismantle political institutions that protect rights, thus making it the case that rights will be violated more (that is, vindicated less) in the future. By contrast, discriminatory approaches do not necessarily face this paradox, since they can avoid it by incorporating systemic considerations into their criteria of discrimination.⁹²

The charge of demandingness doesn’t necessarily invalidate non-discriminatory theories of reparation, just like highly demanding versions of utilitarianism aren’t necessarily incorrect. However, the demandingness objection at least increases the burden of proof for non-discriminatory theories: to the extent that making reparation might require neglecting valuable projects and dismantling highly justified social institutions, the facial justification for reparation must be highly compelling (and, at the very least, stronger than if reparation did not impose these stringent demands). Moreover, the advocate of a non-discriminatory theory must also posit that every injustice has this compelling property, since if only some injustices had the property then the theory would be discriminatory. Finally, the advocate of a non-discriminatory theory must also establish that her approach avoids the paradox related to non-discrimination described above—that, in refusing to discriminate among cases for which reparation is called for, a theory can undermine the broader point of making reparation in the first place.

To sum up questions related to discrimination, a theory of reparation must either be discriminatory (arguing that some injustices call for reparation, while others do not) or non-discriminatory (arguing that all injustices call for reparation). If a theory is discriminatory, it needs to offer plausible criteria for distinguishing the injustices that call for reparation from the ones that do not. These criteria must either avoid or resolve the paradox of discrimination. If an approach is non-discriminatory, then (given the

⁸⁹ Corlett (2010), at 225.

⁹⁰ *Id.*

⁹¹ *Id.*, at 229.

⁹² *See, e.g.*, Waldron (1992); Simmons (1995a).

disquieting number and severity of injustices in human history) it needs to address concerns about demandingness.

VII. Conclusion

Here is a brief summary of my proposed framework for thinking about reparation. Central to any theory of reparation is an account of justification, an answer to the question “Why make reparation?” Every such theory also posits or at least implicates a conception of reparation, an answer to the questions “How do injustices have significance?” and “How does reparation ameliorate this significance?” The collective nature of injustices complicates the answers to these questions, as does the historical nature of many injustices. Every theory confronts the issue of distinctiveness, the question of how (if at all) reparation is different from other kinds of political commitments. Finally, every theory also confronts the issue of discrimination, the question of whether (and, if so, why) some injustices call for reparation while others do not.

This framework provides a set of common questions that every complete theory of reparation for injustices can be expected to answer. Beyond its use in explicating theories of reparation, this framework can also be used to assess such theories, as I show in the next chapter.

Chapter 4- Assessing Theories of Reparation

In this chapter, I use the framework introduced in chapter 3 to evaluate some existing ways of thinking about reparation. We should assess an approach based on whether it offers a compelling and appropriate account of the justification for reparation; whether its implicit conception of how reparation ameliorates can capture the phenomenology of reparation; whether it has the resources to address complications posed by historical distance and collectivity; whether it establishes how reparation is distinct from other kinds of considerations (since an approach that denies that reparation is distinct is not really a theory of reparation at all); and whether it offers viable criteria for distinguishing the injustices that call for reparation from the ones that don't (or, alternatively, a principled case for non-discrimination).

The issues in the framework are abstract, so any assessment of theories based on them will also be abstract. This abstractness is necessary to avoid begging the question. Perhaps we could more concretely compare the various approaches by focusing on their verdicts about the justification for reparation in particular cases. However, this kind of comparison would be circular, since part of what we want a theory of reparation is to answer these very questions.

In what follows, I consider the three most prominent approaches to thinking about reparation: corrective justice approaches, rights-based approaches, and legitimacy-based approaches.¹ Each of these approaches differs in its account of justification (that is, its answer to the question "Why make reparation?"), and several of these approaches differ in their implicit conceptions of reparation (that is, their answer to the question "How does reparation ameliorate?"). I first articulate each approach in its broadest terms, then analyze a few exemplars.

None of these approaches is fully satisfactory under the abstract standards of the framework. However, some of these approaches are better than others, and each approach adds something to the best understanding of reparation. The Liberal Theory of Reparation that I introduce in chapter 6 can both accommodate all of the elements of the framework and capture what is useful in these extant approaches.

¹ These are not the only ways to think about the justification for reparation. For example, many legal scholars see the justification for reparation in terms of extant legal materials (*e.g.*, Posner & Vermeule (2003); Brophy (2006); Klimchuk (2004)) or their entailments (see Forde-Mazrui (2004)). On these approaches, if the legal materials support reparation, then reparation is called for; if the legal materials do not support reparation, then reparation is not called for. These approaches deny that determining whether reparation is justified requires a systematic examination of political commitments and principles. See Vermeule (2012); Posner & Vermeule (2003).

Although this atheoretical approach is common among legal scholars, it is lacking for at least two reasons. First, despite the claim to eschew theorizing, most examples of the atheoretical approach draw from one or more of the theories that I discuss in this chapter. To indict a theory, then, is to indict the atheoretical approach that is built on it. Second, nearly all versions of this atheoretical approach utilize the compensatory conception to explain why injustices matter and how reparation ameliorates. Because the compensatory conception fails to capture the phenomenology of reparation (as I argue in chapter 2 and below), atheoretical approaches are deficient under the framework.

I. Corrective Justice Approaches

One approach sees reparation as a requirement of justice. Aristotle distinguished the forms of “specific” justice in terms of distributive justice and corrective justice. Distributive justice is concerned with the fair distribution of benefits and burdens. Corrective justice is concerned with restoring the equality that is disrupted by unjust transactions. Both of these forms have been proposed as ways to conceive reparation.

Consider how the reparation of injustices might be a requirement of distributive justice. Reparation would be a way of achieving a just distribution of resources.² In the terms introduced in chapter 3, this distributive justice approach is reductionist because it denies that reparation is an analytically distinct topic. A reductionist position holds that the significance of injustices can be fully redescribed in terms of some other political goal, with the ameliorative impact characteristic of reparation achieved by meeting this political goal. On the distributive justice approach, injustices matter because (and to the extent that) they prevent the realization of our criteria for distributive justice, whatever those are. Reparation is called for as a way of realizing these criteria. Presumably, the case for reparation would evaporate if it were possible to realize these criteria without specifically redressing the injustices. Thus, to see reparation as a question of distributive justice is to deny that we need a theory of reparation. I think there is much to be said for these distributive justice approaches, as well as for the view that a distinct theory of reparation is unnecessary on a suitably broad understanding of distributive justice. I address both of these points more fully in chapter 5. For now, it suffices to note that a distributive justice approach to reparation fails under the framework because it is reductionist, and therefore not really a theory of reparation.

A more common way of seeing reparation as a matter of justice invokes the form of corrective justice. However, taking this approach requires modifying Aristotle’s description of corrective justice somewhat. For Aristotle, corrective justice is concerned with correcting previously unjust transactions between private parties, whether voluntary (as in contract) or involuntary (as in theft).³ Corrective justice differs from distributive justice in several ways. The former is concerned with equality, or restoring each party to his status prior to the transaction; the latter is concerned with fairness.⁴ Corrective justice applies retrospectively to a transaction that has already occurred,⁵ while distributive justice implements fairness in order to further the good of the *polis*. Furthermore, Aristotelian corrective justice “does not consider either the common good, or even the principles of distributive justice, but considers only the harm that has been done and the means of restoring the *status quo ante*.”⁶ This feature is captured by the notion that

² See Tan (2007); Pierik (2006); Logue (2004).

³ EN.V.1131b25-26

⁴ EN.V.1131b27-1132a3.

⁵ EN.V.1132b18-20

⁶ Irwin (1988), at 429.

corrective justice is “autonomous” from distributive justice.⁷ On Aristotle’s view, then, corrective applies only to courts or the legal system; involves private parties; concerns private goods; and is autonomous from distributive justice.

One appeal of corrective justice views is that they provide a compelling account of the facial justification for reparation. That reparation is required by justice is a compelling answer to the question “Why make reparation?” Moreover, this case for reparation is distinctive in the sense meant by the framework. The realization of some other political goal does not change whether or to what extent reparation is called for.

Corrective justice approaches have other meta-theoretical aspects that are implicit in Aristotle’s account. For example, Jules Coleman argues that every theory of corrective justice embraces three core arguments: the agency thesis—that corrective justice is applicable “only with respect to losses occasioned by human agency”; the rectification thesis—that corrective justice aims to right a wrong, rather than to accomplish some other goal; and the correlativity thesis—that corrective justice claims are restricted to those who “bear some normatively important relationship to each other,” as opposed to the agent-neutral claims that sound in distributive justice.⁸ Aristotle’s view contains each of these theses. Losses that are not occasioned by human agency are the kinds of burdens that are the concern of distributive justice. And Aristotle’s account embraces the correlativity thesis because the demands of corrective justice apply only to the parties to a transaction.

Aristotle’s account suggests a further feature of corrective justice that I will call the “disequilibrium thesis.” On this thesis, wrongs disrupt the equilibrium between victim and wrongdoer, and the disruption of this equilibrium provides the normative impetus for reparation. The disequilibrium thesis is embodied in Aristotle’s mechanistic construal of corrective justice. For the purposes of determining what corrective justice requires,

it makes no difference whether a good man has defrauded a bad man or a bad man a good one, nor whether it is a good or a bad man that has committed adultery; the law looks only to the distinctive character of the injury, and treats the parties as equal, if one is in the wrong and the other is being wronged, and if one inflicted injury and the other has received it.⁹

On the disequilibrium thesis, then, to determine that an event is a wrong or injustice (under the relevant criteria) is both necessary and sufficient to establish that reparation is called for. No other inquiry is required.

There are many attempts to justify reparation on grounds of corrective justice. However, because reparation involves political injustices, each of these efforts departs from Aristotle’s restriction of corrective justice to the private law and to private parties.

⁷ Klimchuk (2003).

⁸ Coleman (1995), at 26-7.

⁹ EB.V.1131b26-1132a6; see also Zipursky (2003), at 695.

That said, most versions of the corrective justice approach retain the central concerns with agency, rectification, and correlativity, and nearly all adopt some form of the disequilibrium thesis. In the remainder of this part, I'll consider three versions of the corrective justice approach.

A. “Wrongful Harm” views

One family of views makes the case for reparation in terms of harms that are wrongfully imposed on the victim of an injustice. Jules Coleman offers a prominent version this “wrongful harm” view.¹⁰ Coleman does not directly discuss the issue of reparation for political injustices, but many who argue for reparation based on corrective justice utilize Coleman’s argument or something like it.¹¹ For Coleman, those who are causally implicated in (and responsible for) imposing wrongful harm upon others have agent-relative duties of repair.¹² These duties of repair can be discharged by compensation, understood broadly to include any effort by the wrongdoer to “make good” the losses that have resulted from his wronging of the victim.¹³

Coleman sees corrective justice as a moral duty related to the imposition of wrongful harm. The duty to rectify wrongful harms that one has culpably caused is not ultimately conventional, although this duty informs our conventions (and, in particular, the conventions of tort law).¹⁴ Coleman does not fully articulate the structure and content of corrective justice as a moral principle,¹⁵ but others have done so in a way that is compatible with Coleman’s view. For example, Jonathan Winterbottom offers the following “moral principle of corrective justice”:

Those who impose wrongful harm upon others have an (agent-relative) duty to repair those harms... [which] may be understood as a duty to compensate, so long as we understand compensation more broadly than monetary compensation to include whatever steps are required in order to repair harm.¹⁶

¹⁰ Coleman calls his view the “mixed conception” of corrective justice. Coleman (1992), §16.3. I introduce the term “wrongful harm” in order to highlight the most relevant aspect of Coleman’s view for the purposes of my analysis: only wrongs that impose harms call for reparation. In this respect, Coleman’s account of corrective justice differs from Ernest Weinrib’s. For Weinrib, wrongdoing is sufficient to trigger reparative obligations under corrective justice, regardless of whether the wrongdoing also imposes harm. Weinrib (2012), at 21.

¹¹ See, e.g., Winterbottom (m.s.); McCarthy (2004), at 752; Sepinwall (2006).

¹² Coleman (1995), at 30 (“Corrective justice is... the principle that one has a duty to repair the wrongful losses for which one is responsible.”).

¹³ Coleman (1992), at 277; Coleman (2005), at 353.

¹⁴ Coleman (1995), at 24. Coleman’s view also differs in this respect from Weinrib’s, which defends corrective justice solely as an animating principle of private law. See Weinrib (1994).

¹⁵ As Gardner (2010), at 3-4 points out.

¹⁶ See Winterbottom (m.s.), at *17.

Winterbottom's formulation captures all of the relevant aspects of Coleman's view, so I will attribute it to Coleman in what follows.

On this way of conceiving corrective justice, only harms arising out of wrongdoing call for reparation.¹⁷ Wrongdoing and harm are jointly necessary to establish the facial justification of reparation. By implication, an event does not justify reparation if it does not make someone worse off, even if the event is wrongful. Neither is reparation called for in the kinds of cases that Seana Shiffrin calls "mixed benefactions," which involve imposing harms as part of bestowing benefits that result in an overall improvement to the recipient's situation.¹⁸

Aside from these clear implications, a "wrongful harm" view of corrective justice is parasitic on an account of what makes an action wrongful,¹⁹ as well as an account of what constitutes harm. As to the former, Coleman says that an action is a "wrong-doing" if it unjustifiably violates or frustrates someone's "legitimate interests"—that is, interests that are protected by applicable norms.²⁰ An action is a "wrong" if it merely violates her rights, regardless of whether this violation is justifiable or not.²¹ A person's rights are a special subset of her legitimate interests, so, for the sake of calling for reparation, it is sufficient that an action violate the rights of another, regardless of whether this violation is culpable or justifiable. For Coleman, both "wrongs" and "wrong-doings" satisfy the wrongfulness component of corrective justice.

Likewise, Coleman contends that a harm is a setback to someone's legitimate interests,²² but he does not further articulate or claim a theory of harm.²³ Most proponents of corrective justice views adopt what Judith Jarvis Thomson calls the "comparative counterfactual" account of suffering a harm, according to which "A's suffering a harm is A's being in a state *s* such that A is worse off in a way for being in *s* than he would have been if he hadn't been in *s*."²⁴ It is possible to read this standard out of Coleman's work.²⁵ On this account of harm, a "harmful event is an event that makes things go worse for

¹⁷ Coleman (1992), at 323-6.

¹⁸ Shiffrin (1999), at 129. See also Herstein (2008), at 350-1.

¹⁹ As Coleman concedes. Coleman (1992), at 329.

²⁰ *Id.*, at 472.

²¹ *Id.*, at 331-2.

²² *Id.*, at 281.

²³ *Id.*, at 330. By positing that only setbacks to legitimate interests constitute harms, Coleman builds the notion of wrongfulness into his account of harm. This move cuts against much recent work on the metaphysics of harm, which aims to separate these two concepts. See, e.g., Bradley (2012), at 395.

²⁴ Thomson (2010), at 446. For examples of this view, see Perry (2003); Ripstein (2006); Winterbottom (m.s.). C.f. Roberts (2006), whose corrective justice account is premised on a comparative account of suffering a harm that does not require counterfactual baselines.

²⁵ For example, Coleman's construal of harms as "setbacks to well-being", (1992) at 434, mirrors that of comparative accounts of harm, since the notion of a setback usually presupposes a baseline for comparison.

someone, on the whole, than they would have gone if the event had not happened.”²⁶ We determine whether an event harms an agent by judging how she fares in the state of the world in which the event occurred against how she would fare in a state of the world in which the event did not occur. An event harms an agent if she fares worse in the occurrent state than in the comparison state. Given this definition of harm and Coleman’s argument that harm is a necessary condition for justifying reparation, it follows that an event for which there is no intelligible comparison state could not have harmed someone, and therefore does not call for reparation to that person.

The “wrongful harm” view deviates from Aristotle’s in applying more broadly than the legal system, as well as in a number of other respects that are not important to elaborate here.²⁷ However, this view resembles Aristotle’s in attributing a central place to agential actions, positing a goal of rectification, and requiring correlativity between the victim and the wrongdoer. The “wrongful harm” view also embraces the disequilibrium thesis. For Coleman, to classify an action as a wrong in the relevant sense is sufficient to establish that reparation is called for.²⁸ Like Aristotle, Coleman also sees the claims secured by the moral principle of corrective justice as outside the realm of distributive justice.²⁹

To see how the “wrongful harm” view might apply to a real-world debate about reparation, consider the Greenwood case. The “wrongful harm” view suggests that reparation is called for because (and to the extent that) the riots wrongfully imposed harms on those against whom they were perpetrated. This standard is easily met: the destruction of property, killing, and internment of Greenwood’s residents was inarguably unjustified and undoubtedly set back the legitimate interests of residents. Thus, given the “correlativity thesis,” the riots provide any agent who was causally implicated in and

²⁶ Bradley (2012), at 396.

²⁷ For example, unlike Aristotle Coleman does not presume that the gains from wrongdoing will be identical to the losses. See Kramer (1996).

²⁸ Coleman & Mendlow (2010) (The principle of corrective justice “says that an individual has a duty to repair the wrongful losses that his conduct causes.”); Coleman (1987), at 464 (“If I gain wrongfully and you lose wrongfully, corrective justice says your loss and my gain ought to be annulled.”); Coleman (1992), at 371 (“Corrective justice imposes the duty on the wrongdoer to compensate his victims for the costs his wrongdoing imposes on them.”). Coleman’s acceptance of the disequilibrium thesis (that the imposition of a wrongful harm is sufficient to generate a valid claim for reparation) should not be confused with the “equilibrium thesis,” or the notion that the goal of tort law is to “reestablish [an] equilibrium” by “nullify[ing] whatever gains and losses have occurred.” Coleman rejects the “equilibrium thesis.” Coleman (1992), at 276.

Coleman’s later work takes a different approach, which might be called a “normative power” interpretation of corrective justice. This interpretation denies the disequilibrium thesis: the imposition of wrongful harm is neither necessary nor sufficient to generate a duty of compensation. Rather, wrongdoing places the wrongdoer under a Hohfeldian liability to the victim, and the victim has a Hohfeldian power to impose a duty to compensation on the wrongdoer. Coleman (2012), at 549. I discuss this normative power interpretation below at n. 48.

²⁹ Coleman (1992), at 305. Here, too, Coleman’s view does not stand in for the field. Not everyone who adopts a harm-based view about corrective justice accepts the autonomy of corrective justice from distributive justice. *See, e.g.*, Perry (2000).

responsible for them with an agent-relative duty to repair the harms inflicted on anyone who was harmed by the riots.

Whether this reparative duty retains its normative charge depends on the answers to several questions. One set concerns against whom the duty might apply. *Ex hypothesi*, no living individual who was alive at the time of the riots would have met even the most minimal conditions for ascribing responsibility. Because correlativity requires identity between a wrongdoer and a payer, the case for reparation depends on whether responsibility can be attributed to some collective entity (like the State of Oklahoma or the City of Tulsa). If so, then those corporate agents might have a duty of repair. The second set of questions concerns those who might be the targets of this agent-relative duty of repair. Clearly, people alive at the time of the riots and displaced by them would count as victims, and thus be eligible claimants under the correlativity thesis. However, it is an open question whether the class of eligible claimants can be drawn more broadly. Perhaps we can conceive of some collective agent (like the African-American community of Tulsa, or African-Americans in general) as being victimized by the riots. If so, then this collective agent would be an appropriate target of reparation. If no such entity can be identified, then (on the correlativity thesis) reparation would not be justified to anyone other than the dwindling ranks of direct victims of the riot.

We are now in a position to explicate the “wrongful harm” view in terms of the framework I proposed in chapter 3. I’ll assume that the moral principle of corrective justice (which holds that the imposition of a wrongful harm generates an agent-relative duty to make reparation) is a valid principle of political morality, although I express some doubts about this principle below. That a valid principle of political morality requires making reparation is a good *prima facie* answer to the question “Why make reparation?” Moreover, the tying of reparation to products of agency seems correct. It would be odd to speak of making reparation for the damage caused by a hurricane. Likewise, that harms arise from an injustice is clearly relevant to the case for reparation, although (as I discuss below) perhaps not in the way that Coleman’s view suggests.

Coleman’s invocation of the “correlativity thesis” also presents an exacting standard for claimant and payer justification. The correlativity thesis is equivalent Janna Thompson’s “exclusion principle,” the view that only victims of a wrong may claim reparation and only wrongdoers may be expected or demanded to make it.³⁰ Even if an event is a wrongful harm, you are not justified in claiming reparation for it unless you were both wronged and harmed by it. Harms to non-victims are like misfortunes, and thus unintelligible as a matter of corrective justice (although perhaps a valid source of claims in distributive justice). Likewise, you may not be expected or required to make reparation if you were not a wrongdoer—that is, if you were not causally implicated in the perpetration of a wrong and responsible for this implication. The correlativity thesis posits that only those who meet these standards could have the agent-relative duty to make reparation. Thus, clear instances of wrongfully imposed harms do not call for reparation from those who were not responsible for perpetrating them.

³⁰ See Thompson (2001), at 16, and above in Ch. 3.

These exacting standards for claimant and payer justification have stark implications. One concerns wrongs that are causally implicated in a person's existence. On the comparative counterfactual conception of harm, harm is determined by way of comparing occurrent states with counterfactual states. If no such comparison state is intelligible for an agent (for example, because the agent would not have existed if not for the wrong), then the wrong could not have harmed the agent. This is a version of the "non-identity problem": someone could not have been wronged by an event that is causally implicated in her existence, since if not for the event she would not exist.³¹ On a harm-based view of wrongdoing (like the "wrongful harm" view), non-identity scenarios cannot involve harms, and thus cannot justify reparation.³² On such views, non-identity is a conceptual obstacle to justifying reparation. Some might find this implication problematic, since it would rule out a number of instances where the case for reparation seems compelling.³³ However, given the abstract level of evaluation, I do not want to rule out a theory based solely on implications that seem counterintuitive. I also leave open the question of whether the exclusion principle is a plausible way to specify payer and claimant justification. Perhaps these criteria are too exacting, inviting counterintuitive results in other instances. For now, it suffices to note that, by virtue of the correlativity thesis, Coleman's account of corrective justice (and, according to Coleman, all accounts of corrective justice) are committed to adopting the exclusion principle as criterion for claimant and payer justification of reparation.

"Wrongful harm" views like Coleman's straightforwardly adopt the compensatory conception of how reparation ameliorates. Wrongfully harming someone creates a debt.³⁴ The reasons to make reparation are the reasons to pay a debt: namely, that doing so is required by a freestanding principle of political morality. The harm imposed by wrongdoing fixes the burden in making reparation—the wrongdoer must compensate the victim so as to "make good the loss."³⁵ The provision of compensation necessarily contributes to the fulfillment of the debt, and full compensation (which frees the victim from the wrongfully imposed harm) expiates the significance of the wrong.³⁶ I will discuss some fundamental problems with this picture below. For now, I only note that a "wrongful harm" view seems committed to the compensatory conception. It would be

³¹ See Parfit (1987), ch. 16.

³² See, e.g., Sher (1981), at 7; Morris (1984), at 177.

³³ See Shiffrin (2009), at 334. The non-identity problem is not necessarily intractable. Like Parfit, we might reject the person-affecting mode of ethics that requires intrapersonal comparisons in order to establish harm (or wrongdoing). Parfit (1987), at 378 Or we might propose that the relevant wrongs in these instances are wrongs against groups, whose identities they do not fix. See Simmons (1995a), at n. 41. Or we might just bite the bullet and accept that one cannot be wronged by an event that is causally implicated in her existence. However, if the non-identity problem applies to a wrong, then the proponent of a "wrongful harm" view must conclude that reparation for that wrong cannot be ultimately justified.

³⁴ Coleman (1992), at 362 (corrective justice "morally... grounds a right to recover and a debt of repayment.")

³⁵ Coleman (1992), at 374.

³⁶ Winterbottom (m.s.), at 53; Coleman (1992), at 343.

very difficult (at least) to reformulate “wrongful harm” view without drawing on something like this story of how reparation ameliorates.

As for questions about collectivity, Coleman’s version of the “wrongful harm” view is compatible with a variety of accounts of group agency or joint action that could resolve questions related to collectivity. Indeed, such an account would be necessary in order to extend Coleman’s view to the realm of political injustices. Recall that, for Coleman, duties of repair can only arise for wrongful harms that at least one agent is responsible for imposing. Therefore, applying corrective justice to political injustices would require articulating standards under which collective entities like states can be responsible. Moreover, because the correlativity thesis effectively requires identity not only between payers and wrongdoers, but also between claimants and victims, extending the “wrongful harm” view requires explaining how collectives can have agent-relative duties. Extending the “wrongful harm” view also requires an account of how collectives can be victims of injustices and what it means for an event to harm a collective agent.

By articulating an account of collective agency with these parameters, the proponent of the “wrongful harm” view can avoid skepticism about whether historically distant injustices call for reparation. If group agents are intelligible as victims and wrongdoers and the identity of a group agent is stable over time, then correlativity might be satisfied (and reparation justifiable) for such distant injustices. For example, in the Greenwood case, we might posit that the state and city were responsible for the wrongful infliction of harm against the African-American residents of Greenwood. We might also posit that the riots were perpetrated against African-American residents of Greenwood as a group. On this interpretation, the riots could be seen to have generated an agent-relative duty for the former two group agents to repair the wrongful losses imposed on the latter group agent. This duty might still have normative force to the extent that the contemporary versions of each group agent are identical to the agents involved in the wrongdoing. However, if the victim of this injustice cannot be conceived as a group agent, then the correlativity thesis requires a skeptical conclusion about whether reparation can be justified. The same skepticism holds if the criteria for group agency do not see contemporary versions of group agents as identical to their historical counterparts. If either of these arguments is sound, then distant injustices do not call for reparation because there are no eligible targets for the agent-relative duty of repair.

The “wrongful harm” view undeniably meets the condition of distinctiveness. Coleman agrees with Aristotle that corrective justice differs from distributive justice in form, as well as that corrective justice is autonomous from distributive justice. Thus, the case for reparation does not reduce to distributive justice, nor can the normative impetus for reparation be satisfied by the achievement of distributive justice.

The “wrongful harm” view is also clearly discriminatory, holding that some injustices call for reparation and other don’t. Coleman’s reasoning suggests at least two criteria for discrimination. The first arises from the requirement that only harm-imposing events call for reparation. Therefore, an injustice that does not currently impose harms

does not call for reparation.³⁷ The second criterion comes from the exclusion principle. If the harms arising out of an injustice are not borne by the victim of the injustice, then the injustice does not call for reparation. These criteria do not invite the “paradox of discrimination” mentioned in chapter 3 because they deny that injustices necessarily call for reparation.

There are several serious problems with the “wrongful harm” version of the corrective justice approach. I will discuss three that cast doubt on its viability as a theory of reparation. First, the “wrongful harm” view provides an inadequate account of the wrongfulness of injustices, as well as why reparation is justified *prima facie*. On Coleman’s version of the “wrongful harm” view, the normatively salient features of an injustice are that it violates the victim’s rights (or unjustifiably violates her legitimate expectations) and that it imposes harms on the victim. Yet other aspects of injustices are normatively salient—for example, the way that many injustices disrespect or disregard their victims³⁸ or undermine confidence in the applicability of moral, legal, or political norms.³⁹ For example, any full account of why the Greenwood riots matter would have to reference not only the harms that were wrongfully imposed on the residents of Greenwood, but also the degradation and disrespect that were conveyed by both the riots and the failure of officials to intervene. Moreover, the Greenwood riots provided everyone (not merely those who were direct targets of the violence) reason to doubt that political institutions were committed to the equal protection of citizens.

Because the “wrongful harm” view sees impetus for reparation solely in terms of wrongs and harms, it cannot easily explain the significance of disrespect, disregard, and the undermining of confidence in shared norms. Perhaps the proponent of this view might conceive these phenomena in terms of harms: disrespect and disregard routinely involve harms, as does the undermining of confidence in shared norms. However, this reductionist strategy does not get things right. Disrespectful and disregarding treatment is normatively significant regardless of whether it also harms its target. For example, a policy that systematically degraded a segment of the population by conveying a message of their inferiority would call for reparation, even if that treatment did not worsen the situation of the targets (*e.g.*, because these people had already internalized the message of inferiority implicit in policy).

Moreover, the reductionist strategy suggests that harm matters in itself, which seems implausible. An alternative view is Seana Shiffrin’s “will-oriented” account of harm, on which “harm involves a distinctive sort of frustration or impediment of the will or the ability to exert and effect one’s will.”⁴⁰ For Shiffrin, harm matters because it violates a person’s autonomy by obstructing or impeding “her control over substantial elements of her experience.”⁴¹ Seeing harm in terms of interference with agency can

³⁷ This requirement resembles the one proposed by Spinner-Halev (2007).

³⁸ Gaus (1991), at 67-8; Kumar & Silver (2004), at 149-151.

³⁹ Walker (2006), at 30-32.

⁴⁰ Shiffrin (2012), at 382-3.

⁴¹ *Id.*, at 383.

explain why “[t]he most serious harms seem to involve states or conditions that obstruct, frustrate, or directly conflict with an agent’s cognizant interaction with her circumstances and her ability to lead a life within those circumstances that is distinctively and authentically hers—a life that is more than merely that which is watched, marked, endured, or undergone.”⁴² Shiffrin’s will-based view provides a way to resist the assimilation of disrespect, disregard, and undermining confidence into harm. Rather, each of these phenomena can be seen as alternative ways of interfering with a person’s agency. A policy that disrespects someone or disregards her interests necessarily frustrates her agency, regardless of whether it does in the way that is characteristic of harming. The frustration of agency provides the call to which reparation responds. On a view of harming like Shiffrin’s, then, the wrongful imposition of harms does not fully explain why injustices matter because it does not capture the significance of disrespect, disregard, or the undermining of shared norms. Nor is the wrongful imposition of harm necessary to justify reparation, since some injustices that do not impose harms (or wrong the victim in the way that Coleman envisions—*i.e.*, by violating her rights or legitimate expectations) can still call for reparation.

The advocate of a “wrongful harm” view might try to avoid these criticisms by first seeing wrongs and harms as disjunctive grounds for reparation, then broadening the category of wrongfulness. On this strategy, certain kinds of disrespectful or disregarding treatment would call for reparation regardless of whether such treatment violated someone’s rights or legitimate expectations or worsened her situation. Such a move would require major revisions to Coleman’s account of wrongfulness.⁴³ Moreover, expanding the notion of wrongfulness in this way would also put pressure on the correlativity thesis, the notion that valid claims to reparation must involve victims and wrongdoers. It seems possible that a non-victim could be disrespected or degraded by an injustice in a normatively salient way. In a sense, the Greenwood riots conveyed a powerful message of inferiority about African-Americans everywhere, even ones who had never lived in the Greenwood area. Moreover, injustices can undermine non-victims’ confidence in shared norms: that state and local officials failed to intervene in the riots implied that the norm of equal protection was illusory. Expanding the notion of wrongfulness seems necessary based on what Coleman called the “rectification” thesis—the notion that corrective justice is about rectifying wrongs. However, at least in the political domain, the rectification thesis seems incompatible with the correlativity thesis. Because Coleman contends that both theses are part of the core of corrective justice approaches, we can question whether any such view (not merely the “wrongful harm” version) captures the facial justification for reparation.

The second main objection to the “wrongful harm” view is that it does not tell a plausible story about how reparation ameliorates the significance of injustices. In chapter 2, I argued that the compensatory conception is generally deficient because it cannot

⁴² *Id.*, at 388.

⁴³ For example, appreciating that disrespectful or degrading treatment could justify reparation would require Coleman to abandon his strategy of defining “wrongfulness” solely in terms of wrongs (which violate rights) and “wrongdoings” (which violate legitimate expectations).

capture reparation's causal structure—the way that a gesture's expressive and intentional content determine its ameliorative success. This inadequacy applies to the “wrongful harm” view. This view places some constraints on how reparation should be implemented: presumably, a gesture of reparation should not itself wrongfully harm the target. However, these constraints are too weak to capture the causal structure of reparation. Presumably, the “wrongful harm” view would find deficient a gesture of redress that both imposed “expressive harms” on and violated some right or legitimate expectation of the claimant.⁴⁴ Otherwise, the “wrongful harm” view could not appreciate how the attitudes conveyed by a redressive gesture could affect a gesture's status as reparation. However, as I argued in chapter 2, the attitudes conveyed by a gesture can affect its status as reparation in a variety of other ways. Take the Greenwood example. I take it as uncontroversial that a redressive gesture that failed to repudiate the attitudes of racial superiority and inferiority implicit in the riots would be deficient. Such a gesture would ameliorate the significance of this injustice less than a gesture that repudiated these racist attitudes, and it might not ameliorate at all. Yet, because the “wrongful harm” view adopts all of the tenets of the compensatory conception, it cannot appreciate this deficiency.

Likewise, the “wrongful harm” view could not capture reparation's intentional dimension—the way that a payer's reasons for actions can affect a redressive gesture's status as reparation. The “wrongful harm” view is blind to the importance of such motivating reasons because it is difficult to see how acting for a certain reason could constitute a wrongful harm. Yet reasons for action can matter to the ameliorative impact of a gesture of redress. For example, a redressive program directed toward the victims of the Greenwood riots and their descendants would be deficient if it were made solely as part of an effort to maintain the racialized subordination of African-Americans. It seems plausible that such a gesture would not ameliorate the significance of the riots at all. Yet the “wrongful harm” view could not appreciate this deficiency.⁴⁵

The third major objection is that the “wrongful harm” view fails to capture the relevant normative phenomenology in another respect: namely, by getting the directionality of reparation wrong. This charge might appear puzzling at first because Coleman's concerns about the directionality of claims to reparation led him to

⁴⁴ *E.g.*, Sepinwall (2006), at 224-5

⁴⁵ Could the defender of the “wrongful harm” view reformulate it in order to capture this causal structure of reparation? Perhaps this view can be articulated in terms of the relational conception of reparation, under which the moral principle of corrective justice would be part of the normative ideal of the political relationship. I am skeptical about the possibility of such a reformulation. It would require denying several tenets of Coleman's formulation of the “wrongful harm” view, including the notion that wrongs create debts and that reparation is justified in terms of those debts. This move would also require denying the correlativity thesis and the disequilibrium thesis. As noted above, Coleman sees the former of these as a core commitment of any corrective justice theory, and the latter seems to be as well. Finally, it is unlikely that the criteria of “wrongful harm” would survive such a reformulation: “wrongful harms” might be neither necessary nor sufficient to explain the ways that the political relationship can be impaired in light of its normative ideal. On the relational conception, reparation might be called for in a variety of cases where there is no harm or violation of rights and/or legitimate expectations, and it might not be called for in some clear cases of wrongful harms.

incorporate the correlativity thesis into his “mixed conception” of corrective justice and abandon his earlier view, the “annulment thesis,” which did not require that the wrongdoer annul the losses imposed by her wrongdoing.⁴⁶ Yet the concern about directionality here comes not from the correlativity thesis, but from what I have called the disequilibrium thesis, the view that that impetus for reparation comes from the disruption of the equilibrium between victim and wrongdoer. This thesis has the problematic implication of being insensitive to what, after Judith Shklar, I will call the claimant’s “sense of injustice,” the particularized grievance based on the “special kind of anger we feel” and the “betrayal that we experience” when we are wronged.⁴⁷ On the disequilibrium thesis, the disruption of the equilibrium is both necessary and sufficient to establish that reparation is called for. In other words, the victim’s (or claimant’s) sense of injustice doesn’t matter to whether reparation is called for, nor, by implication, would the fact that the victim *does not* demand reparation. Yet this kind of insensitivity appears to be a theoretical deficiency. An insensitive gesture ameliorates imperfectly, if at all. This **sensitivity requirement** seems like an entailment of what, in chapter 2, I called non-replication: the basic notion that a gesture is deficient as reparation if it replicates the wrongmaking features of an underlying wrong. Part of what makes some wrongs (and, arguably, most political injustices) wrong is that the victim doesn’t matter. This insensitivity partially explains why harms that are wrongfully imposed by injustices have greater significance than identical harms that arise from justified policies.

To appreciate the problem that insensitivity to the sense of justice raises for the “wrongful harm” view, consider the Greenwood case. The rounding up of African-American citizens was clearly insensitive to their interests. What drove this policy was a desire to facilitate the razing of Greenwood, and whether this policy would also have protected African-Americans from death or injury simply didn’t matter. Insensitivity, then, is the difference between internment (which calls for reparation) and protective quarantine (which does not seem to). Yet, because the “wrongful harm view” adopts the disequilibrium thesis, it allows reparation to replicate this wrongmaking feature of the underlying injustice. The disruption of the equilibrium is both necessary and sufficient to justify reparation. Therefore, the case for reparation does not depend fundamentally on the grievances of Greenwood residents or other victims of the riots. The “wrongful harm” view thus fails to capture the way that reparation ameliorates because it can’t spot the deficiency of insensitive tokens of redress.⁴⁸

⁴⁶ See Coleman (1992), at §16.4.

⁴⁷ Shklar (1990), at 83.

⁴⁸ David Copp suggests what I previously (at n. 28) called a “normative power” interpretation of Coleman’s view: the relevant type of wrongdoing does not create a duty of compensation, but rather triggers “a Hohfeldian ‘liability’ to the victim, who has the Hohfeldian power to demand compensation and thereby to impose a duty of compensation on the victim.” Copp (2010), at fn. 50. This extra step would avoid the disequilibrium thesis, since the wrongdoing is insufficient to generate a duty of compensation. As such, the normative power interpretation would not run afoul of the sensitivity requirement described in the text. The case for reparation would depend on whether the victim exercises her power to impose a duty of compensation on the victim.

Coleman seems to embrace the normative power interpretation in later work, Coleman (2012), at 549, although it arguably does not describe his earlier, more thorough elaboration of his view. See Coleman

In sum, the “wrongful harm” version of the corrective justice approach is faulty because it doesn’t provide a complete account of the justification for reparation and fails to capture key aspects of how reparation ameliorates the significance of injustices.

B. Gardner’s “Continuity” view

Recently, John Gardner has articulated a novel version of the corrective justice approach. On what Gardner calls the “continuity” thesis, the corrective justice duty to repair losses is an alternative (although imperfect) way of complying with the rationale behind the primary obligation that was breached in wrongdoing.⁴⁹ Gardner illustrates the continuity thesis with the following example from Neil MacCormick. Say that I promise to take my children to the beach today, but an emergency comes up that (justifiably) prevents me from doing so. Despite being justified in breaking my promise, I am bound (without having to make a further promise) to “take them to the beach at the next suitable opportunity.” My broken promise “continues to exert a hold on me after I break it,” and my promissory obligation “leaves some traces of itself, some echo, behind for later.”⁵⁰

Gardner’s “continuity” view is a species of corrective justice because it advances all of the theses that Coleman sees as characteristic of corrective justice views. It adopts the agential thesis because only agents can incur and breach the kinds of duties that give rise to corrective justice. It adopts the rectification thesis because the goal of redress is to “make up for one’s failure to perform” a primary obligation.⁵¹ It adopts the correlativity thesis because redress involves only the parties to the breached primary obligation—in other words, only the breacher can make up for her breach, and these make up efforts can only be directed to the breachee. Finally, Gardner’s view also adopts what I have called the disequilibrium thesis: the breach of the primary obligation is both necessary and

(1992), at 369 (“If an actor’s conduct gives rise to a wrongful loss, the actor has a reason for making repair, expressed as a duty to render compensation.”). Moreover, this normative power interpretation is arguably at odds with the rectification thesis, which for Coleman is one of the core elements of corrective justice. For example, Coleman has argued that “claims in corrective justice are claims to repair or rectification.” Coleman (1995), at 26. On the normative power interpretation, claims in corrective justice would not be “claims to repair or rectification” so much as claims of authority to impose rectificatory duties on others.

Nonetheless, the normative power interpretation of the “wrongful harm” view avoids the worry about insensitivity described here. However, three caveats are in order. First, it is not clear that Coleman means the “normative power” interpretation to apply to corrective justice as a moral principle, rather than as a principle animating tort law. Coleman (2012), at fn. 19. Second, many harm-based corrective justice views continue to embrace the disequilibrium thesis, positing that wrongdoing is both necessary and sufficient to give rise to a duty of compensation. *See, e.g.*, Lyons (2004); Winterbottom (m.s.); Sepinwall (2006). Third, even on the normative power interpretation, the “wrongful harm” view rests on the compensatory conception, and so fails to capture the relevant normative phenomenology.

⁴⁹ Gardner (2010), at 33. Keating (2012) offers a similar account of the normative underpinnings of corrective justice in tort law. Gardner’s formulation of the continuity thesis differs somewhat from Joseph Raz’s position, which sees compensation as the next-best way of complying with the violated duty itself rather than with the rationale underlying the duty. *See* Raz (2004).

⁵⁰ Gardner (2010), at 28-9.

⁵¹ Gardner (2010), at 34.

sufficient to generate the kind of second-best obligation of redress in which reparation consists.

However, Gardner's "continuity" view differs from a "wrongful harm" view like Coleman's in a number of respects. First, it denies that corrective justice is a freestanding moral principle. Rather, corrective justice is an entailment of the primary obligation that was violated in the wrongdoing. (One could presumably extend the continuity thesis to the political domain by seeing the fulfillment of obligations as a requirement of justice or political morality.) Second, the "continuity" view does not base the case for reparation on a showing that the wrongdoing harmed the victim. Rather, the violation of the primary obligation itself is sufficient to call for reparation. Considerations related to harm or loss are relevant to establishing what complying via corrective justice involves, but not whether there is a duty to comply through corrective justice. As such, Gardner's view evades the criticism that the notion of "wrongful harm" does not fully capture the facial justification for reparation.

Most importantly, Gardner's "continuity" view does not presuppose the compensatory conception in its story about how reparation ameliorates.⁵² Rather, Gardner offers a different picture, which I will call the *conformity conception*. We can articulate this conception using the same schematic used in chapter 2 to describe the compensatory and relational conceptions.

- (1) **What do wrongs do?** Wrongs breach primary obligations.
- (1a) **Why make reparation?** Because the breached primary obligation continues to exert normative force, and making reparation is the next-best way of satisfying the reasons undergirding this obligation.
- (2) **How to calculate the reparative burden?** In light of the rationale behind the breached primary obligation.
- (3) **What does reparation do?** Genuine reparation conforms to the breached primary obligation insofar as possible, thus necessarily diminishing its normative force. However, even full reparation does not fully ameliorate the significance of the wrongdoing because the "next-best way of satisfying reasons that apply to us" inevitably "leave[s] behind some remainder, however slight, of unsatisfied reason."⁵³

The conformity conception avoids some of the most troubling implications of the compensatory conception. For example, it does not require conceiving the significance of wrongs or injustices in terms of debts, and so does not necessarily run afoul of reparation's expressive dimension. Furthermore, given its identification of a remainder,

⁵² Arguably, this attribution of the conformity conception to Gardner is at odds with other writings, in which he seems to embrace the compensatory conception. E.g., Gardner (2013), at 71. ("Reparation is a special kind of compensation which has the added feature that it is paid by or on behalf of someone who bears causal responsibility for the injury or loss that is being compensated.")

⁵³ Gardner (2010), at 35.

the conformity conception does not see full reparation as expiating the significance of the underlying wrong or injustice.

Consider how the “continuity” view might apply to the Greenwood case. The rioters breached their primary obligations not to kill and harm others, as well as their obligations not to destroy property. State and local officials breached their primary obligations to protect citizens from threats to their life, well-being, and destruction of property, as well as by arguably being complicit in facilitating the wrongdoing by the rioters. Each of these primary obligations has the same underlying rationale, namely the importance of safety and bodily integrity to well-being and autonomy. On Gardner’s view, the rationale behind these breached primary obligations would continue to apply to both rioters and officials, although it is unclear what constitutes the next-best way of conforming. Perhaps next-best conformity would require compensating for the loss of property and life, as well as establishing political institutions to safeguard against further breaches like this in the future.

Having laid out Gardner’s “continuity” view, we can analyze it in terms of the framework. As with the “wrongful harm” view, the two most important questions here concern Gardner’s account of the justification for reparation and his view’s implicit conception of how reparation ameliorates.⁵⁴ Let’s explore these two questions in tandem.

On the issue of justification, the “continuity” view seems to provide a valid, agent-relative reason to make reparation. However, I doubt that this view fully captures the significance of injustices and the normative impetus for reparation, as well as that it provides an appropriate reason for making reparation. Gardner is somewhat unclear about how the breached primary obligation carries on as a remnant in the secondary obligations of corrective justice, but we can charitably interpret his formulation so that the remnant exerts rational force: valid obligations generate what John Broome calls “normative requirements” regarding conformity.⁵⁵ Justice requires conforming to valid obligations,

⁵⁴ Gardner’s “continuity” view does not run aground on any of the other elements of the framework. On the issues of collectivity and distance, the “continuity” view itself offers no answers but is compatible with a variety of plausible accounts of collective agency and the continuity of collective identities. On the question of distinctiveness, Gardner’s view clearly denies the reductionist strategy because it does not allow for the significance of an injustice to be reduced to (or ameliorated by) the accomplishment of some other political goals—the MacCormick example is meant to show that a breach of an obligation continues to exert normative force, even where the breach is justified. Moreover, Gardner’s embrace of the correlativity thesis provides a basis for discrimination: injustices perpetrated by a wrongdoer who no longer exists do not call for reparation, since the normative force exerted by the breached obligation applies only to the breacher. Thus, the “continuity” view utilizes something like Janna Thompson’s “exclusion principle”: a wrongdoer is the only one who can be expected to make reparation, because she is the one to whom the primary obligation applied.

⁵⁵ Broome (1999). Gardner entertains this Broomean formulation of his view, but goes on to make a stronger claim that obligations entail reasons, rather than merely normative requirements. Gardner (2010), at 53. For Gardner, to say that A has an obligation to Φ entails that A has reason to Φ , reason to do the various things necessary to Φ ’ing, and (where Φ ’ing is impossible) reason to conform with the rationale behind Φ ’ing insofar as possible. This construal of Gardner’s position is even more controversial than the Broomean formulation I examine in the text, given the questions about instrumental rationality identified by, among others, Kolodny (2005) and Raz (2005).

and this requirement rationally entails a further requirement to conform to a primary obligation insofar as possible when perfect conformity is impossible (given breach).

If this interpretation is correct, then Gardner's "continuity" view has difficulty accounting for the significance of injustices and the impetus for reparation. The "continuity" view holds that adhering to primary or reparative obligations is a rational requirement, which suggests that the failure to conform to a primary or reparative obligation is an instance of irrationality. In both types of cases, the violation of the obligation would constitute a failure conform to the reasons that undergird the obligation.

If this is a plausible construal of Gardner's argument, then the "continuity" view cannot capture the essentially *bipolar nature of wrongdoing and reparation*: the way that (at least some) injustices ground complaints by victims, and that reparation responds to these complaints.⁵⁶ The intelligibility of these complaints and responses presupposes a background of authority relations and mutual accountability.⁵⁷ To say that an action is an injustice is to imply that the perpetrator of it is answerable to the victim, as well as that the victim has normative power to hold the perpetrator accountable.⁵⁸ The accountability that arises out of such bipolar obligations contrasts with that arising out of "monadic" accountability structures, under which the violation of an obligation does not endow anyone with a special authority to hold the violator accountable.⁵⁹ Rationality seems like the paradigmatic example of a monadic accountability structure. When you act irrationally, you may (or may not) act wrongly, but you do not necessarily wrong anyone in particular. Thus, Gardner's view has the implication that failing to abide by a primary or reparative obligation does not wrong the obligee in a way that gives her special authority to hold the perpetrator accountable. If it did, then the justification for reparation would be conformity with the obligee's demands, rather than (as Gardner argues) the rationale underlying the obligor's breached obligation. But at least some injustices are violations of bipolar obligations,⁶⁰ and all claims for reparation seem to have this bipolar structure. The "continuity" view is structurally problematic because it gives every injustice a monadic structure, thus neglecting the bipolar structure of (at least some, if not all) injustices and claims for reparation.

A further problem is that the "continuity" view undersells the normative issues at stake in injustice and reparation. We might criticize as irrational those who perpetuate an injustice, as well as those who do not conform to apt demands for reparation. But surely stronger criticisms are available. It would be strange (however appropriate) to say that the rioters and officials were irrational in their razing of Greenwood; moreover, if the

⁵⁶ Thompson (2006).

⁵⁷ Darwall (2006).

⁵⁸ Darwall (2012).

⁵⁹ Michael Thompson (2006); Darwall (2012).

⁶⁰ I leave open the possibility that some injustices could be violations of what Darwall (2012) calls "moral obligation period" and thus have a monadic structure, although I am not entirely sure how this could be. The point here is that Gardner's "continuity" view requires all injustices to have a monadic structure.

Greenwood riots require reparation, then the failure of political agents to make reparation would be license a far harsher form of criticism than would their failure to observe *modus ponens*. Moreover, some philosophers deny the normativity of rationality—that being subject to a rational requirement to Φ entails that one has a reason to Φ .⁶¹ Yet it seems perfectly plausible to deny that rationality provides reasons and accept that breaching an obligation provides compelling reason to make reparation. If one denies the normativity of rationality, then the “continuity” view can’t tell the whole story about our reasons to make reparation.

A third problem concerns whether the “continuity” view would appropriately motivate redress. To the question “Why make reparation?”, the “continuity” view answers: “Because if I did not make reparation I would fail to conform to the reasons underlying the obligation whose breach constituted a wrong.” The ultimate justification for reparation is a function of the wrongdoer (or payer’s) conforming to a rational requirement. Yet this response runs afoul of the sensitivity requirement described above. The case for reparation does not essentially depend on the victim’s (or claimant’s) grievance arising out of the injustice.⁶² This insensitivity is a conceptual worry because it violates the more basic requirement of non-replication. Since the wrongness of (at least some) injustices consists in their disregard of the victim, it would be puzzling if gestures of redress that similarly disregarded the victim could ameliorate the significance of these injustices.

Aside from this insensitivity, the “continuity” view has difficulties accounting for other aspects of the phenomenology of reparation. In particular, this view cannot fully appreciate reparation’s causal structure—in particular, how the gestures expressed by a gesture and reasons for which it is made can affect its status as reparation. Unlike views based on the compensatory conception, this failure is not total. The “continuity” view can appreciate reparation’s expressive dimension by invoking the rationale behind the breached obligation: actions that express attitudes that are inconsistent with this rationale could be ruled out as inappropriate because they do not conform to this underlying rationale.

However, the “continuity” view (and the conformity conception that underlies it) cannot account for reparation’s intentional dimension. Assume, as argued above, that Gardner’s “continuity” view says that conformity with reasons underlying an obligation is a rational requirement. After Niko Kolodny, we can distinguish two modes of conformity with a rational requirement: state requirements require that “you be a certain way at a given time,” while process requirements “require you to do something over time,

⁶¹ See, e.g., Kolodny (2005). To be clear, Gardner does not deny the normativity of rationality. See Gardner (2010), at 31-33.

⁶² Unlike views based on the compensatory conception, though, the “continuity” view could appreciate how the victim’s not wanting reparation would affect the case for reparation. To the extent that the obligee could release the obligor from the primary obligation, the victim would have the power to release the wrongdoer from duties to make reparation arising out of a breach of the primary obligation. This contrasts with the “wrongful harm” view, on which the victim’s decisions wouldn’t matter in even this counterfactual sense.

where ‘do’ is understood broadly so as to include forming and revising beliefs.”⁶³ For Gardner, conformity with a norm of corrective justice does not have an agential component: I can conform to such a norm even when some other agent (like an insurance company) acts on my behalf.⁶⁴ Thus, Gardner sees conformity as a state-based requirement. To conform (insofar as possible) to the rationale underlying the primary obligation is to act in a way that’s consistent with the rationale. This state-based picture suggests that the process by which the agent’s actions conform does not matter to judging whether the agent has satisfied his obligations of corrective justice. Yet, as I argued in chapter 2, reparation’s intentional dimension means that process matters ineliminably. If a gesture of redress is made for an inappropriate reason, its ameliorative impact is at least blunted (and perhaps negated) even if it has the effect of placing the target in the state of the world that she would have been in had the gesture been genuine reparation. Thus, because the “continuity” view construes conformity as a state requirement, it cannot appreciate reparation’s intentional dimension.

In sum, Gardner’s “continuity” view does not provide a complete or compelling answer to the question “Why make reparation?” Also, its implicit story about how reparation ameliorates doesn’t appreciate why genuine reparation must be sensitive to the grievances of victims and be done for the right kinds of reasons.

C. Lazar’s “Hybrid” View

Seth Lazar offers still another version of a corrective justice view. For Lazar, the point of corrective justice is rectification, or “set[ting] matters right.”⁶⁵ Because Lazar’s view distinguishes the rectification of harms and wrongs (and articulates different requirements for each), I will call it a “hybrid” view.

For Lazar, a harm is a damage or setback to a person’s interests. Compensation can rectify a harm, either by mediating between the interest in its damaged form and some restored form, or else by promoting some equally valuable interest.⁶⁶ Moreover, the rectificatory effect of compensation on harm does not depend essentially on who provides the compensation. For any particular harm, Lazar argues, the question of whether compensatory duties fall on “the state, the offender, or some other party” cannot be resolved by conceptual analysis.⁶⁷ Different considerations apply to the rectification of wrongs, which Lazar defines as violations of a person’s rights and/or degradations of his “status as an equal member of the moral community.” For Lazar, the rectification of a harm does not necessarily rectify a wrong. Nor can gestures annulling the disvalue of a

⁶³ Kolodny (2007), at 371.

⁶⁴ Gardner (2010), at 11.

⁶⁵ Lazar (2008), at 363.

⁶⁶ *Id.*, at 356-7.

⁶⁷ *Id.*, at 359.

wrong (e.g., through punitive damages) or punishing the wrongdoer rectify the disrespect implicit in the wronging of the victim.⁶⁸

Rather, Lazar argues, the only way to rectify a wrong is through “full apology.” For Lazar, such an apology has moral components: the wrongdoer must acknowledge causal responsibility for the wrong; accept moral responsibility for the wrong; and repudiate the wrongdoing (which requires the sincere expression of regret).⁶⁹ These moral components have practical corollaries: the wrongdoer must commit to the non-recurrence of the wrongful action; where she has gained through the wrongdoing, she must disgorge these gains; and she must commit to making reparation, by which Lazar means a “good faith effort to share the burden of harm which she imposed on the victim through the injury.”⁷⁰ Reparations concretize the moral elements of the wrongdoer’s apology. Moreover, unlike the rectification of a harm (which does not necessarily require the wrongdoer’s involvement), “the agent of rectification of the wrong must be the offender herself.”⁷¹ The affirmations, acknowledgments, and expressions necessary for rectification cannot be conveyed by someone other than the wrongdoer.

Although Lazar sees his account as a species of corrective justice, this classification is disputable. On the harm side, Lazar’s “hybrid” view denies what Coleman calls the correlativity thesis—that the demands of corrective justice necessarily involve only wrongdoers and victims. On the wrong side, Lazar’s view explicitly denies what Coleman calls the “rectification thesis”—the notion that the goal of corrective justice is to right a wrong. Instead, Lazar sees that the goal of reparation as a way of “do[ing] right by the people we injure.”⁷² The upshot is that rectification might expiate an offender’s guilt for the wrong, even if it does not expiate the significance of the wrong itself.⁷³ Given Coleman’s contention that these two theses are tenets of all corrective justice views, it is unclear whether Lazar’s “hybrid” view falls within this category.

Moreover, Lazar’s “hybrid” view denies what I have called the disequilibrium thesis—that identifying an action as a wrong or injustice is sufficient to establish that reparation is called for. Indeed, Lazar believes that rectification cannot ever be a “matter of right.”⁷⁴ Lazar’s argument here is ingenious, but counterintuitive. For Lazar, the apology model is the only plausible construal of the rectification of wrongs. This model imposes internal demands on the wrongdoer, requiring her to “feel a certain way” (namely, to repudiate and regret her prior action). Yet “there is... no plausible conception of justice which could justify demanding that a person feel a certain way.” Thus, Lazar

⁶⁸ *Id.*, at 359-62.

⁶⁹ *Id.*, at 363-4.

⁷⁰ *Id.*, at 364.

⁷¹ *Id.*

⁷² *Id.*, at 365.

⁷³ *Id.*

⁷⁴ *Id.*, at 366.

concludes, rectification is “beyond the scope of justice.”⁷⁵ Moreover, Lazar’s logic suggests that rectification is beyond the scope of *normativity*. Assume a minimal notion of ought-implies-can, on which to say that someone ought to do something is to say that she is capable of doing it. If ought implies can, then cannot implies ought not. On Lazar’s apology model, if a wrongdoer cannot make it the case that she regrets her perpetration of a wrong and disrespect of the victim’s moral status, then it follows that she is not normatively required to do so or subject to normative criticism for failing to do so.

So Lazar’s apology model does more than place rectification beyond the scope of justice. Given its intentional and expressive success conditions, this model denies that some wrongdoers have reason to rectify their wrongs and implies that these failures are not subject to criticism. At the very least, these implications are revisionist. Moreover, they cut off Lazar’s “hybrid” view from the core strength of corrective justice views: the way that construing reparation as a requirement of justice provides a clear and compelling account of facial justification, a good answer to the question “Why make reparation?” On Lazar’s view, the answer to this question (which seems to involve the way that wrongdoing degrades the wrongdoer’s moral status)⁷⁶ is elusive.

Lazar’s “hybrid” view might also be criticized based on its implicit conception of how reparation ameliorates. Appreciating the disjunctive nature of Lazar’s account is important here. Lazar’s account of how reparation ameliorates *harms* utilizes the compensatory conception, while his account of how reparation ameliorates *wrongs* seems to utilize something like the relational conception. To be fair, Lazar does not fully explain how reparation ameliorates the significance of wrongs. However, as noted above, he suggests that making reparation is a way of restoring a wrongdoer’s moral status. This suggestion is consistent with the basic thrust of the relational conception—that reparation ameliorates by providing victims and others with reasons to revise their relationships with the wrongdoer. The apology model also envisions expressive success conditions to reparation—genuine reparation must repudiate the wronging and convey the wrongdoer’s regret.

There are several problems with this “hybrid” view about how reparation ameliorates. First, it’s unclear that the bifurcation strategy works, since it requires appraising the normative significance of wrongs and harms in fundamentally different ways. While Lazar’s argument that these two phenomena are not interdefinable (such that the rectification of a harm does not necessarily rectify a wrong) is plausible, it would be strange if harms and wrongs had radically different normative significance.

Second, the expressive requirements of the apology model seem too stringent. As discussed in chapter 2, we can imagine a variety of successful reparative gestures that do not repudiate a wrong or express regret. Expression of these attitudes might be important as a response to certain injustices, but it is far from obvious that they are categorical requirements for amelioration.

⁷⁵ *Id.*

⁷⁶ *Id.*, at 365.

Third, the apology model does not seem to capture reparation's intentional dimension. Lazar recognizes the importance of intentions to successful reparation, conceding that corrective justice looks down on providing injurers with incentives to apologize because "what matters is that the apology be genuine, and if it is premised on an incentive then, whether or not it actually is genuine, it will always be suspect."⁷⁷ Yet products of the apology model will not necessarily satisfy these intentional requirements. A wrongdoer who apologized, conveyed genuine regret, and made redress solely out of concern for her own moral status would be missing something. One way to explain this deficiency is in terms of the sensitivity requirement. The status-conscious wrongdoer would not be responding to the victim's grievance. Yet, as Lazar concedes, this kind of disregard of the victim is constitutive of wrongdoing. Thus, the apology model cannot appreciate why a redressive gesture made entirely for self-centered reasons would be deficient.

It is difficult to characterize Lazar's "hybrid" view as a species of corrective justice at all, since it denies some core tenets of this position. Moreover, by eschewing that reparation can be required by justice (and, by implication, normatively required at all), this view does not provide a plausible explanation of the *prima facie* justification for reparation. Finally, this view does not capture how reparation ameliorates the significance of injustices very well.

To summarize, seeing reparation as a distinct requirement of justice would provide a compelling answer to the question "Why make reparation?" However, none of the corrective justice approaches examined here were able to satisfy all of the elements of the framework. "Wrongful harm" views proved inextricable from the compensatory conception, and so offered an implausible story about how reparation ameliorates. Gardner's "continuity" view avoided the compensatory conception, but nonetheless failed to capture the bipolarity of reparation. Lazar's "hybrid" view gained its plausibility only by denying that reparation is a requirement of justice. Moreover, this view fails to avoid all of the difficulties in explaining how reparation ameliorates that plagued the "wrongful harm" and "continuity" views.

II. Rights-based Approaches

On a rights-based approach, the rights violated by an injustice form the core of the case for reparation. The basic thrust of such an approach is as follows. Injustices contravene rights. The contravention of rights calls for reparation, which vindicates these rights. Reparation, as Arthur Ripstein's summarizes Kant's view, "just gives [the victim]

⁷⁷ *Id.*, at 367.

back what [she] already had.”⁷⁸ The normative force for reparation is entailed by the state’s requirement to honor or respect rights.⁷⁹

Rights-based approaches have important strengths. In particular, they capture structural features of reparation better than justice-based accounts do. However, rights-based accounts are ultimately unsatisfying because they do not provide a compelling account of the justification for reparation, nor do they fully capture the phenomenology of how reparation ameliorates.

Before proceeding, it might help to contrast rights-based approaches with the corrective justice approaches described above. Both kinds of approaches could invoke notions of rights and justice, but rights-based approaches assign explanatory priority to rights. Unlike corrective justice views, rights-based views do not posit a freestanding principle of political morality in order to justify reparation. Rather, the justification for reparation is part of a more fundamental commitment to the protection and vindication of rights. The rights-based theorist might reconcile these two approaches by seeing justice solely in terms of the protection of rights, or else seeing the vindication of rights as a principle of justice that has lexical priority. Nevertheless, on a rights-based approach, rights are bedrock in any answer to the question “Why make reparation?”

A rights-based approach posits that the contravention of a right is sufficient to justify reparation *prima facie*. This commitment differs from the “wrongful harm” versions of corrective justice described above, which see harm as another fundamental requirement to justifying reparation. On a rights-based view, an injustice that contravened someone’s rights without harming her would still ground a claim for reparation. To explain the sufficiency of rights contraventions to the justification for reparation, a rights-based approach might posit the existence of natural rights, whose moral force is not essentially institutional. For example, John Locke saw wrongdoing as generating both a common right to punish the wrongdoer as well as a distinct right for the person who has received damage to “seek reparation from him that has done it.”⁸⁰ A rights-based theorist might also invoke David Owens’s notion of a “normative interest,” an interest that “takes normative phenomena as its object, an interest *in* which thoughts, feelings, and actions are obligatory, blameworthy, appropriate, or even intelligible.”⁸¹ For Owens, wrongdoing can matter solely because it contravenes normative interests, regardless of whether it also harms someone by setting back her non-normative interests.⁸²

⁷⁸ Ripstein (2009), at 166.

⁷⁹ Examples of those who adopt rights-based approaches include Paul (1991); Lomasky (1991); Waldron (1992) and (2002); Simmons (1995a); Boxill (2003); Sher (1981) and (2005); and Cohen (2009). Ripstein (2009) also interprets Kant along these lines.

⁸⁰ Locke (1988), at 273; see also Boxill (2003).

⁸¹ Owens (2012), at vi.

⁸² *Id.*, at § 12 (rejecting the “Injury Hypothesis” as account of wrongfulness). Owens argues that an action could be wrongful even if it did not even set back normative interests, *id.*, at 65, but a rights-based theorist need not adopt this argument.

Because rights-based approaches see the contravention of a right as sufficient to justify reparation *prima facie*, they can avoid many of the epistemic and justificatory difficulties that arise out of the notion of harm. For example, a rights-based approach can judge reparation to be called for in cases that Owens calls “bare wrongings”— wrongful actions that do not make anyone worse off.⁸³ A rights-based view might also call for reparation in cases where a wrongdoing ultimately benefits the victim of the wrong.⁸⁴ By contrast, a “wrongful harm” version of the corrective justice approach, which sees harm as integral to the justification for reparation, would deny that reparation could be justified in either type of case.

That said, a rights-based approach need not see harm as completely irrelevant to the case for reparation. Instead, harm might have derivative significance. For example, one of the rights whose contravention calls for reparation might be the right to certain levels of support from one’s parents.⁸⁵ Facts about welfare would matter in that, if an action did not deprive a person of parental support in the relevant way, then it would not contravene these rights. However, not all rights whose contravention could call for reparation involve considerations of welfare. The rights-based theorist might contend that we need not establish that killing a person harms him in order to conclude that such a wrong grounds a claim for reparation in virtue of contravening his right to life.

Rights-based approaches differ from each other in two main respects. First, they differ in specifying the kinds of rights whose contravention calls for reparation. Many advocates of rights-based approaches invoke rights whose significance does not ultimately derive from political institutions.⁸⁶ Yet Jeremy Waldron, for example, defends a rights-based view that does not appeal to natural rights. For Waldron, the central question for justifying reparation concerns whether the rights violated by an injustice “retain their moral force.”⁸⁷ Waldron denies the plausibility of Locke’s pre-institutional construal of natural rights generally, and the Lockean account of the right to property in particular.⁸⁸

Second, rights-based approaches differ in how, exactly, rights or normative interests are implicated in the case for reparation. Here, it might help to distinguish between two ways that a contravened right could be vindicated through reparation.

⁸³ *Id.*, at 15-16.

⁸⁴ An example of this phenomenon is Seana Shiffrin’s case of Wealthy, an eccentric who drops \$5 million cubes of gold bullion on Unlucky, a bystander, thereby breaking Unlucky’s arm but rendering him better off. Shiffrin argues that Unlucky has a claim against Wealthy for the costs of the restorative surgery, for which “[i]t seems an inadequate defense that Wealthy had already given Unlucky \$5 million and that this gift made Unlucky better off, even considering the broken arm.” Shiffrin (1999), at 127-8; see also Gaus (1991), at 69-70.

⁸⁵ *E.g.*, Cohen (2009), at 87-90.

⁸⁶ *E.g.*, Simmons (1995a); Boxill (2003); Corlett (2009).

⁸⁷ Waldron (2004a), at 246.

⁸⁸ Waldron (1992), at 17; Waldron (1988), at 171-194.

Reparation can be seen as vindicating *rights themselves*.⁸⁹ On this more backward-looking approach, when A steals B's property, A's restitution of the stolen property might be said to vindicate B's rights over the property that were contravened by A's theft. This contravention, in turn, entails a denial of B's moral status.⁹⁰ Making reparation is a way of honoring this contravened right, and of restoring the victim's status as much as possible. Arthur Ripstein interprets Kant as positing that "a remedy in the case of the violation of a private right is not something new, but is rather simply the right itself, which survives the wrongdoing unchanged."⁹¹ Likewise, Loren Lomasky argues that rights secure a particular moral order, and "compensation in the wake of an infringement of rights is a move towards restoration of [that] moral order."⁹² However, just as it is not always possible to restore some moral orders once they have been disrupted, it is not always possible to vindicate rights that have been contravened. An obvious example of a nonvindicable right is the right to life. If the justification for reparation requires the possibility of vindicating a right, then the rights-based view might face the following difficulty. If a contravened right could not be vindicated, then it would not call for reparation (although it might call for some other response, like punishment of the wrongdoer). This limited notion of vindication would restrict the justification for reparation to cases where restitution of the contravened right is possible, like the return of expropriated property. Yet most advocates of the rights-based view would contend that reparation could be justified even where restitution is impossible.⁹³ Furthermore, the restricted notion of vindication could have other counterintuitive implications.⁹⁴ A rights-based view might avoid these difficulties by seeing a contravened right that cannot be vindicated as nevertheless exerting normative force,⁹⁵ or else by allowing that the dead can have vindicable rights.⁹⁶

Alternatively, reparation might be seen as vindicating a *commitment to rights*. Suppose again that A steals B's property. A regime that did not provide ways of vindicating B's rights might be seen as failing to take these rights seriously. Reparation is part of the prospective commitment to the protection of rights that are contravened by wrongs or injustices. This forward-looking approach avoids problems arising from non-vindicable rights. The contravention of a right undermines the credibility of a scheme for

⁸⁹ E.g., Wigley (2009), at 645.

⁹⁰ See McGary (2003), at 99; Gaus (1991), at 62.

⁹¹ Ripstein (2009), at 166.

⁹² Lomasky (1991), at 39.

⁹³ E.g., Simmons (1995a), at n.2; Paul (1991), at 102.

⁹⁴ For example, this construal would imply that expropriation of a victim's holdings calls for reparation as a way of vindicating a victim's property rights. Yet it would also imply that expropriating a group's holdings as part of genocide would not call for reparation. The extinction of a group would extinguish their rights, and thus make reparation unintelligible. Yet the latter injustice is more serious than the former and, as such, seems to ground a more urgent case for reparation.

⁹⁵ E.g., Lomasky (1991), at 33; Wigley (2009). This move would be analogous to Gardner's claim that a violated obligation continues to exert normative force.

⁹⁶ Ridge (2003).

protecting rights. Even if the right itself can't be vindicated, the credibility of the scheme can. This approach also allows reparation to take a wider variety of forms. For example, enacting political safeguards to prevent future rights contraventions might vindicate a commitment to rights, even though it does not honor any right that has actually been contravened. However, some rights-based theorists deny that such vindicatory measures would be reparation at all.⁹⁷

All extant rights-based views of which I am aware take the backward-looking approach, at least in part. That is, all are concerned with vindicating rights as much as possible.⁹⁸ Therefore, I will focus my analysis on this approach.

Having sketched some basics of rights-based views, let's elaborate them further using the framework. Consider the issue of justification. On the rights-based view, the answer to the question "Why make reparation?" is that reparation vindicates rights that were contravened in injustice. This answer is only as plausible as the account of rights that it encodes. This account must show how rights can at once be weighty, pre-politically and intrinsically significant, and vindicable. Let's explore each of these elements in turn.

First, rights-based approach probably must identify some pre-political rights, entitlements whose significance is not wholly a function of being instantiated within political institutions. As a descriptive matter, all of the rights-based approaches to reparation considered here invoke such pre-political rights, and David Lyons has argued that this commitment is a conceptual requirement of such views.⁹⁹ Without a notion of pre-political rights, a rights-based theory would have implausible implications. For example, if rights were entirely institutional artifacts, then U.S. slavery would not call for reparation *prima facie* because then-extant political institutions did not afford the African-Americans in the south the right to control their own labor.

Second, the rights grounding claims to reparation must be held to be intrinsically important. If the significance of rights derived from some other consideration (like the extent to which rights promote welfare), then the rights-based view would present a reductionist case for reparation. The significance of an injustice could be expressed in terms of that other goal rather than in terms of the contravention of rights, and achieving that other goal would obviate the need for reparation. Thus, as discussed below, attributing intrinsic significance to rights is necessary for a rights-based view to resolve the problem of distinctiveness under the framework for describing theories of reparation that I have proposed.

⁹⁷ *E.g.*, Corlett (2009), at 74-5, 211.

⁹⁸ Some rights-based approaches are almost exclusively focused on the retrospective element. *E.g.*, Corlett (2009), at 9. Others combine concern with retrospective vindication of rights with prospective concern for vindicating commitment to rights. *See, e.g.*, Ripstein (2009), ch. 6.

⁹⁹ Lyons (1977), at 256.

Third, the rights at issue must be weighty. This weightiness is required because the assertion of a right “can block not only courses of action that survive the consequentialist’s delicate balancing but even alternatives that would render every party better off, where being better off is understood in terms of the familiar welfarist indifference curve apparatus.”¹⁰⁰ At the political level, reparative efforts will inevitably detract from other important political goals. If reparation can ever be justified, then the goal of vindicating rights must be able to justify failing to meet these other political goals.¹⁰¹

Finally, a rights-based approach must also see rights as capable of being vindicated through reparation. The possibility of vindication is easiest to appreciate where the violated right is an entitlement to property. Some such contraventions are capable of restitution, with reparative efforts restoring all of the features of ownership (like the powers to exclude and alienate). In these cases, it is easy to see how reparation gives the victim “back what [she] already had.”¹⁰² It’s more difficult to appreciate how reparation could vindicate rights that involve normative powers, incommensurable goods, or political liberties. However, drawing from Bernard Boxill’s interpretation of Locke, a rights-based theory might posit that when an injustice violates some fundamental right (like the natural right of self-preservation), it generates a derivative “right to reparation” for the victim.¹⁰³ Boxill’s argument suggests that this secondary right to reparation can be vindicated by compensatory efforts, and (by implication) that vindicating this secondary right has the effect of vindicating the primary right that was violated by an injustice. Therefore, a rights-based theory might allow for the vindication of rights directly (through efforts like restitution or restoration) or indirectly (through honoring the Lockean “right to reparation”).

On the issues of claimant and payer justification, some rights-based views deny the exclusion principle. In other words, they allow that the claimant of reparation can (in some circumstances) be someone other than the victim of the injustice, and/or that the payer can be an agent other than the wrongdoer.¹⁰⁴ For example, some argue that rights violations create claims to compensation, the fulfillment of which vindicates the violated right. These claims are descendable, so compensating the descendant claimant vindicates the victim’s rights.¹⁰⁵ However, other advocates of rights-based approaches reject this deviation from the exclusion principle, either because of general doubts about the

¹⁰⁰ Lomasky (1991), at 24.

¹⁰¹ Demonstrating that the rights involved in reparation are weighty does not require establishing that rights (even natural rights) always override other considerations, that they can never justifiably be infringed. Moreover, meeting this desideratum does not require the rights-based theorist to take a stand on how rights have the weight that they have—*e.g.*, whether they operate as trumps or side constraints.

¹⁰² Ripstein (2009), at 166.

¹⁰³ Boxill (2003), at 65-66.

¹⁰⁴ Waldron (2002), at 147-50.

¹⁰⁵ *E.g.*, Kershnar (1999), at 99-100; Boxill (2003), at 68.

justification for inheritance or specific doubts about the descendability of rights to compensation.¹⁰⁶

As for its conception of reparation, the rights-based approach captures the bipolar structure of reparation far better than the corrective justice approaches described above. On a rights-based view, an injustice wrongs its victims in particular by violating their rights. This wronging in turn endows victims a special authority to hold the perpetrator of the injustice to account. Reparation responds to this accountability relationship. The rights-based view can appreciate how the structure of reparation for injustices differs from the violations of obligations that have a “monadic” accountability structure, which give rise to a shared authority to hold the wrongdoer to account. This capacity to account for the bipolarity of reparation differentiates rights-based approaches from John Gardner’s “continuity” view, described above. These two kinds of approaches resemble each other in many respects. However, Gardner’s view makes the case for reparation in terms of rational requirements on the wrongdoer in the wake of her breached obligation. Whether the victim demands (or even wants) reparation does not matter fundamentally. By contrast, rights-based approaches see the justification for reparation as a response to what (after Joel Feinberg) we might call someone’s “making” a claim, rather than her simply “having” a claim.¹⁰⁷

Likewise, rights-based approaches capture the sensitivity requirement, the notion that the victim’s sense of injustice should matter to the case for reparation. On a rights-based view, whether reparation is ultimately justified depends on whether the rights-holder asserts her rights. If a victim has a claim to reparation but decides not to make it, then reparation would not be called for. In such a scenario, a wrongdoer’s (or someone else’s) making reparation would deny the victim’s special authority. By contrast, this special authority of the victim does not matter fundamentally to “wrongful harm” versions of the corrective justice approaches. Given the disequilibrium thesis, reparation is called for whenever the victim has a claim, regardless of whether she makes that claim. By avoiding the disequilibrium thesis, a rights-based approach also avoids the insensitivity to the victim’s grievance that goes along with it.

Most extant versions of rights-based views invoke the compensatory conception to explain how reparation ameliorates the significance of injustices.¹⁰⁸ The wrongdoer’s violation of the victim’s rights creates a debt.¹⁰⁹ The reasons to make reparation arise from the reasons to discharge such debts—namely, reasons stemming from the importance of rights.¹¹⁰ The amount of the debt created by the injustice establishes the

¹⁰⁶ Thompson (2001), at 119-20; Ridge (2003), at 39-42; Sher (2005), at n. 21.

¹⁰⁷ See Feinberg (1970), at 252-3.

¹⁰⁸ However, it might be possible to formulate a rights-based approach that draws on the relational conception of reparation. I discuss the prospects for such a formulation later in this chapter, at n. 147.

¹⁰⁹ Lomasky (1991), at 26.

¹¹⁰ McGary (2003), at 99

reparative burden on the wrongdoer or payer.¹¹¹ Full reparation vindicates the violated right, thus expiating the significance of the wrong.

That rights-based views invoke the compensatory conception is evident from the following example by Joel Feinberg:

“Suppose you are on a backpacking trip in the high mountain country when an unanticipated blizzard strikes the area with such ferocity that your life is imperiled. Fortunately, you stumble onto an unoccupied cabin locked and boarded up for the winter, clearly somebody else’s private property. You smash in a window, enter, and huddle in a corner for three days until the storm abates. During this period, you help yourself to your unknown benefactor’s food supply and burn his wooden furniture in the fireplace to keep warm.”¹¹²

After Judith Jarvis Thomson, Feinberg distinguishes infringements of rights (which are justified) from violations of rights (which are not). The backpacker case is meant to elicit intuitions about whether infringements generate duties of compensation. However, the important feature here (common to both infringements and violations) is that compensation is a way of vindicating a transgressed right, thereby ameliorating the normative significance of the transgression. On Feinberg’s argument, the transgression of the cabin owner’s rights creates a debt (even if this transgression is justified).¹¹³ This debt encapsulates the significance of the wrong and sets the burden for reparation. In compensating the cabin owner, the backpacker decreases this debt (and, by implication, the significance of the transgression). After full compensation has been made, the backpacker’s transgression of the cabin owner’s rights no longer has normative significance—that is, it no longer generates reasons for action or belief. To make full reparation, then, is to vindicate the right whose violation or infringement establishes the significance of the injustice.

Rights-based approaches have no difficulty accounting for the inherently collective nature of political injustices. States and other corporate entities can violate rights just the same as individuals can. Moreover, a rights-based view can explain the possibility of collective victimization by positing groups as bearers of rights. A. John Simmons argues that Locke’s theory of property rights allows for holdings by collectives or groups. Thus, the expropriation of Native Americans was a direct violation of the

¹¹¹ This is an implication of Roy Brooks’s arguments that civil rights programs and the civil war could not have paid off the debt created by U.S. slavery. Brooks (2006), at 192-4.

¹¹² Feinberg (1978), at 101.

¹¹³ *Id.* (“One owes compensation here for the same reason one must repay a debt or return what one has borrowed.”) On the other hand, a rights-based theory might dispute Feinberg’s argument by denying that the backpacker’s actions create a debt in the first place. For example, Joshua Oberdiek argues that these kinds of justified contraventions are allowed for in the specification of the right to property. See Oberdiek (2004) and (2008). One can accept Oberdiek’s argument that the backpacker does not incur a debt while still allowing that, had the backpacker violated (rather than infringed) the cabin owner’s rights, reparation would ameliorate in roughly the way described here.

rights of that group to its fair share of property, one that derivatively wronged the individual members of the group.¹¹⁴

On the issue of distance, one attraction to a rights-based approach is that it can avoid the non-identity problem and, as a result, global skepticism about the justifiability of reparation for distant injustices. An argument developed by Bernard Boxill and George Sher exemplifies this promise.¹¹⁵ The paradigm case for both Boxill and Sher is U.S. chattel slavery, in which the victims of slavery were grievously wronged and for which they were never compensated. Boxill and Sher's approach suggests that the rights of the victims of slavery were violated in different ways than the rights of their descendants. Slavery violated a myriad of rights of slaves, including their rights to self-determination and bodily integrity. This injustice calls for reparation to slaves. However, it could not ground reparation to their descendants, whose rights to self-determination could not have been violated by slavery. Given the non-identity problem, these descendants would not have existed if slavery had not occurred and, by implication, had the rights of slaves not been violated in the ways that they were. Thus, non-identity is a conceptual obstacle to justifying reparation to someone for rights violations that preceded and are causally implicated in her existence.

However, this obstacle can be evaded by basing reparation on a contravention of rights that occurred within the claimant's lifetime, since this kind of violation would not be causally implicated in someone's existence. Boxill, Sher, and others identify such contraventions arising from the failure to redress the victims of slavery. Boxill argues that the failure to make reparation to the victims also violated their descendants' rights to inherit resources from them.¹¹⁶ Sher sees the failure to rectify as a wrongful failure to compensate the victims, which interferes with their "ability to provide for" their descendants (and to which benefit the descendant claimants presumably had a right).¹¹⁷ Andrew Cohen elaborates this approach further. Cohen notes that, for Locke, parents have natural duties to support their children, which (Cohen argues) correlate with rights by children to "support from their parents" above a certain "level of welfare."¹¹⁸ In failing to make redress to the victims of an injustice, a wrongdoer not only violates their rights to reparation but also interferes with their capacity to support their descendants.

¹¹⁴ Simmons (1995a), at 181-2.

¹¹⁵ In describing Boxill and Sher's view, I will assume that this view is, in fact, rights-based approach—in particular, that it sees the violation of rights as sufficient to ground a claim for reparation. This formulation seems to deviate from what both Boxill and Sher argue. For example, both Boxill and Sher note the need to show harm or injury in order to have a valid claim to reparation. Boxill (2003), at 65; Sher (2005), at 184. However, it is fair to read both Boxill and Sher as offering a rights-based approach, at least in the way that I have described it here. Both views see the violation of rights as fundamental to the case for reparation and deny that harm is relevant independently of the violation of rights. Boxill sees proof of harm as relevant when the violated right is a right not to be harmed in certain ways. Likewise, Sher can be read to see harms to a victim as an "automatic effect" of the violation of her rights. Sher (1981), at 13.

¹¹⁶ Boxill (2003), at 68.

¹¹⁷ Sher (2005), at 192-3.

¹¹⁸ Cohen (2009), at 82, 87-8.

Cohen argues that this interference does not directly violate the descendants' rights to support, which are "initially against the parents."¹¹⁹ Rather, the violation of the victims' rights to reparation facilitates the violation of the descendants' rights to support in a way that grounds a claim to reparation. The reasoning here resembles that underlying the legal claim of tortious interference with contract: when you induce someone to breach his promise, you are part of violating a promisee's rights and may be called on to help vindicate them. In each of these formulations, the failure to compensate a victim of an injustice either directly violates or otherwise contravenes some right of the victim's descendants. This violation or contravention does not precede the claimant's existence, so the justificatory barriers posed by the non-identity problem do not apply.¹²⁰

Distance presents another significant difficulty for justifying reparation under rights-based accounts, a problem that Jeremy Waldron's "supersession thesis" makes salient.¹²¹ As discussed above in chapter 3, Waldron sees all entitlements as sensitive to background circumstances. Differences in circumstances can change the scope of rights of acquisition: the entitlement to exclusive use of property is less problematic when there is enough and as good for everyone else in the relevant political community. Likewise, Waldron argues, changes in circumstances between the time of an injustice and the present can affect the scope of rights to rectification. An injustice is superseded when it is "overtaken by circumstances"—that is, when beneficial changes in the world subsequent to the time of an action transform it from an injustice to a "morally permissible" action which *ex hypothesi* cannot ground claims to reparation.¹²² For Waldron, distance itself does not effect supersession, so much as the kinds of overall social improvements and epistemic barriers that routinely accompany distance.¹²³

Waldron's supersession thesis is thus two different claims. The first claim is that every injustice is supersession-apt, or capable of having its normative significance expiated even if not attended to directly. The second claim is that beneficial changes in circumstances subsequent to an injustice are sufficient for the injustice to be superseded.

Waldron's supersession argument bears on what I have called the facial justification for reparation: where an injustice has been superseded, it does not call for reparation at all.¹²⁴ By contrast, on a harm-based approach to reparation (like Coleman's),

¹¹⁹ *Id.*, at 88.

¹²⁰ Moreover, if we interpret the Boxer/Sher approach to see the violation of rights as sufficient to justify reparation *prima facie*, then we can avoid the epistemic barriers associated with calculating baselines faced by views (like the "wrongful harm" version of the corrective justice approach) that see harm as an independent requirement for justifying reparation.

¹²¹ Waldron (1992), at 20-26.

¹²² Waldron (2002), at 156, 160.

¹²³ Waldron (2004a), at 249 (arguing that factors relevant to supersession "almost always *associated* with the passage of time," like the growth and stabilizing of expectations or the declining availability of reliable evidence about original titles, etc.)

¹²⁴ Waldron (2004a), at 244-5.

considerations of distance mainly present epistemic barriers to determining whether a particular person was harmed by a particular injustice. This affects what I have called “claimant justification,” or the justification of reparation to a particular agent, but it does not deny that the injustice itself could justify reparation *prima facie*.

So a version of the rights-based approach like the one developed by Boxill and Sher can avoid the skepticism about the justifiability of reparation that arises from the non-identity problem. However, distance presents another obstacle to justifying reparation for rights-based approaches: where an injustice has been superseded by distance, it does not justify reparation *prima facie*.

Rights-based approaches can also provide a distinctive justification for reparation by arguing that reparation is essential to vindicating rights. To see how a rights-based approach could be distinctive, consider a possible consequentialist argument about reparation based on the value of rights. On this argument, rights have a certain (intrinsic) value. Reparation promotes this value by securing conditions under which rights can be exercised, as well as by protecting against violations in the future. However, to the extent it is possible to identify the value of rights, then it might also be possible to realize this level of value without making reparation. For example, the wrongdoer could simply cease to violate rights, and the resources that might otherwise be devoted to reparation could be directed to building a credible commitment to prevent future rights violations. Neither of these strategies would be reparation because neither directly responds to the injustice itself. However, if these strategies would increase the value of rights in the world, then the consequentialist argument would favor doing them instead of making reparation. The consequentialist argument is therefore reductionist: the significance of injustices as violations of rights can be redescribed in terms of some other goal (namely, the intrinsic value of rights and the disvalue of rights violations), and the ameliorative impact characteristic of reparation could be achieved by measures that maximized the value of rights in the world, even if these gestures did not specifically vindicate the violated right itself.

The advocate of a rights-based approach could resist this reductionism. She could argue that, while these alternative strategies would increase the realization of rights in the world, they would not vindicate the rights violated by an injustice. This notion of vindication, then, preserves the analytic distinctiveness of the rights-based approach. Without this notion, it is difficult to see a rights-based approach as a theory of reparation.

On the issue of distinctiveness, a rights-based theory could offer a bare bones account of discrimination, a way of differentiating the wrongs that justify reparation from the ones that don't. On such a bare bones account, only those injustices that violate vindicable rights call for reparation. If an injustice didn't violate rights or if the violated rights couldn't be vindicated, then reparation would not be called for. Aside from the principled objections to this bare-bones account, there are also concerns about its demandingness. The vindication of all violated rights to property would require dismantling current economic and political institutions. To the extent that these institutions serve to protect rights, then the bare-bones approach would seem to invite

paradox: vindicating rights that were violated by historical injustices would have the effect of undermining institutions that serve, in general, to vindicate rights. These concerns about demandingness seem serious, although not all advocates of rights-based views find them to be so.¹²⁵

Beyond this bare bones approach to discrimination, the advocate of a rights-based view might allow for discrimination in a variety of ways. For example, a rights-based view might (along the lines of Thompson's exclusion principle) propose that the violation of rights can only call for reparation to the victim. The advocate of this approach might avoid the paradox of discrimination by allowing that all rights violations call for reparation, but denying that some (or all) such claims can be descended.

A. John Simmons offers still another set of discriminatory criteria, based on the prescriptibility of rights. On Simmons's Lockean account, reparation is a way of vindicating a group's claim to its fair share of unowned property. However, all such claims are subject to "mandatory downsizing," such that "[p]roperty claims that were once perfectly legitimate may cease to be so with decreases in the pool of resources or increases in the number of persons needing to draw on those resources."¹²⁶ This criterion could avoid the paradox of discrimination by positing that all contravened rights to property (that is, denials of groups' "fair share") call for reparation, while also avoiding concerns about demandingness by requiring that claims to reparation for the contravention of property be sensitive to the resources available to other groups. In other words, Simmons's view would allow changes in circumstances to change what counts as a "fair share."

These are the most common way that rights-based approaches discriminate between the injustices that call for reparation and those that don't. However, they do not exhaust the possible discriminatory criteria.¹²⁷ The account of discrimination implicit in Simmons's approach avoids the paradox of discrimination and concerns about demandingness. It seems possible that the proponent of a rights-based approach could offer other discriminatory criteria as well.

¹²⁵ *E.g.*, Corlett (2009).

¹²⁶ Simmons (1995a), at 163; see also Waldron (2004a).

¹²⁷ For example, one alternative is to limit the rights violations that call for reparation. On this approach, the violation of rights would be necessary but not sufficient to call for reparation. However, that rights violations are sufficient to ground reparation seems to be the fundamental tenet of all rights-based approaches, as well as what separates these approaches from the "wrongful harm" versions of corrective justice described above. Moreover, this standard would straightforwardly invite the paradox of discrimination because it would deny the validity of some claims to reparation based on considerations unrelated to the normative significance of injustices.

Another alternative is to posit that reparation is not justified when making reparation would result in a greater violation of rights than would be vindicated in the reparation itself. Yet such a view would amount to what Robert Nozick called "utilitarianism of rights," Nozick (1974), at 28, and would conflict with the deontic understanding of rights that undergirds most rights-based approaches.

There are a variety of difficulties with extant versions of rights-based approaches. Some of these difficulties arise out of their accounts of justification, their answers to the question “Why make reparation?” Others are products of their implicit conceptions of reparation, their answers to the question “How does reparation ameliorate?” I will highlight six such difficulties, then examine whether they might be remedied.

One difficulty is the construal of rights that undergirds rights-based approaches. As noted earlier, a rights-based approach is committed to a notion of rights as weighty, pre-politically and intrinsically significant, and vindicable. This picture is controversial. For example (and as discussed more extensively below), the most plausible type of right that could be directly vindicated through reparation is the right to property. However, some are suspicious about the coherence of prepolitical notions of property rights.¹²⁸ These conventionalist views do not deny that property rights are weighty, although they typically attribute less weight to property rights than those who take the Lockean view. Rather, they deny that property rights are significant in themselves. They also see candidate explanations for how property rights could have prepolitical significance to be both mysterious and confused. Some, after Hume, posit an even broader conventionalism under which every right presupposes a convention under which it is intelligible.

In highlighting problems with the notion of rights undergirding rights-based theories, I do not seek to disqualify them on these grounds. The debate between conventionalist and nonconventionalist theories of rights is extensive, and I cannot adjudicate it here. Moreover, some rights-based approaches might excise the more problematic aspects of asserting the prepolitical nature of rights.¹²⁹ Finally, bracketing these objections based on the nature of rights allows for the illumination some deeper problems with rights-based approaches. I only note here that the plausibility of the rights-based approach to reparation presupposes the plausibility of seeing rights as pre-politically and inherently significant. If rights lack either of these features, then one should reject rights-based approaches to reparation.

A second major difficulty with rights-based approaches is their incompleteness. Many advocates of the rights-based approach assert that the violation of rights is the normatively salient aspect of an injustice to which reparation responds.¹³⁰ A rights-based approach sees the violation of rights as sufficient to justify reparation *prima facie*, but this commitment often bleeds into the claim that rights violations are *necessary* to justify reparation. Both of these positions are untenable because violation of rights is not all (or even the most important part) of why injustices matter. When an injustice violates rights, the disrespect or disregard animating the action can matter independently of the violation of rights itself.¹³¹

¹²⁸ E.g., Nagel & Murphy (2003), at 45; Thomson (1990), at 337.

¹²⁹ E.g., Waldron (1992) and (2004).

¹³⁰ McGary (2003), at 99; Vernon (2007), at 550; Lomasky (1991); Paul (1991); Waldron (1992), at 15.

¹³¹ E.g., Kumar & Silver (2004), at 149-151; Roberts (2001), at 358; Reidy & Von Platz (2006), at 364.

This point is illustrated in the distinction between violations and infringements of rights that many rights-based theories make. Violations involve the contravention of rights without justification, while (on some views) infringements are justified contravention of rights.¹³² Some rights-based views posit that both violations and infringements give rise to compensatory duties,¹³³ while others deny that infringements ground compensatory duties.¹³⁴ However, few such theorists would deny that there is *any* meaningful difference between violations and infringements.¹³⁵ Those who accept a violation/infringement distinction, then, seem committed to the view that there is something beyond the contravention of a right that matters—violations have at least one normatively significant feature that infringements do not.

Moreover, not all injustices violate rights, and some of such injustices seem to call for reparation nonetheless. Consider the following hypothetical version of the Greenwood case. Abe is an African American resident of Tulsa who is in prison after having been convicted of theft. On the night of the riots, Abe learns of the racial violence being perpetrated against other African Americans and escapes from custody in order to join in the defense of the neighborhood. In the course of the riots, Abe's home is destroyed and he is detained in the armory with the rest of the Greenwood residents in order for the white mob to raze the neighborhood. The destruction of Abe's home is clearly a violation of his right to property. However, it is less clear that Abe's internment would violate his rights to liberty and to self-control. On some theories of punishment, Abe might be said to have forfeited these right in virtue of his prior theft.¹³⁶

My intuition is that Abe's internment is a serious injustice, even though there was sufficient reason to detain Abe.¹³⁷ How might this be? One possible explanation is that the internment violated Abe's rights after all. Perhaps the restrictions of liberty involved in detaining someone can only be justified when effected by an authorized agent, and only the state (and never a mob) can have this authorization. Absent authorization, depriving someone of his freedom might violate his rights to liberty and self-control.¹³⁸ However, this explanation would not capture the unjustness of detaining Abe in the circumstances of Greenwood because the white rioters were (arguably) deputized, so internment would have been carried out under the aegis of an authorized agent. I think the

¹³² See Thomson (1980).

¹³³ *E.g.*, Wigley (2009).

¹³⁴ *E.g.*, Zimmerman (1994).

¹³⁵ Granted, some libertarians who advocate strict liability for contraventions of rights would deny that there is any normative difference between rights infringements and rights violations. *See, e.g.*, Epstein (1973). Likewise, the advocate of a specificationist theory of rights might also deny that this distinction exists by denying that infringements are really contraventions of rights in the first place. *See* Oberdiek (2004)

¹³⁶ *E.g.*, Wellman (2009) and (2012).

¹³⁷ Not everyone would share this intuition. *See, e.g.*, Wellman (2012), at 382-3.

¹³⁸ Simmons (1991).

better explanation is that internment (however authorized and warranted) would degrade and disrespect Abe in a way that not only constitutes an injustice, but also calls for reparation. While there might have been legitimate reasons to detain Abe, these reasons did not figure into the process through which Abe was actually detained. That Abe was guilty of a crime and deserved to be in prison did not matter to his being detained. If Abe had not been deserving of imprisonment, he would have been detained anyway. If this intuition is well founded, then we can doubt that the rights-based position provides a complete account of the facial justification for reparation. The violation of a right would not be necessary to identify an injustice as normatively significant, nor would it capture the full significance of many serious injustices.

The defender of a rights-based approach might attempt to parry these criticisms about completeness by positing a broader notion of rights to which reparation responds. For example, she might see disrespect and disregard as themselves violations of rights by invoking what Rainer Forst calls the “right to justification,” or the “right to be recognized as an agent who can demand acceptable reasons for any action that claims to be morally justified and for any social or political structure or law that claims to be binding upon him or her.”¹³⁹ Yet even if one sees disrespect or disregard as normatively significant aspects of injustices, there are problems with positing that a victim has a right to a wrongdoer’s respect or regard, as well as seeing victims as having rights regarding the wrongdoer’s sincere expression of certain attitudes. One problem concerns voluntarism: beliefs and attitudes respond to features of objects, and so they are not the kinds of things that are under direct volitional control. Because of this, we might not take beliefs or attitudes to be appropriate objects of claim-rights. A more serious problem with this strategy is that it invokes a capacious account of rights. On this strategy, the order of explanation is, in essence, to first identify a normatively salient feature of injustice, then to posit a right regarding the nonoccurrence of this consideration. On this picture, rights are not bedrock. They are invoked in a way that is “conclusory, not justificatory.”¹⁴⁰ In justifying reparation, it seems sufficient to reference the normatively salient features of the injustice, and unnecessary to reverse-engineer a rights violation. Yet seeing rights as bedrock is a core commitment of any rights-based approach to reparation. So a rights-based approach might evade the charge of incompleteness only to deny a core commitment, one that distinguishes the rights-based approach from other views.

That said, the proponent of a rights-based approach might simply concede the criticism that rights violations are not all that matters in injustices. She could admit that the rights-based view is incomplete, but assert its validity *pro tanto*. On this approach, rights violations would not be necessary to show why an injustice calls for reparation, but they would be sufficient to do so. Perhaps a concessive rights-based theorist could wed the rights-based view to a “wrongful harm” view like Coleman’s: injustices that violate rights call for reparation to the victim regardless of whether they also impose harms, as do injustices that wrongfully impose harm on victims while violating their rights.

¹³⁹ Forst (2010), at 719.

¹⁴⁰ Oberdiek (2004), at 339.

Given these reasons to doubt the completeness of rights-based approaches, are there also reasons to doubt their validity? I think so. To see why, consider a third difficulty with rights-based approaches: namely, the notion that fully vindicating rights violated by an injustice thereby expiates the normative significance of that injustice. Among rights-based approaches, what it means to vindicate a right is often left mysterious. Some rights seem inherently incapable of vindication after violation, the right to life being a key example. Vindication seems most plausible for violations of property rights. These violations usually involve depriving an agent of her power to control, exclude, use, or alienate her property. The right to property might be vindicated by restoring the powers that were interfered with through the injustice, or by providing equivalent (or equivalently valuable) powers.

So vindication seems possible for only a subset of rights. Yet even within this subset, it is doubtful that vindicating a right violated by an injustice would thereby expiate the normative significance of that injustice, as the rights-based view would contend. If reparation could have such an expiation effect, then it would seem to legitimate forced transfers (especially given minimal notions about the fungibility of property rights). The violation and vindication of a right would be normatively equivalent to the non-violation of that right. Likewise, to the extent that a rightsholder's consent can make it the case that another person's action does not contravene her rights, then making full reparation after the violation of a right would be equivalent to having obtained the rightsholder's consent. While many advocates of rights-based approaches defend the expiation effect implicitly¹⁴¹ or explicitly,¹⁴² this effect is inconsistent with the notion that rights matter intrinsically.¹⁴³ As such, one core tenet of the rights-based view (namely, that rights have intrinsic significance) is at odds with a tenet of the compensatory conception (namely, that full reparation expiates the normative significance of an injustice).¹⁴⁴

¹⁴¹ For example, Goodin (1989) and (1991) seems committed to reparation's having an expiation effect as a matter of principle, although he argues that epistemic difficulties in determining the ends displaced by wrongdoing provide reasons to favor non-violation over the combination of violations and compensation *ex post*.

¹⁴² See Simmons (1995a), n. 2.

¹⁴³ See Gaus (1991), at 75; O'Neill (1987), at 78-9.

¹⁴⁴ One might question whether it is possible to embrace the compensatory conception without attributing the expiation effect to full reparation. In my mind, the latter is an analytic requirement of the former. The compensatory conception models the normative significance of a wrong or injustice in terms of a debt. The notion of a debt implies the possibility of discharge. Proponents of the compensatory conception might disagree about *how*, exactly, a debt can be discharged, but they would seem to be committed to the notion that discharge is conceptually possible. If A has a debt to B arising out of X, then it follows that there are some circumstances (actual or hypothetical) under which B could satisfy these obligations. Otherwise, it would not make sense to classify X as generating a debt, rather than an impairment or injury or some other metaphor. To say that an injustice creates a debt but that no imaginable redressive gesture could discharge this debt is to use a non-standard notion of debts, which calls into question much of the intuitive force of the compensatory conception.

We might also doubt the expiation effect because an injustice could have normative significance even when violated rights have been fully vindicated. Consider the example of an injustice in which the violated rights could be fully vindicated—someone is deprived of the right to vote in an election, only to have this right restored prior to the election. The restoration of the right to vote appears to be a full vindication: the voter has exactly the same political powers after restoration as he would have had if the deprivation had not occurred. Yet the underlying injustice of deprivation would still have normative significance. For example, it would (appropriately) bear on practical questions, like how much the voter should support the political institutions that deprived him of his right. It seems plausible that, regardless of the restoration, the voter would have some reasons not to support these institutions that would not apply to others whose rights had not been similarly violated and restored. This residual significance of injustices after the full vindication of rights follows from the fact that the violation of rights is not all that matters in serious injustices. In these cases, then, perfect reparation would be possible, but would still not expiate.

A further conceptual problem with the rights-based approach is that it neglects what I have called reparation's causal structure—the way that a gesture's etiology (and, in particular, the attitudes it conveys and the reasons for which it is done) can determine whether and how much it ameliorates the significance of an injustice. Some tokens of redress might fully vindicate the rights violated by an injustice, yet replicate particular wrongmaking features of the underlying injustice. If so, then a redressive gesture that fully vindicated a right would nevertheless fall short in ameliorating the significance of the injustice. For example, the deprivation of the right (like the right to property or the right to vote) might both violate the rights-holder's authority and also disregard or disrespect the rights-holder's agency. Each of these seems relevant to explaining why a rights violation is wrong. A gesture that fully restored the rights-holder's authority in a particularly degrading way would address some of these wrongmaking features, while failing to address (and perhaps compounding) others. Such a gesture would therefore be deficient. Yet a rights-based approach cannot account for this deficiency. On such a view, the violation of a right is what matters in an injustice, and the vindication of a violated right is what matters in reparation.

Perhaps the rights-based approach might avoid this difficulty by denying that disrespectful attitudes are ever wrongmaking features of an injustice.¹⁴⁵ However, this move seems at odds with our normative world. Alternatively, the advocate of a rights-based view might expand the rights at stake to encompass a right to “symbolic compensation.” “Symbolic compensation” views (like the ones offered by, among others, Bernard Boxill and Howard McGary) posit that there is a symbolic element to the reparative burden created by some injustice. On this approach, the victim could be seen as having a right that the wrongdoer convey certain attitudes, which are entailed by her right that the wrongdoer act in a way that will vindicate the violated rights. Yet this “symbolic compensation” approach is problematic because it assumes that attitudes are

¹⁴⁵ Arthur Ripstein interprets Kant in this way. Ripstein (2009), at 85 (“In cases of redress, the use of force restores a regime of equal freedom.... From the point of view of equal external freedom it does not matter why people act in conformity with the demands of right, so long as they do so.”)

the kinds of things that can be the subject of claim rights and allows for respectful actions that are based on inappropriate reasons.¹⁴⁶ Thus, the rights-based approach cannot capture reparation's expressive and intentional dimensions, and it is more broadly incompatible with the causal structure of reparation.¹⁴⁷

Because rights-based views are formulated in terms of the compensatory conception of reparation, they offer an unconvincing story about how reparation ameliorates. Rights-based views do a better job than many corrective justice views in capturing the bipolar structure of reparation, as well as explaining why reparation cannot be insensitive to grievances arising out of an underlying injustice. However, rights-based views cannot capture why a gesture's etiology could determine its success in ameliorating the significance of an injustice.

Here is a summary of the main problems with rights-based views. Given their incompleteness, these views cannot provide a full answer to the question "Why make reparation?" At best, rights-based views could only be part of a complete theory of

¹⁴⁶ See the discussion of "symbolic compensation" approaches in chapter 2, at p. 24.

¹⁴⁷ Can a rights-based approach be formulated to be compatible with the relational conception of how reparation ameliorates? If so, then a rights-based approach might avoid some of the difficulties of capturing reparation's phenomenology that arise out of the compensatory conception. On such an approach, the normative ideal of the political relationship would be conceived largely in terms of rights—not only a prospective commitment to the non-violation of rights, but also a retrospective commitment to vindicate rights that have been violated.

Whether a rights-based approach can be combined with a relational conception of reparation depends on the viability of this construal of the normative ideal of the political relationship. I think this formulation is incomplete, illiberal, and therefore implausible. There seems to be more to the political relationship than a commitment to protecting and vindicating rights. For one thing, there is also a commitment to the public justification of terms of interaction. *See, e.g.*, Freeman (2001).

Further, combining the relational conception with a rights-based approach would still fail to capture the causal structure of reparation. A rights-based view must deny that there is a substantial expressive or intentional component to reparation. To see why, consider A. John Simmons's analysis of reparation to Native Americans for expropriation, described in chapter 2. For Simmons, reparation should aim to vindicate Native Americans' rights to their fair share of property. If so, then it matters whether contemporary Native Americans have forfeited these rights, as well as whether any such forfeiture was culpable. Simmons argues that, while Native Americans lacked a conception of private property and thus would have resisted the mandatory downsizing required to adhere to the Lockean proviso, this conception would have amounted to "nonculpable moral ignorance" and should not undermine Native American claims. Simmons (1995a), at 180-1. Yet, this kind of sentiment would violate the non-replication requirement: the gesture of redress would replicate wrongmaking features of the underlying wrong, and so would seem to ameliorate only imperfectly (if at all). I think the nonreplication requirement is independently plausible. The only way for a rights-based view to capture this requirement would be to posit that claimants' rights could be violated when payers convey certain attitudes or acting for certain reasons. Yet this seems difficult for a rights-based view, since one person cannot be easily said to have a right that another convey certain attitudes or act for certain reasons. Thus, the combination of a rights-based view with a relational conception of reparation fails to capture the relevant phenomenology, unless the defender of such a view can explain why the nonreplication requirement is not plausible or why the attitudes and motivations of another could be the subject of claim-rights.

reparation. Moreover, because extant rights-based approaches utilize the compensatory conception to explain how reparation ameliorates, they lack even this *pro tanto* viability.

III. Legitimacy-based Approaches

A third family of views sees the case for reparation in terms of legitimacy. On these approaches, injustices undermine the legitimacy of a political system. Reparation is a way to bolster or restore this legitimacy. Thus, the impetus for reparation comes from concern about the legitimacy of political institutions.

Legitimacy-based approaches differ from the corrective justice and rights-based approaches described above mainly in their emphasis. Some theorists see legitimacy arguments for reparation as complementing rights-based or corrective justice arguments.¹⁴⁸ Indeed, it seems possible to convert any corrective justice or rights-based approach into a legitimacy-based approach. For example, a corrective justice approach posits corrective justice as a tenet of political morality. The legitimacy theorist might see (certain) deviations from political morality as compromising the legitimacy of political institutions. Likewise, the rights-based theorist might see the violation of rights (or the non-vindication of violated rights) as threatening the state's legitimacy. However, on a legitimacy-based account, concerns about legitimacy as fundamental to answering the question "Why make reparation?" If the violation of rights or deviation from a principle of political morality didn't undermine legitimacy, then a legitimacy-based account would deny that it calls for reparation.

Any legitimacy-based account of reparation turns on a couple of broader questions. First, what does it mean to say that political institutions are legitimate? There are at least two ways to construe legitimacy. Legitimacy might, at bottom, be a normative question about whether a state has the right to rule.¹⁴⁹ On this normative construal, injustices delegitimize by undermining whatever gives the legitimate state a right to rule. Legitimacy can also be construed in empirical terms, with a state's legitimacy being a function of its subjects' identification with its directives¹⁵⁰ or its being recognized as legitimate by external entities.¹⁵¹ On this construal, injustices would delegitimize by altering these empirical factors (*e.g.*, by changing the degree to which subjects identify

¹⁴⁸ *E.g.*, Valls (2013).

¹⁴⁹ *E.g.*, Copp (1999); Estlund (2009), at 41. Some offer stronger definitions of legitimacy, under which political legitimacy entails that citizens have a generalized duty to obey official directives. See Simmons (1999), at 746; Song (2012). Other philosophers see these the right to rule and the duty to obey as detachable, such that it's possible for a state to be legitimate even though citizens lack a *prima facie* duty to obey its directives. *See, e.g.*, Applbaum (2010); Buchanan (2002); Edmundson (1998); Guerrero (*m.s.*); Wellman (1996); Perry (2013). Resolving this connection between legitimacy and political obligation is unnecessary here. If injustices undermine a state's right to rule, then they necessarily undermine stronger claims concerning the duty to obey.

¹⁵⁰ Tyler (2005).

¹⁵¹ Crawford (2007), §1.3-1.4.

with or external entities recognize the state). In what follows, I will focus on the normative construal of legitimacy, rather than the empirical construal.¹⁵²

Seeing legitimacy as a normative phenomenon raises another question: in virtue of what does or could a political entity have the right to rule over someone? An answer to this question proposes the grounds of legitimacy. Legitimacy-based approaches to reparation mainly differ in how they construe the grounds of legitimacy. These differences, in turn, suggest different ways that injustices could threaten (and reparation could bolster) political legitimacy.

Legitimacy-based approaches have some clear advantages as theories of reparation. For one thing, they provide a compelling account of the justification for reparation. Legitimacy is a fundamental concern of political morality. If an injustice undermines political legitimacy and reparation would bolster it, then there would be compelling reason to make reparation for that injustice. (Whether legitimacy-based arguments also provide an appropriate reason for making reparation is an open question that I discuss below.)

In addition, legitimacy-based accounts are compatible with the relational conception of reparation, so they might well offer a plausible picture of how reparation ameliorates. A. John Simmons contends that legitimacy demarcates a “special moral relationship” between a state and a subject.¹⁵³ At least at an abstract level, construing legitimacy as essentially relational might be compatible with the relational conception of reparation—the idea that relationships impaired by injustice or wrongdoing both provide the impetus for reparation and establish what successful reparation requires. Whether any version of a legitimacy-based approach succeeds in capturing all of the elements of the relational conception of reparation we have considered so far (like reparation’s causal structure, its intentional and expressive dimensions, the bipolar structure of reparations claims, the non-replication and sensitivity requirements) remains to be seen. The point is that a legitimacy-based approach *might* be able to account for these phenomena. This prospect makes the legitimacy-based approach worth investigating. By contrast, the corrective justice and rights-based approaches to reparation examined so far seemed structurally incapable of capturing these features.

Simmons’s appreciation of the relational structure of legitimacy motivates two of his most important conceptual challenges to accounts of legitimacy. The first challenge is

¹⁵² I focus on this question in part because most of the philosophical work on legitimacy adopts the normative construal, and in part because the attitudinal construal is argued to be circular. *See, e.g.,* Nozick (1974), at 134 (“Attempts to explain the notion of legitimacy of government in terms of the attitudes and beliefs of its subjects have a difficult time avoiding the reintroduction of the notion of legitimacy when it comes time to explain the precise content of the subjects’ attitudes and beliefs....”). Furthermore, many of the arguments posed in empirical terms can be reformulated in normative terms by positing that the relevant empirical phenomena (like recognition by external entities or the identification of those subject to a regime) explain why a state does or doesn’t have the right to rule. I discuss this argument below in connection with identification-based approaches to legitimacy.

¹⁵³ Simmons (1999), at 752; Simmons (1993), at 5; Morris (2005), at 319.

what Simmons calls the “particularity requirement”- the notion that legitimacy describes the political relationships of particular subjects with particular states.¹⁵⁴ States or political entities are not legitimate in general; rather, their authority is legitimate over some people and not over others. A plausible account of legitimacy cannot rest at showing “the general quality or virtues of a state”; it must also show the “nature of its rights [to rule] over any particular subject....”¹⁵⁵ The former kinds of considerations establish the justification for a state, but they are insufficient to establish its legitimacy. This suggests another of Simmons’s most well-known challenges, which might be called the “conflation problem.” This problem says that it is a conceptual mistake to infer a state’s legitimacy from its justification, since judgments about the former turn on different kinds of considerations than judgments about the latter.¹⁵⁶ Here, too, the relational structure of legitimacy illuminates Simmons’s argument. Justification is an essentially third-personal concept, one that applies (and can be appreciated) impersonally. Legitimacy, owing to its relational structure, is an essentially second-personal concept: legitimate political directives operate only within specified relations. A state can be just in the abstract without having legitimate authority over you. Avoiding the conflation problem requires capturing the second-personal structure of legitimate political relationships.

Aside from these global strengths, though, a legitimacy-based approach to reparation is only as plausible as its underlying account of legitimacy—that is, its explanation of what grounds political legitimacy, how (if at all) injustices might delegitimize, and how (if at all) reparation might bolster legitimacy. Articulating the grounds of legitimacy is a requirement for an account of legitimacy to be valid; resolving how injustices might compromise legitimacy and reparation bolster it are required for a legitimacy-based theory of reparation to succeed under the framework. It may well be that the best account of legitimacy’s grounds does not support a viable theory of reparation. Thus, we can assess a legitimacy-based approach internally, based in part on how well it establishes the conditions under which a political entity has the right to rule. We can also assess its account of legitimacy based on whether it can resolve Simmons’s conceptual challenges- namely, the particularity problem and the conflation problem. Finally, we can assess an approach based on whether this account of political legitimacy links up to a plausible theory of reparation, where plausibility is determined in terms of the framework introduced in chapter 3. I examine four candidates of legitimacy-based approaches to reparation, which I call voluntarist, instrumental, democratic, and identification accounts. Ultimately, none these candidates is fully satisfactory. Some rest on implausible notions of what makes political entities legitimate. Others fail to satisfy all of the elements of the framework—most notably questions of justification, conception, discrimination, and distinctiveness.

¹⁵⁴ Simmons (1979), at 31, and (2007). Simmons formulates the particularity requirement in terms of political obligations, which he sees as correlates of the right to rule. As noted above, my analysis here does not adopt this view about the correlativity of legitimacy and political obligation. I think it’s not only possible to formulate the requirement solely in terms of legitimacy, but also that the requirement continues to have bite when formulated in this way.

¹⁵⁵ Simmons (1999), at 752.

¹⁵⁶ *Id.*, at 756.

A. Voluntarist Accounts of Legitimacy

Voluntarist accounts of legitimacy posit that the state is legitimate in virtue of the volitional exercises of its subjects. Simmons provides perhaps the most prominent recent example of such a view. For Simmons, “state legitimacy is the logical correlate of various obligations, including subjects' political obligations.”¹⁵⁷ Simmons argues that the only volitional commitments can give rise to obligations.¹⁵⁸ As such, the only possible ground for legitimacy is some volitional commitment. For Simmons, as for Locke, either actual or tacit consent (or else some form of non-coerced, knowing accepting the benefits of a state that is tantamount to consenting) is necessary to establish a state's legitimacy.¹⁵⁹ Both hypothetical consent to a state's authority or having compelling reasons to act in accordance with the state's directives are insufficient to ground this relationship because they do not involve exercises of volition. Having a good reason to enter a relationship is not the same thing as being in that relationship.¹⁶⁰ Moreover, Simmons sees further qualifiers on the kinds of volitional exercises that could ground legitimacy. To establish political legitimacy, consent must be not only voluntary but also free. The coercive imposition of a choice situation or the lack of genuine alternatives vitiates the normative force of someone's consent. From these premises about the grounds of legitimacy, Simmons deduces the anarchist conclusion that “all existing states are illegitimate.”¹⁶¹ Few people undertake the kinds of consent necessary to ground legitimacy. Moreover, because there is no alternative to rule by some state, the conditions for free choice are not met in our world. Therefore, states lack legitimate authority over even those (like immigrants) who have explicitly consented or voluntarily accepted the benefits of social cooperation, since these volitional exercises lack the requisite degree of freedom.

As far as I am aware, no advocate of a voluntarist account of legitimacy has extensively discussed how injustices might undermine political legitimacy, or how reparation might bolster it.¹⁶² However, the advocate of a voluntarist view would seem committed to seeing the significance of injustices in virtue of being *ultra vires*. As an empirical matter, certain injustices are beyond the ambit of what citizens have consented

¹⁵⁷ Simmons (1999), at 746.

¹⁵⁸ Simmons (1979), at 11-16.

¹⁵⁹ Simmons (1993), at 72. For the sake of clarity, in what follows I refer to the volitional exercise necessary to establish legitimacy in terms of consent even though other exercises might, on Simmons's view, be capable of grounding legitimacy.

¹⁶⁰ A voluntarist account can avoid both of the conceptual challenges that Simmons raises. It can resolve the conflation problem by seeing volitional exercises as necessary for legitimacy, but unrelated to justification. It can also avoid the particularity problem: an extremely just state does not automatically have legitimate authority over citizens of other states where there is no volitional exercise connecting those citizens to that state.

¹⁶¹ Simmons, (2001), at 103.

¹⁶² Simmons contends that the victims of injustice might not only be owed reparation, but also have political obligations that “are (at least) much more limited than those of other citizens.” Simmons (2013), at 314. However, he does not elaborate this point.

to or could freely do so. If an otherwise legitimate state acts *ultra vires*, then its authority is compromised. This compromising would apply at least regarding the *ultra vires* action, and would encompass at least those at whom the *ultra vires* action was targeted. Moreover, certain *ultra vires* actions might compromise the state's legitimacy in other domains and over those who were not targets of the *ultra vires* action itself. These actions might "void [a state's] right to rule altogether."¹⁶³

The Greenwood riots exemplify how this delegitimizing effect might work. Assume for the sake of argument that African-American residents of Tulsa had effectively consented to rule by the city of Tulsa and the state of Oklahoma. A central component of this authorization would have been a guarantee of governmental protection against wanton violence. Otherwise, membership in the polity would have been no better than existing in a Hobbesian state of war. State and local officials lacked the authorization to turn a blind eye toward (or facilitate) the racialized violence of the Greenwood riots. To the extent that these governmental institutions wielded legitimate authority over the residents of Greenwood before the riots, they would not have afterwards. Moreover, protection against attacks is so central and the failures involved in the Greenwood riots so egregious that these events might well have undermined the legitimacy of political institutions over residents of Tulsa who were not displaced or harmed by the riots at all. Official acquiescence would run against the terms of consent by both victims and non-victims.

On such a voluntarist account, any legitimizing effect of reparation would be indirect. Making reparation might give citizens reasons to ratify governmental action or expand the ambit of their consent, such that the *ultra vires* action is no longer outside the ambit of the state's charge. Likewise, reparation might provide reasons to forgive political actors, or facilitate a kind of re-consenting that could cease the state of war. However, attributing any direct legitimating effect to reparation would undermine the fundamental commitments of the voluntarist approach, since it would indicate that legitimacy turned on something other than a volitional commitment.

Voluntarist accounts of political legitimacy are problematic in their own right. Many (even those who advance a voluntarist position) argue that consent is insufficient to establish political legitimacy.¹⁶⁴ The wrongness of the Greenwood riots isn't solely (or even primarily) a question of whether governmental officials acted *intra vires*. Consent by the residents of Greenwood to these riots wouldn't have made them just, nor would it have insulated the state from all of the delegitimizing effects of these injustices. Moreover, as discussed above, voluntarist accounts have anarchist implications: such accounts are likely to yield the conclusion that no political entity is legitimate because "nothing resembling a state (no matter how perfectly just and admirable the quality of its laws and its administration of them is and no matter how just the process by which it

¹⁶³ Van Der Vossen (2012), at 566.

¹⁶⁴ Simmons (1999), at 746 n. 18 ("Consent is necessary—but not sufficient—for legitimacy and political obligation, (in part) because the justification of a type of state is necessary for consent to a token of that type to be binding. We cannot bind ourselves by consent to immoral arrangements.")

came into being) is ever likely to achieve the consent of all those it governs.”¹⁶⁵ Indeed, many seem to defend voluntarist approaches with an eye toward reaching this anarchist conclusion.

More to the point here, the voluntarist account of political legitimacy does not support a plausible theory of reparation. For one thing, the voluntarist approach is reductionist. The significance of an injustice is explained entirely in terms of other considerations (namely, non-consent). This significance could be fully ameliorated by the requisite kind of volitional exercise, regardless of whether any political action responds to the injustice. Further, voluntarist accounts reach the same verdict about the legitimacy of states based on the lack of occurrent consent, regardless of whether the state has perpetrated an injustice or not.¹⁶⁶ For the voluntarist, all existing states are illegitimate. In light of this anarchist conclusion, there would appear to be no meaningful difference between the illegitimacy of a government that had prevented the Greenwood riots and one that took a more active role in perpetrating them. Yet denying such a difference strikes me as absurd, regardless of whether a person’s consenting to a state’s rule is generally sufficient to establish its legitimacy. Such injustices, in Bas Van Der Vossen’s terms, at least compromise a state’s “external” legitimacy, regardless of whether they also compromise its “internal” legitimacy.¹⁶⁷

Moreover, the voluntarist account described here does not offer a plausible conception of how reparation would ameliorate the significance of an injustice. In particular, the voluntarist position fails to follow through in its explication of the relational structure of legitimacy. Say that A and B are both citizens of the same legitimate state (S), and that S perpetrates an injustice against A. Intuitively, this perpetration delegitimizes S vis-à-vis A. After Scanlon, we might say that this event impairs S’s relationship with A in light of that relationship’s normative ideal. Yet the perpetration of this injustice also compromises S’s right to rule over B.¹⁶⁸ The disregard of A seems to reverberate within both the S-A and S-B relationships. To put it more concretely, the perpetration of (or failure to intervene in) the Greenwood riots compromised the legitimacy of the relevant political institutions in general, and not merely regarding the African-American residents of Greenwood. A voluntarist approach cannot appreciate this generalized delegitimizing effect of injustices, or at least cannot do so easily (that is, without specifying some implicit reference to A in the content of B’s consenting).¹⁶⁹

¹⁶⁵ Buchanan (2002), at 702.

¹⁶⁶ Allen Buchanan makes something like this point in noting that consent theories see all major questions about political power as having the same answer. Buchanan (2002), at 698-99.

¹⁶⁷ Van der Vossen (2012).

¹⁶⁸ Wellman (2009), at 436-8, makes a similar argument for how a state’s violation of human rights can compromise its legitimacy generally, and therefore its rights against interference by other states.

¹⁶⁹ Likewise, it seems plausible that, after a state has perpetrated an injustice against A but not against B, the provision of reparation to A can bolster its right to rule over both A and B. The voluntarist approach cannot easily explain this phenomenon either, although the problem here might lie in the voluntarist’s denial that reparation can directly bolster a state’s legitimacy at all.

Thus, the voluntarist approach has internal problems as an account of legitimacy. Apart from these internal flaws, this approach fails as a theory of reparation because it doesn't satisfy important aspects of the framework.

B. Instrumental Accounts of Legitimacy

Instrumental accounts see political legitimacy largely as a function of how political institutions protect the basic rights or further basic interests of their citizens.¹⁷⁰ A regime is legitimate when it protects these basic rights or furthers these basic interests and illegitimate when it does not. The legitimacy of political institutions (at least in part) on how well these institutions meet other goals (like the promotion of welfare or securing of rights). On an instrumental account, injustice might delegitimize political institutions by frustrating the achievement of the goals in whose achievement legitimacy consists.¹⁷¹

Instrumental accounts of legitimacy cannot easily resolve either of Simmons's conceptual challenges. That a state protects the basic rights or promotes the interests of its citizens would not establish its legitimacy over those particular citizens, since other states might better protect those rights or promote their interests. Moreover, instrumental accounts of political legitimacy arguably conflate justification and legitimacy because they see the achievement of political goals as sufficient to establish a certain kind of political relationship, rather than merely being a (good) reason to establish such a relationship.

Not all instrumental accounts of legitimacy are vulnerable to Simmons's conceptual challenges. For example, Robert Nozick did not discuss the issue of political legitimacy extensively,¹⁷² but his defense of the minimal state can be read to support an instrumental conception of legitimacy that resolves Simmons's challenges. On this Nozickian account, the protection of basic rights is the *raison d'être* for the state, the justification for having a state rather than a non-state arrangement.¹⁷³ If a state has authority solely based on its capacity to protect rights, then political legitimacy turns on the legitimacy of current patterns of holdings. The legitimacy of holdings is a function of the procedure through which they were acquired: "whatever arises from a just situation by just steps is itself just."¹⁷⁴ Holdings are legitimate if they were acquired or transferred in a way that respects rights, and (by implication) illegitimate if acquired or transferred in

¹⁷⁰ *E.g.*, Arneson (2003); Wall (2006). Many other accounts posit at least some instrumental element to legitimacy. *See, e.g.*, Stilz (2011); Buchanan (2002); Spinner-Halev (2012a).

¹⁷¹ Utilizing an instrumental conception of legitimacy provides a clean way to combine a legitimacy-based approach to reparation with a rights-based approach. On such a hybrid view, an injustice that seriously violated rights would provide both a direct reason to make reparation (owing to the rights violation) and an indirect reason (owing to the delegitimizing effect of the rights violation).

¹⁷² As Simmons (1999), at 743-5, notes.

¹⁷³ Nozick (1974), part 1.

¹⁷⁴ *Id.*, at 151. Although Nozick emphasizes the importance of consent, his account of legitimacy is not a consent-based view because he allows that a state can acquire legitimacy over citizens who have not consented to it. *Id.*, at 139-40; see also Morris (2005), at 316.

a rights-violating way. As one commentator puts it, Nozick sees a state's legitimacy in terms of whether it "actually has (or has had) certain kinds of morally unobjectionable relationships with those it controls."¹⁷⁵ Unrectified injustices (that is, holdings that were acquired or transferred in a rights-violating way) thus taint the legitimacy of holdings, as well as the legitimacy of the political institutions that arise to protect these holdings. "In the process of original acquisition and subsequent transfer, one seriously wrong step anywhere along the line prevents the process from being 'justice preserving'... [and] suffices to taint the holder's title to the object."¹⁷⁶ On the Nozickian account, then, the goal of rectifying historical injustices is to remove the taint of past injustice on present patterns holdings.¹⁷⁷ In legal parlance, injustices encumber current holdings and reparation serves to "clear title."

This Nozickian account of political legitimacy meets both of Simmons's challenges. It doesn't run afoul of the particularity problem because it doesn't posit a maximizing proviso whereby a state that better protects rights has a greater claim to legitimacy than a state that protects rights less well. Also, Nozick's account of legitimacy doesn't run afoul of the conflation problem. Rather than conflating justification and legitimacy, the Nozickian argument narrows the ambit of legitimacy so much that it is indistinguishable from the protection of rights that (for Nozick) determines a state's justification.

One might object to the Nozickian account of political legitimacy. In narrowing the standard for legitimacy to a concern about the justification for patterns of holdings, the Nozickian account might miss important aspects of the meaning of legitimacy. Also, the Nozickian "title clearing" argument for reparation runs afoul of several of the issues in the framework.

One major problem here concerns discrimination. The Nozickian "title clearing" argument is essentially nondiscriminatory.¹⁷⁸ Any unrectified injustice in acquisition or transfer compromises the legitimacy of holdings, and thus political legitimacy. Nozick's discussion of the epistemic issues related to rectification suggests a concern with injustices that occur at the formation of a society, but the "title clearing" logic also applies to injustices that occur subsequent to the formation of political society.¹⁷⁹

¹⁷⁵ Simmons (1999), at n. 15.

¹⁷⁶ Goodin (2013), at 487.

¹⁷⁷ Nozick (1974), at 152.

¹⁷⁸ While the Nozickian account is non-discriminatory, some instrumental versions of the legitimacy-based accounts provide criteria for distinguishing the injustices that call for reparation from those that don't. *E.g.*, Van Der Vossen (2012), at 573-4.

¹⁷⁹ *See, e.g.*, Davis (1976), at 839 ("The rectification principle... seems to be the most problematic part of the entitlement theory. If is certainly an essential part; for, without it, if there has been a single injustice in the history of a state, no matter how far back, the state will not be able to achieve a just distribution of goods in the present.")

Given this inability to discriminate between injustices that call for reparation and those that don't (as well as the prevalence of injustices in our history), the Nozickian account raises serious concerns about demandingness. These concerns are an internal problem for the Nozickian account, given its construal of rights as side-constraints on legitimate governmental action. As Loren Lomasky argues "[a] confiscation of property preparatory to bringing about the Brave New World would sin against the rights of contemporary individuals to be secure in the possession of the property they are actually using in the ongoing pursuits of their projects."¹⁸⁰ Further even if it were possible to formulate some criteria for discrimination within the Nozickian argument, this approach would not escape what, in chapter 3, I called the paradox of discrimination. Preserving the legitimacy of political institutions would require abrogating of the rights of contemporary rightsholders. As such, the legitimacy of political institutions could only be preserved through actions that (on Nozick's account of political legitimacy) would themselves tend to delegitimize political institutions.

Moreover, the Nozickian "title clearing" argument doesn't capture important features of how reparation ameliorates. In particular, this approach implicates what above I called the "disequilibrium thesis"—the notion that disruption of a normative equilibrium is necessary and sufficient to call for reparation. In the Nozickian argument, the case for reparation depends entirely on whether title is tainted. Thus, the Nozickian "title clearing" argument runs afoul of structural features of reparation, just as "wrongful harm" versions of the corrective justices approach do.

For one thing, the "title clearing" argument violates the sensitivity requirement—the requirement that the case for reparation depend essentially on the victim's grievance. For Nozick, the case for reparation does not depend on (and, indeed, need not reference) the particularized grievance of the victim or claimant. Rather, the goal is to remove the taint of current holdings. What the victim of the injustice wants or demands does not affect whether reparation is called for. Moreover, whether the victim has forgiven the injustice wouldn't matter to the normative impetus for reparation.

For another thing, the "title clearing" argument runs afoul of the nonreplication requirement. It cannot see the deficiency in gestures of redress that replicate wrongmaking features of an underlying injustice. In particular, the "title clearing" argument could not spot the defects of gestures that convey disrespectful attitudes about victims or are motivated by reasons that disregard or demean claimants. Of course, the defender of the Nozickian account might deny these criticisms by arguing that the violation of rights exhausts what's wrong with an injustice. If so, then the case for reparation need not be sensitive to the victim's or claimant's sense of injustice. Further, the replication of disrespectful attitudes or reasons might be argued not to blunt the ameliorative effect of redress, since these attitudes or reasons might not explain why injustices were wrong. I think these contentions are independently implausible. The violation of rights is part of what makes (some) injustices wrong, but it is not necessarily

¹⁸⁰ Lomasky (1987) at 145.

the only thing. While the “title clearing” argument might provide a compelling reason to make reparation, it does not offer an appropriate or general reason to do so.

So instrumental accounts of legitimacy do not provide a plausible theory of reparation. Many such accounts are implausible as theories of legitimacy, since they cannot overcome Simmons’s conceptual challenges. While a Nozickian version of the instrumental account might be able to withstand these conceptual challenges, it does not offer a satisfactory theory of reparation.

C. Democratic Accounts of Legitimacy

Democratic accounts see political legitimacy as a function of the democratic pedigree of political institutions. A regime has political legitimacy if its institutions are suitably democratic, and it lacks such legitimacy if its institutions are not. There are a variety of ways to connect democratic institutions with political legitimacy. The account I consider here construes political legitimacy in terms of authorization: democratic political institutions are authorized by the (rights of) participation by those over whom the institutions apply.¹⁸¹ When political institutions engage the will of their subjects in this way, then those subject to coercive directives are not subjected to an “alien will.” Rather, these directives can be said to emanate from the wills of citizens, and thus be reconciled with their status as free people.¹⁸²

Given a concern about authorization, injustices might delegitimize democratic institutions in the same way that they would on a voluntarist account. Injustices are by definition *ultra vires*, beyond the authorization that democratic institutions have or could have. As such, injustices represent alien impositions—they cannot be reconciled with the freedom of those over whom they are coercively imposed.

I believe that the democratic account (or something like it) provides the best explanation of the phenomenon of political legitimacy. However, it does not follow that this approach provides the best theory of reparation. It’s difficult to assess a democratic legitimacy-based approach to reparation because there are no exemplars. However, the democratic approach faces some risks as the basis for a theory of reparation. For one thing, it’s not clear how reparation would ameliorate the significance of an injustice. If an injustice represents an alien imposition that is irreconcilable with freedom, then it’s not obvious that actions subsequent to the injustice could vindicate that freedom.¹⁸³

Furthermore, the democratic approach does not establish a distinctive case for reparation. However reparation would ameliorate or restore the legitimacy of political institutions in the wake of an injustice, it would seem possible to accomplish the same restoration via tokens that do not specifically address the underlying injustice. For

¹⁸¹ See Buchanan (2002); Stilz (2010).

¹⁸² Pettit (2012).

¹⁸³ In any event, this argument would run into many of the same problems concerning the meaning of vindication discussed above in connection with the rights-based approach.

example, the democratic theorist might respond to the Greenwood case by vindicating the political participation rights of African Americans in Tulsa, which might ensure that police would intervene to prevent future riots. This way of arguing for political representation would be reductionist because it could be made without reference to the Greenwood riots.

Perhaps some versions of the democratic account could avoid these difficulties. Yet any such account would still face a basic problem that applies to voluntarist accounts: while the lack of authorization might be one objectionable aspect of (certain) political wrongs, it does not capture the core features of why many injustice are significant. However plausible the democratic account of political legitimacy is on its face, it confronts serious obstacles as a theory of reparation.

D. Identification-Based Accounts of Legitimacy

Finally, identification-based accounts construe the legitimacy of political institutions as, at least in part, a function of whether citizens feel “at home” in them.¹⁸⁴ This notion has its roots in Hegel’s political philosophy: to be “at home” in a social world is to overcome one’s alienation from it, to reconcile one’s status as an individual with membership in a political community.¹⁸⁵

Here is a brief sketch of the identification-based account. One is “at home” in a political community when one believes that its institutions are “structured in a particular way and endors[es] them in that form,” and these beliefs “accurately reflect the structures of the institutions.”¹⁸⁶ Duncan Ivison describes one way that “at homeness” might be linked to political legitimacy:

“The enterprise of democracy rests upon a premise of collective agency, however contestable and fluid that conception of agency is. Citizens must come to accept their own ‘authorship’ of the procedures (deliberative and otherwise) through which the state reaches its decisions in order to realize their equal freedom and feel ‘at home’ amongst its institutions and norms.”¹⁸⁷

Whether someone is “at home” in an institution is a function of whether its authority claims over her are justified and whether she identifies with the authority-claiming institution.¹⁸⁸ Where the members of a political community feel at home, they identify with the political institutions of that community and these institutions (might) have

¹⁸⁴ Spinner-Halev (2012a), §1.1; Hardimon (1992) and (1994); Sciaraffa (m.s.), ch. 5.

¹⁸⁵ Hardimon (1994), at 1-2.

¹⁸⁶ Roberts-Thompson (2008), at 72.

¹⁸⁷ Ivison (2000), at 363.

¹⁸⁸ Sciaraffa (m.s.), at 167.

legitimate authority over them.¹⁸⁹ If members do not feel at home, then the institutions lack legitimacy, although they might still have *de facto* authority.

Given this construal of legitimacy, injustices might delegitimize by impeding the “at homeness” of members within a political community. Suffering systematic injustice is routinely associated with disaffection and alienation.¹⁹⁰ Indeed, it might be argued that a self-respecting agent who has been systematically subject to injustices should not identify with the institutions of the unjust political community.¹⁹¹ By interfering with a member’s identification, injustice compromises “at homeness,” and thus legitimacy.¹⁹²

If injustice delegitimizes by interfering with identification, then reparation could bolster legitimacy by promoting a target’s identification with a political community, thus enabling her to be “at home” in that community.¹⁹³ On this approach, “state redress is... a process of overcoming resistance to civic identification.”¹⁹⁴ The thinking here is that reparation repudiates the past injustices of a political community, and this disavowal facilitates the formation of a new political community with which the victims of an injustice can (be expected to) identify.¹⁹⁵

The identification-based account is problematic as a theory of legitimacy. The most basic objection is that identification seems neither necessary nor sufficient for legitimacy. Your identifying with the political institutions of a community doesn’t establish whether those institutions have the right to rule over you. After all, your identification might be a type of false consciousness.¹⁹⁶ If someone’s identification with political institutions can be subject to criticism, then there are normative standards for evaluating such identifications. The defender of an identification-based approach must concede that identification is insufficient to establish legitimacy, since identifications that

¹⁸⁹ By contrast, Christiano (2008), 61-2, sees “at homeness” as an interest that is furthered by political institutions acting in ways that are publicly justifiable, rather than as an independent criterion for establishing political legitimacy. Christiano’s construal of the relation between “at homeness” and legitimacy is more akin to the instrumental view described above.

¹⁹⁰ Winter (2011), at 802-3.

¹⁹¹ See, e.g., Shelby (2007), at 136-7.

¹⁹² Ivison (2000), at 371 (Injustice risks undermining “the legitimacy of the basic institutions meant to address social and economic disadvantage, and the social trust that is crucial for mutual coexistence in deeply diverse political communities.... [W]hat are at risk of being undermined are the conditions under which certain members of the political community could ever feel 'at home' amongst its basic institutions and practices.”)

¹⁹³ Verdeja (2006), 463-4; Winter (2011) 805-8.

¹⁹⁴ Winter (2011), at 799.

¹⁹⁵ Winter (2011), at 806 (“Dissociation removes a reason for resisting subjective identification. Making the state something other than what it was, redress makes citizen affiliation, and consequently legitimation, possible.”)

¹⁹⁶ Simmons (2001), at 83.

do not adhere to the relevant normative standards would fail to legitimate political institutions even *pro tanto*.¹⁹⁷

Yet these normative standards might also be applied to refusals to identify with political institutions. This possibility suggests that identification is not necessary for political legitimacy either. If institutions meet the applicable normative standards, then identification seems to do no independent work in establishing legitimacy. As Simmons argues, “to call a state legitimate is surely to say something about *it*, about the rights it possesses or the scope of its authority. The attitudes of a state’s subjects can at best be part of what argues for its legitimacy, not that in which its legitimacy consists.”¹⁹⁸ If an institution meets the relevant substantive criteria, then a subject’s refusal to identify with it might be criticized as irrational,¹⁹⁹ or on some other grounds. It is difficult to see how an irrational refusal to identify with a political institution would compromise its right to rule. Legitimacy seems more robust than this.

The identification-based approach also has problems as a theory of reparation. This approach does not capture all of the important aspects of reparation’s phenomenology. To be sure, this approach gets much of the phenomenology right, accounting for many aspects of reparation’s causal structure. If reparation aims to remove barriers to civic identification that arise out of an injustice, then successful reparation cannot replicate the disrespectful or degrading attitudes of the underlying injustice. Otherwise, the barriers to identification would remain.²⁰⁰ Likewise, the identification-based account captures the sensitivity requirement: the victim’s sense of injustice must matter to the case for reparation in order for reparation to facilitate the victim’s civic identification. It is plausible that many injustices impede identification because they convey the attitude that the victim does not matter. If the victim’s grievance didn’t matter to the case for reparation either, then the gesture of redress would replicate an identification-impeding element of the underlying injustice.

However, the identification-based account leaves out another important aspect of reparation’s phenomenology—namely, the bipolar structure of reparations claims. As I defined it above, injustices seem to ground complaints by claimants, and reparation

¹⁹⁷ Many defenders of identification-based approaches do concede this insufficiency. For example, Ivison posits that reparation aims to bolster both the rights-based and identification-based dimensions of citizenship. Ivison (2000), at 367. This distinction implies that a political order that maintained identification but disrespected rights would be illegitimate. See also Winter (2011), at 810 (“If the state is a morally unsalvageable political project, processes of state legitimization would be no more than an ideological propaganda designed to stabilize an unjust order.”); Sciaraffa (m.s.), at 167 (contending that justification of an institution’s claims to authority is a necessary condition for its being “a home for its subjects.”)

¹⁹⁸ Simmons (1999), at 749.

¹⁹⁹ Winter (2011), at 810 (“[S]tate legitimacy rests on reasons and particular individuals can mistake the degree of legitimacy a state possesses or resist its legitimation unreasonably. A state could become more legitimate [through making reparation], even if redress participants oppose its legitimacy.”)

²⁰⁰ See, e.g., Winter (2011), at 810 (arguing that the “dissociative” function of reparation “can be undone by other state actions demonstrating the persistence” of norms for which reparation is made).

responds to these complaints. Yet the identification-based approach construes the case for reparation in fundamentally first-personal terms: reparation is about providing the claimant what she needs to overcome her barriers to identification based on the injustice. The claimant's demands might implicate specific wrongdoers or payers, but they need not do so. Gestures of redress do not respond to the claimant's grievance, so much as her alienation.

Furthermore, the identification-based account cannot easily capture reparation's intentional dimension. A gesture of redress that is done for inappropriate reasons might nevertheless increase the civic identification or feelings of "at homeness" of its targets. Such a gesture would not ameliorate the significance of the underlying wrong, but the identification-based approach could not explain this deficiency.

Nor can the identification-based account establish the distinctive significance of injustice and reparation. On these accounts, there seems no essential difference between barriers to identification that arise out of injustices from those that do not. For example, the Greenwood riots might pose a barrier for contemporary Tulsans to identify with their political institutions. Likewise, the failure to elect a Republican president might also impose a barrier for identification. One of events is an injustice, the other is not (necessarily). Yet both types of barriers disrupt the "at homeness" of citizens. If legitimacy is a function of "at homeness," then concern for legitimacy would require interventions in both types of cases, and for exactly the same reasons. Moreover, interventions that aim to overcome more mundane barriers to identification might have the side effect of decreasing injustice-based barriers based as well. Say that someone is alienated from political institutions by both the Greenwood riots and by the failure to elect Republican presidents. The U.S. Supreme Court's decision in *Bush v. Gore* might have removed the latter barrier to identification and, in doing so, also have removed the former. Yet the possibility of this effect means that the identification-based account is reductionist: the significance of an injustice would be fully redescribed in terms of the political goal of civic identification, with the ameliorative impact characteristic of reparation achieved by facilitating this identification.

IV. Conclusion

In this chapter, I have argued that none of the main ways of thinking about reparation is satisfactory. None can resolve the basic issues of the framework. None can simultaneously provide a compelling and appropriate answer to the question "Why make reparation?", tell a plausible story about how reparation ameliorates, establish why reparation as distinctively significant, and plausibly distinguish the injustices that call for reparation from the ones that do not.

However, my analysis of these approaches has not entirely been an exercise in debunking. Some of these approaches have useful elements. In particular, legitimacy-based approaches show promise in offering both a compelling justification for reparation and a descriptively accurate conception of how reparation ameliorates.

Further, examining these approaches has helped refine the framework. Consider the phenomenological question of how reparation ameliorates the significance of injustices. In chapter 2, I argued that reparation has a causal structure. A redressive gesture's etiology determines whether (or how much) it succeeds as reparation. I also argued that this causal structure revealed expressive and intentional dimensions to reparation. The attitudes that a gesture conveys and reasons for which it is made determine whether it is reparation. I also posited a basic requirement of non-replication: a gesture is deficient as reparation if it replicates wrongmaking features of an underlying wrong or injustice. The analysis of corrective justice views revealed a further aspect of reparation's phenomenology—namely, the sensitivity requirement. Genuine reparation must respond to the grievance of the claimant. Insensitive gestures ameliorate imperfectly, if at all. The discussion of John Gardner's continuity version of the corrective justice approach (as well as some rights-based approaches) revealed still another insight: the bipolar nature of wrongdoing and reparation, or the way that injustices ground complaints by victims, and reparation responds to these complaints. Any plausible story about how reparation ameliorates should capture all of these phenomena.

Chapter 5- Why a Liberal Should Care About Reparation

Chapter 6 offers a theory of reparation for political injustices that draws on the philosophical liberalism of John Rawls. At first glance, this effort might appear misguided. Assigning theoretical importance to reparation seems at odds with important aspects of Rawls's project, particularly the abstract level at which principles of political cooperation are justified. Given these incongruities, philosophical liberalism might not provide a solid foundation for a theory of reparation. Moreover, one might argue that existing aspects of Rawls's theory (like the principles ensuring fair equality of opportunity and distributive justice) can fully account for the phenomena of injustice and the impetus for reparation. If so, then philosophical liberalism does not treat reparation as an analytically distinct topic, and so (under the framework I outlined in chapter 3) does not generate or need a theory of reparation. Therefore, before describing my Liberal Theory of reparation, I need to show that such a theory is important for the liberal project.

That is the task of this chapter. My argument is that certain injustices undermine the possibility of political justification and, by implication, the stability and legitimacy of political institutions. In order to meet these fundamental commitments, the liberal needs a theory of reparation. I provide an indirect argument for this claim by analogy with Rawls's discussion of reasonable pluralism. Serious injustices threaten the political relationship, just as reasonable disagreement about the good does. If (as Rawls argued) philosophical liberalism must account for the phenomenon of reasonable disagreement, then it should also address the phenomenon of destabilizing injustices. I also provide a more direct argument for why certain injustices threaten the liberal commitment to political justification—namely, by providing victims (and others) with reason to reject ostensibly fair terms of political cooperation.

There are many ways to describe the normative ideal of the political relationship. A classical liberal or libertarian might see this ideal in terms of the protection of fundamental rights, ones that do not originate within political institutions. A perfectionist liberal might see this ideal in terms of how well political institutions protect or facilitate certain fundamental interests or values. A contractarian might construe the ideal in terms of whether political arrangements are rationally justifiable (in comparison with alternatives or anarchy) to those subject to them.¹ The strand of thought that I will call philosophical liberalism sees the ideal of the political relationship in terms of the mutual justifiability of political arrangements to those subject to (or affected by) them. This approach is liberal because it is concerned that the terms be justifiable to everyone.² It is contractualist because it construes this justifiability in terms of practical reasons, rather than rationality or mutual advantage.³ This tradition has its roots in the political writings of Rousseau and Kant, and it encompasses a number of contemporary thinkers—most prominently, Rawls.

¹ *E.g.*, Gauthier (1987).

² Waldron (1987).

³ Freeman (1990).

In what follows, I assume philosophical liberalism to be the most plausible way of specifying the ideal of the political relationship. Moreover, I also assume that Rawls's version of philosophical liberalism is the most appropriate target of analysis. I do not defend either of these assumptions. Rather, my analysis is meant to be internal to Rawls's project.

Part I offers a brief summary of some elements of Rawls's position. Part II outlines a basic move that the liberal might make to deny that injustice matters or that liberalism needs a theory of reparation. A theory of reparation presupposes that injustice-related considerations have distinctive significance. Yet injustice-related considerations are a type of particularity, and the Rawlsian framework is designed to abstract from all particularities in the formulation of principles of justice. Thus, the basic move says, because injustice-related considerations should be screened, the liberal should not view reparation as a fundamental question of political justice. This basic move does not entail that a Rawlsian must see injustice as completely irrelevant to justice. A Rawlsian might construe injustice-related considerations as part of non-ideal theory, and thus not on the agenda for formulating principles of justice. I call this the evasive maneuver. A Rawlsian might also contend that injustice-related considerations are already accounted for within Rawls's framework: specifically, in the principles requiring fair equality of opportunity or distributive justice. These are reductionist maneuvers.

In part III I provide two arguments internal to the Rawlsian program for thinking that the basic move is incorrect. An indirect argument sees the case for accommodating injustice-related considerations as at least as strong as the case for accommodating disagreement-related considerations. A more direct argument sees injustice-related considerations (unlike other particularities) as threatening the ideal of political justification and, in turn, the possibility of political stability and legitimacy. Injustice-related considerations can generate reasons to reject ostensibly fair terms of political and social cooperation. Because these injustices threaten the possibility of political justification, the evasive maneuver begs the question and the reductionist maneuvers are inadequate. Thus, injustice-related considerations are fundamentally important to liberal justice, and philosophical liberalism needs a theory of reparation.

I. Background: Rawls on the Political Relationship

For Rawls, the problem of justice involves specifying "the fair terms of social cooperation between citizens characterized as free and equal yet divided by profound doctrinal conflict."⁴ Theorizing justice requires, at a minimum, establishing which abstract principles should govern the basic structure of a society. Any plausible set of principles must contain certain features, including "a specification of certain rights, liberties, and opportunities," the assignment of a "special priority for these freedoms" in political life, and "measures assuring all citizens, whatever their social position, adequate all-purpose means to make intelligent and effective use of their liberties and

⁴ PL, at xxvii

opportunities.”⁵ Just principles of political cooperation must also be derived from a decision procedure that reflects the fundamental freedom and equality of citizens.⁶

Identifying abstract principles (and the decision procedure for deriving them) is not enough to solve the problem of justice. Both the principles and the institutions that they regulate must also be stable. To say that principles of justice are stable is to say that they “generate [their] own support and the institutions to which [they] lead [are] self-enforcing. . . . In a democratic regime stable social cooperation rests on the fact that most citizens accept the political order as legitimate, or at any rate as not seriously illegitimate, and hence willingly abide by it.”⁷ Therefore, the viability of a conception of justice depends crucially on whether political relationships among citizens are characterized by particular standard of political justification.⁸

This standard of political justification arises out of two structural features of the political relationship. First, the political relationship is assumed to be a relationship of persons within the basic structure of society, a structure that citizens can be assumed to “enter only by birth and exit only by death.”⁹ Because of this assumed inescapability, the standard of political justification is more demanding than a criterion of mutual advantage (which would allow for exit as an alternative to agreement). Second, the political relationship involves citizens’ coercive imposition of political power on themselves.¹⁰ As such, every party to a political relationship has reason to care about the terms of cooperation as both a potential target and partial author of coercive imposition.

Given these structural features, Rawls’s standard of political justification has at least four important elements. One is reasonableness, by which I mean that normative reasons are the currency of political justification. For views like Rawls’s, one aim of a conception of justice is to specify principles of political cooperation that respond to persons’ capacity for practical reasoning, which thereby provide a “public basis for justification that all can accept, in order to sustain willing social cooperation.”¹¹ The special reasons that social rules and institutions provide “subordinate the reasons that are instrumental to realizing our particular ends and concerns.”¹²

⁵ PL, at xlvi.

⁶ PL, xxii.

⁷ JAF, 125.

⁸ This standard of political justification does not necessarily exhaust the ideal of the political relationship. Rawls identifies subsidiary principles (like the natural duty of justice) that apply directly to individuals, and his theory might be read require that citizens also adopt an ethos of justice that guides their individual decisions regarding the exercises of their “productive latitude.” See, e.g., Titelbaum (2008); Shiffrin (2010). However, the ideal of political justification presents the theoretical problems posed by injustice and reparation in starkest relief.

⁹ JAF, at 40.

¹⁰ JAF, at 40.

¹¹ Freeman (1990), at 131.

¹² *Id.*, at 128.

A second element is what Rawls called the “criterion of reciprocity”—that citizens be disposed to propose or accept only those terms of political cooperation that their fellow citizens “might also reasonably accept.”¹³ Satisfying the criterion of reciprocity requires sensitivity to the reasons and bargaining position of others. The offering and accepting of terms of political cooperation takes place among “free and equal” citizens who are not “dominated or manipulated, or under the pressure of an inferior political or social position.”¹⁴ In order to prevent subordination or manipulation, citizens must “limit the principles from and in accord with which they act to principles they are prepared in good faith to justify to others from a shared and appropriate moral point of view.”¹⁵ Thus, reciprocity would preclude proposing terms of political cooperation that disproportionately benefitted oneself at the cost of setting back the interests of one’s fellow citizens, since these citizens would have good reason to reject such terms.

These requirements of reasonableness and reciprocity arise out of structural features of the political relationship, in particular its presumed inescapability. “Given the necessity of social cooperation over a lifetime, the requirement imposed on social norms is that no one can reasonably object when social norms are enforced against them.”¹⁶ Rawls’s ideal of the political relationship resembles T.M. Scanlon’s contractualist ideal of the moral relationship in one important respect: both are relations of “mutual recognition” that reflect a kind of idealized respect by operating under terms that could be reflectively endorsed by all relatives.¹⁷ A hallmark of this kind of relation is a commitment to justifying principles for the “general regulation of behavior” to others who are similarly moved to find such principles.¹⁸ Within relations of mutual recognition, adhering to this pattern of justification is a way of respecting one’s relatives.¹⁹

A third element of the ideal of political justification requires toleration of the standpoints of others. Theorizing about justice “starts by taking to heart the absolute depth of... irreconcilable latent conflict” among people’s conceptions of the good.²⁰

¹³ PL, xlv; see also Quong (2007).

¹⁴ PL, xlv.

¹⁵ Reidy (2006), at 248-9.

¹⁶ Freeman (1990), at 130.

¹⁷ Scanlon (1998), at 162. Rawls suggests this continuity between his ideal of political justification and Scanlon’s ideal of moral justification. Both, he argues, suppose the “basic desire to be able to justify our actions to others on grounds that they could not reasonably reject—reasonably, that is, given the desire to find principles that others similarly motivated could not reasonably reject.... To accept the connection between the two aspects of the reasonable and Scanlon’s principle is to include this form of motivation in the conception of reasonable persons from which justice as fairness starts.” PL, 49 fn. 2.

¹⁸ Scanlon (1998), at 4.

¹⁹ *Id.*, at 155; see also Larmore (1999) (arguing that Rawls’s account of political justification presupposes and instantiates a notion of respecting fellow citizens).

²⁰ PL, at xxviii.

Some disagreements about political questions arise out of citizens' adherence to incompatible (but reasonable) comprehensive doctrines—that is, systematic views of what is valuable in human life and how life should be lived.²¹ Such disagreements are the inevitable byproduct of citizens' exercise of their capacities to formulate and execute plans for living meaningful lives. As such, these disputes cannot be resolved by simply denying the truth of the comprehensive doctrines out of which the disagreements arise, since to do so would be inconsistent with respecting the freedom and equality of adherents to these doctrines. Because these irreconcilable conflicts are inevitable, the element of reciprocity entails that citizens must refrain from appealing to arguments or considerations that adherents to other reasonable comprehensive doctrines could not be expected to uptake. Appeal to such sectarian reasons would “be reasonably resented by citizens who do not share these views. They will therefore not only be destabilizing but also fail to show proper respect for these citizens, who are owed reasons that they could reasonably accept.”²² Tolerance therefore rules out modes of political justification that deny the fundamental beliefs of some citizens or appeal to sectarian reasons that are incompatible with reasonable comprehensive doctrines. It also rules out certain ways of criticizing the comprehensive doctrines to which others adhere.²³

A fourth element of the ideal of political justification is publicity. Citizens in a just society accept not only the principles of justice that govern the basic political institutions, but also their justification.²⁴ This public acceptance provides a shared framework for citizens to justify their political arrangements to one another.²⁵ “The public availability of the conception of justice that society realizes is supposed to allow the public justification of social institutions to be completely carried through without destabilizing consequences.”²⁶

Because this standard for political justification is highly demanding, Rawls envisioned its application as limited. The ideal of political justification applies mainly to public officials in the course of their duties, and to citizens voting on issues of constitutional essentials and matters of basic justice.²⁷ Wider application of this standard would decide too many questions *a priori*, and thus seem incompatible with democratic self-rule.²⁸ This limited application distinguishes Rawls's ideal of political justification from notions of “civic friendship” that apply similar standards to a broader range of

²¹ *Id.*, at 13.

²² Scanlon, (2003), 161.

²³ LOP, at 132 (noting that tolerance requires refraining from criticism of and attacks on a comprehensive doctrine “except insofar as that doctrine is incompatible with the essentials of public reason and a democratic polity.”)

²⁴ JAF, at 89; Shiffrin (2010), at 113, 120-1.

²⁵ JAF, at 27.

²⁶ Freeman (2007), at 16.

²⁷ PL, xxii-xxiii; LOP, at 133-5.

²⁸ LOP, at 164.

political questions.²⁹ Likewise, Rawls's ideal of justification within the political relationship resembles Scanlon's ideal of justification within the moral relationship along the elements of reasonableness and reciprocity, but differs along the elements of tolerance and publicity.³⁰

So Rawls's vision of philosophical liberalism not only sees political arrangements as regulated by principles of justice, but also calls for an ideal of political justification that is embraced by citizens within these arrangements. The importance of this ideal follows from the assumptions that citizens live within political arrangements and coercively enforce the terms of these arrangements. Citizens utilize this ideal of political justification in (arguments about) arranging their basic political and social institutions. In abiding by this ideal, citizens respect the freedom and equality of each other.

The ideal of political justification is connected with at least two other important ideas in Rawls's political thought. First, it explains how principles of justice could be stable over time. Rawls distinguishes at least three ways that a social stability might be achieved: through the imposition of threat or sanction,³¹ through a balance of forces or a convergence of self-interest,³² and through citizens' acceptance of terms of political cooperation as a freestanding moral idea and application of them in their daily lives.³³ This last sense, which Rawls calls "stability for the right reasons," is secured by citizens' "firm allegiance to a democratic society's political (moral) ideals and values."³⁴ This kind of allegiance is not realized if citizens are alienated from political institutions, if they or go along with the dictates of political in light of the balance of social and political forces.

To illustrate the phenomenon of stability for the right reasons, consider Joseph Raz's distinction between conformity and compliance.³⁵ For Raz, someone conforms to an obligation if she does what the obligation requires – if her behavior matches the pattern specified in the obligation. By contrast, someone complies with an obligation when she acts for it. Compliance, then, requires conforming behavior and has a further intentional dimension. In this sense, Rawls envisions the stability of principles of political cooperation as a matter of compliance, rather than conformity. When principles of justice are stable, "the reasons from which citizens act include those given by the account of justice that they affirm... which characterizes their effective sense of justice."³⁶

²⁹ *E.g.*, Schwarzenbach (1996)

³⁰ Freeman (2007).

³¹ PL, at 143.

³² PL, at 147; LOP, at 44.

³³ PL, at xxxvii; LOP, at 15.

³⁴ LOP, at 150.

³⁵ Raz (1999), at 178.

³⁶ PL, at xlii.

Rawls argues that liberal principles of justice could be stable for the right reasons, or (in Raz's terms) that they could secure compliance rather than merely conformity. In part, this stability arises from the educative function of such principles and the profound effect of the basic structure on citizens' lives (and especially their comprehensive doctrines).³⁷ However, part of this stability is also a function of citizens' adherence to the ideal of political justification. Fulfilling this intentional dimension of political justification requires a kind of identification with a political regime: reasonable members of a political society "carry out a justification of the shared political conception by embedding it in their several reasonable comprehensive doctrines."³⁸ The widespread incorporation of this ideal of political justification would facilitate this kind of identification, enabling a "wholehearted" membership in a political community even when one disagrees with the specific products of political institutions.³⁹ When others abide by the standards of political justification, they consider your standpoint in debates about the terms of political cooperation by manifesting a commitment to reaching an overlapping consensus regarding these terms. That others abide in this way, in turn, provides you with good reason to similarly consider their standpoints in proposing terms and deciding whether to accept the terms that have been proposed.

The ideal of political justification also buttresses Rawls's account of political legitimacy. In chapter 4, I defined political legitimacy in terms of authority: to say that a state or other political entity is legitimate is to say that it has the right to rule. This right is delimited, in that it applies to specific people or defined territory. On what Rawls calls the Liberal Principle of Legitimacy, the exercise of political power is legitimate only when it accords "with a constitution (written or unwritten) the essentials of which all citizens, as reasonable and rational, can endorse in the light of their common human reason."⁴⁰ The ideal of political justification helps explain the Liberal Principle of Legitimacy. When political arrangements are compatible with all of the elements of this ideal, they could (by definition) be endorsed in the right kind of way by those to whom they apply.

Rawls's discussion of the Liberal Principle of Legitimacy is brief, and one might quarrel with some of the underpinnings of his view. For Rawls, legitimacy primarily concerns "the moral authorization of political decision making rather than... the moral quality of the decisions made."⁴¹ Rawls interdefines legitimacy and justice, building "substantive demands of justice into his conception of legitimacy" by requiring that state action be properly pedigreed and that political decision procedures satisfy (in their

³⁷ JAF, at 57.

³⁸ PL, at 387.

³⁹ *Id.*, at xxxviii. This identification contrasts Rawls's ideal of political justification from perfectionist views (which assign no intrinsic importance to the manner in which citizens engage with principles of political morality) and classical liberal and contractarian views like Gauthier's (which would see wholehearted membership as irrelevant to the main questions of political theorizing).

⁴⁰ JAF, at 41.

⁴¹ May (2009), at 137.

essentials) reciprocity in justification.⁴² When a government is legitimate, it is “morally entitled to make, implement, and enforce decisions,” even if the decisions themselves lack moral justification.⁴³ Rawls’s contention that “[l]aws cannot be too unjust if they are to be legitimate” implies that it is possible for political arrangements to be at least somewhat unjust and still be legitimate.⁴⁴ Legitimacy is therefore a weaker standard than justice, one that imposes fewer “constraints on what can be done.”⁴⁵ For Rawls, then, the justness of political arrangements normally implies their legitimacy, and some unjust arrangements can nevertheless have the right to rule.

Not everyone would agree with Rawls’s conceptualization of justice and legitimacy. For example, as discussed in chapter 4, A. John Simmons sees legitimacy and justice as conceptually distinct. For Simmons, the question of justice asks about the rational justification for or moral acceptability of political arrangements. By contrast, the question of legitimacy asks when and in virtue of what particular political institutions have authority over specific individuals (and, on Simmons’s view, whether specific individuals have a content-independent obligation to obey these institutions). As such, legitimacy is an essentially relational phenomenon, while justification is not. Simmons raises a challenge to accounts like Rawls’s that I called the “conflation problem.”⁴⁶ According to this challenge, it is a conceptual error to infer a state’s legitimacy from its justification. Judgments about the justification of political arrangements turn on essentially third personal considerations (*e.g.*, the fairness of political arrangements as such), while judgments about legitimacy turn on essentially second-personal considerations (*i.e.*, the state’s authority over particular individuals). Thus, on Simmons’s challenge, the move from justification to legitimacy is a category mistake.

Rawls would presumably deny that the conflation problem is problematic. However, this evasion might be troubling, even if one were more broadly sympathetic with Rawls’s view.⁴⁷ Yet a stronger response to the conflation problem is possible. The Liberal Principle of Legitimacy can avoid the conflation problem entirely if it is reformulated as follows. Assuming that justification and legitimacy are conceptually distinct, it is appropriate to infer that just political institutions are legitimate over those to whom they apply when (and to the extent that) the ideal of political justification is realized within those institutions. In other words, a state has the right to rule over you if its political institutions are just and these institutions have been justified such that you lack good reason to reject them in favor of alternatives. The sensitivity to your standpoint and potential objections provides good reason for you to identify with these specific institutions, to see them (and the terms of political cooperation that they embody) as not

⁴² Reidy (2006), at 249.

⁴³ May (2009), at 138.

⁴⁴ PL, 428

⁴⁵ *Id.*

⁴⁶ See *supra*, at p. 100.

⁴⁷ See, *e.g.*, Horton (2012).

only worth preserving but in some sense your own. Others also have good reason to expect you to see institutions in this way.

Even if this particular reformulation of the Liberal Principle of Legitimacy doesn't adequately resolve the conflation problem, the ideal of political justification seems well-suited to providing some resolution of this problem. Many aspects of this ideal are essentially second-personal, especially the criterion of reciprocity.⁴⁸ Thus, when supplemented by the ideal of political justification, the Liberal Principle of Legitimacy infers legitimacy from second-personal considerations (like the degree to which political arrangements are sensitive to the reasons of specific people), rather than entirely from third-personal considerations (*e.g.*, the rational justification for those arrangements in comparison to non-cooperation). When political arrangements realize the ideal of political justification, citizens have good reason to see specific exercises of political power as legitimate, regardless of whether citizens are the co-authors or targets of these exercises (or both). When a citizen objects to a specific exercise of political authority, it is a sufficient response to her complaint that she lacks compelling reason to reject the terms of political cooperation that license this exercise in favor of alternative principles that would not license it.⁴⁹

Rawls's formulation of the Liberal Principle of Legitimacy says that political institutions have the right to rule to the extent that they are justified. My proposed reformulation is that, when political institutions are justified and realize the ideal of political justification, they have the right to rule over those for whom the ideal is realized. Thus, Rawls's account can provide a satisfactory answer to Simmons's conflation problem.

To summarize the main arguments of this part, Rawls sees a just society as one governed by principles of political cooperation that meet certain objective specifications, are derived from a fair deliberative procedure, and are fairly implemented to regulate the basic structure of a society. In addition, citizens would realize an ideal of political justification in a just, well-ordered society. This ideal of political justification requires that political arrangements be justified by reasons that all citizens could (consistent with their reasonable comprehensive doctrines) publicly accept and expect that others could also accept. When just principles have been implemented and the ideal of political justification is realized, then regulation by (and coercive enforcement of) these principles

⁴⁸ “[I]n justice as fairness, reciprocity is a relation between citizens expressed by principles of justice that regulate a social world in which everyone benefits judged with respect to an appropriate benchmark of equality defined with respect to that world . . .” PL, p. 17.

⁴⁹ Relational accounts of the justification for punishment have a parallel structure. Some argue that the normative ideal of the political relationship includes being susceptible to certain forms of reproach to wrongdoing for which one is responsible. If someone is responsible for wrongdoing in the appropriate way and stands in political relations with others, then it is fair to expect that person (in virtue of her relationships) to be subject to certain forms of reproach. Thus, on this argument, justifying punishment does not depend on whether the target of punishment actually consents to these forms of reproach, nor does it imply that (in wrongdoing) the target generally forfeits her rights against the kinds of harsh treatment that might be involved in reproach. *See, e.g.*, Bennett (2008); Duff (2012).

is consistent with the freedom and equality of all citizens. Moreover, when these conditions are satisfied, political arrangements can be expected to be both stable and legitimate.

II. The Basic Move

Given this framework, it might be wondered whether injustice and reparation matter to the problem of justice. The Rawlsian might preempt high-level theoretical discussion of these issues with the following argument, which I will call the *basic move*. Any principle of reparation implicates a variety of considerations related to an underlying injustice. In chapters 3 and 4, I discussed some of these in connection with the phenomenology of reparation. They include the bipolar structure of wrongdoing and reparation, or how (at least some) injustice ground complaints by specific victims or claimants that sound against specific wrongdoers or payers; the sense of injustice, or the particularized grievance that arises out of victimization by injustice; the sensitivity requirement, or the need for reparation to respond and attribute non-derivative significance to the victim or claimant's sense of injustice; and the non-replication requirement, which sees gestures of redress that reproduce the disrespectful attitudes or reasoning implicit in an underlying injustice as imperfect reparation (at best). Each of these considerations makes essential reference to an underlying injustice. For example, in order to satisfy the non-replication requirement, it is necessary to describe the disrespectful attitudes or reasoning (if any) that attended an underlying injustice. I will call these (and other) factors necessary to formulate an argument about reparation collectively *injustice-related considerations*.

The basic move argues that reparation is not an important theoretical topic because injustice-related considerations would be screened by Rawls's apparatus. Formulating a political conception of justice requires "some point of view, removed from and not distorted by the particular features and circumstances of the all-encompassing background framework, from which a fair agreement between persons regarded as free and equal can be reached."⁵⁰ This abstract methodology "models what we regard—here and now—as fair conditions under which the representatives of free and equal citizens are to specify the terms of social cooperation in the case of the basic structure of society...."⁵¹ For Rawls, examples of such particularities include race, ethnic group, sex and gender, native endowments (like strength and intelligence), the "fact that we occupy a particular social position," and the "fact that we affirm a particular religious, philosophical, or moral comprehensive doctrine."⁵² If these "particular features and circumstances" of citizens were not screened from contemplation, then they would inappropriately influence the content the principles that govern a society's basic political institutions, thus precluding the possibility that these principle could be the object of fair agreement between all free and equal persons.⁵³ This method of abstraction is crucial to

⁵⁰ PL, at 23.

⁵¹ *Id.*, at 27.

⁵² *Id.*, at 24-25.

⁵³ JAF, at 85-86; PL 272-4.

Rawls's argument that the citizens of a well-ordered society accept both principles of justice and their justification.⁵⁴

At first glance, injustice-related considerations would seem to call for screening for the same reasons that other particularities do. Lifting the veil of ignorance to introduce injustice-related considerations would enable "contingent effects" (namely, those related to one's connection with an injustice) to "influence the principles that are to regulate" social relations.⁵⁵ For example, introducing these considerations might counsel against an initially equalized distribution of social primary goods, since the parties in the original position could well see victimization by injustice as calling for a disproportionate share of resources.

Introducing injustice-related considerations might also affect decisions about the kinds of opportunities that should be available to citizens. Perhaps citizens whose opportunities are constrained as a result of injustice should have greater opportunities than citizens generally. Any principle that incorporated this insight would depart from Rawls's description of the principle of fair equality of opportunity, since it might require at least some inequalities in opportunity.⁵⁶

Further, introducing injustice-related considerations might call for a different scheme of equal basic liberties in order to prevent future recurrences of injustices. For example, if a society's history of religiously-motivated violence were introduced in the original position, the principles resulting from this decision procedure might call for greater regulation of religious association than would a version in which this history were screened. Likewise, allowing consideration of racialized violence (like the Greenwood riots) might result in more restrictive principles governing private association in order to protect against a recurrence of violence as a byproduct of groups like the Ku Klux Klan.

Finally, it might be difficult to pierce the veil for injustice-related considerations while continuing to screen characteristics that are highly correlated with victimization by injustice (like race, class, and gender). Yet focus on a wider range of particularities would defeat the logic for invoking Original Position—namely, the effort to model the agreement of "moral persons... in abstraction from their contingencies."⁵⁷ In sum, piercing the veil for injustice-related considerations would likely change the principles of political cooperation that could secure reasonable agreement, and it would compromise the underlying Kantian logic of Rawls's program.

The basic move is consistent with the abstract, forward-looking orientation of Rawls's approach. The kind of screening that underlies the basic move not only allows for the derivation of fair principles of political cooperation, but also ensures that citizens

⁵⁴ JAF, at 89.

⁵⁵ PL, at 272.

⁵⁶ Taylor (2009), at 482.

⁵⁷ PL, at 273.

will have good reason to accept these principles as part of their comprehensive doctrines. Some challenge this forward-looking orientation on its face. For example, A. John Simmons argues that Rawls's theory of justice cannot "acknowledge the legitimate grievances of... persons who have been illegitimately subjected to state coercion, except in cases where all subjects can be so described."⁵⁸ As a result, Simmons contends, Rawls is committed to one of two indefensible positions. On one hand, Rawls might see "wrongs done yesterday [as] in principle different from identical wrongs done tomorrow," since the latter are addressed by principles of justice but the former are not. On the other hand, Rawls might see all "past wrongful subjections by states or persons and territories" as impossible to remedy under principles of justice, "and so morally uninteresting."⁵⁹ This seems to pose a dilemma for Rawls: either keep the general setup of philosophical liberalism, or directly account for the significance of injustice-related considerations (which, for Simmons, would require incorporating an essentially historical dimension to principles of justice).

The Rawlsian might maintain the basic move but respond to Simmons's dilemma by contending that injustice-related considerations have *some* relevance to justice, but they lack *fundamental* relevance. There are at least three ways to carry out this response. First, the Rawlsian might see injustice and reparation as topics in non-ideal theory, and so outside the scope of Rawls's main arguments. I call this the *evasive maneuver*. In *Justice as Fairness*, Rawls conceded that problems related to race-based and gender-based discrimination were "not on the agenda" of his project in *Theory of Justice*.⁶⁰ These topics presuppose only partial compliance with the principles of justice. By contrast, Rawls's main task is to formulate terms of political cooperation that could be fully complied with. Thus, Rawls does not aim to address the phenomenon of partial compliance. More specifically, Rawls sees nonideal theory as containing "two rather different subparts," principles for addressing "natural limitations and historical contingencies" and "principles for meeting injustice."⁶¹ A principle of reparation seems like exactly such a principle "for meeting injustice." Alternatively, the Rawlsian might see the topic of reparation as part of a theory that outlines the transition from a non-ideal world to one in which the ideal principles of justice are realized. As Rawls put it, considerations related to the "desire to preserve the benefits of previous injustice" belong "to the process of transition" which is "covered by nonideal theory and not by the principles of justice for a well-ordered society."⁶² Finally, the topic of reparation might be relevant in latter stages of the 4-stage sequence by which principles of justice are implemented into policy.⁶³ On any of these arguments, questions of injustice and

⁵⁸ Simmons (2010), at 1827.

⁵⁹ *Id.*, at 1829.

⁶⁰ JAF, at 66.

⁶¹ TJ, at 216.

⁶² PL, at 17-18.

⁶³ For example, in explaining why discussions of race are largely absent from *Theory of Justice*, Seana Shiffrin considers the possible argument that "many of the pressing issues regarding race, such as reparations and affirmative action, are intimately connected to redress for and reconstruction in the face of public failures and wrongs toward people of color." Shiffrin (2004), at 1654. To be sure, Shiffrin ultimately

reparation do not bear directly on what count as fair terms (as the basic move maintains they should not). Thus, by appealing to the evasive maneuver, the Rawlsian would deny that injustice-related matter fundamentally to the formulation of principles for political cooperation. In this way, injustice-related considerations are similar to race-based or gender-based considerations: they are topics to be resolved by the application of fair principles of justice, rather than inputs in to the principles themselves.

The Rawlsian might also contend that all of the significance of injustices can be fully accounted for within other parts of Rawls's theory. This is a *reductionist maneuver*, since it reduces the importance of injustices to some other consideration. There are at least two possible reductionist maneuvers. First, one might redescribe the significance of injustices in terms of equality of opportunity. Tommie Shelby makes this point in analyzing the injustice of racialized disadvantage that arises from injustice. According to Shelby, realizing fair equality of opportunity would "mitigate, if not correct" any disadvantages in life prospects based on race "by insuring that the life prospects of racial minorities are not negatively affected by the economic legacy of racial oppression." Thus, "a basic structure that provided fair equality of opportunity for all citizens regardless of race would remove many of the socioeconomic burdens that racial minorities presently shoulder because of the history of racial injustice."⁶⁴ Some injustices deny people the chance to participate in the political institutions of a democratic society. Providing equivalent opportunities would require many of the same gesture that are traditionally called for by reparations movements, such as affirmative action and the provision of resources to individuals or communities that have been victimized by injustices.

Injustices might also matter based on how they affect the social resources that citizens have. Seen in this way, questions of reparation reduce to questions of distributive justice. Injustice-related considerations might be relevant to defining the least-advantaged groups that are favored under Rawls's difference principle. On this principle, economic inequalities are justified only if they work to the benefit of the least advantaged group in society. Suppose that A and B have similar shares of social resources, but A's position can be attributed to injustice while B's cannot. In this scenario, the Rawlsian might concede that the route by which A arrived at his (or its) share of social resources matters to whether A is the least advantaged. If injustice were incorporated into the definition of disadvantage, then the difference principle might resemble a principle of reparation in systematically calling for programs that improve the position of those subjected to injustice.⁶⁵

concludes that the inability of Rawls's apparatus to "handle problems of redress or historically and culturally located features of a society" does not fully justify relegating these issues to topics in non-ideal theory or locating them "further down the four-stage sequence." *Id.*, at 1655. However, a Rawlsian seeking to engage in the evasive maneuver might be adopt Shiffrin's premise and deny her conclusion.

⁶⁴ Shelby (2004), at 1711; *see also* Carcieri (2010), at 305 (contending that reparations "targeted at the health and educational needs of children" in communities that have been subject to racialized injustice "go to the root of what is essential to make [Rawls's Fair Equality of Opportunity principle] a reality.")

⁶⁵ Pierik (2006), at 436.

The reductionist maneuver denies that injustice-based considerations have distinctive significance, but its advocate can still attribute importance to these considerations in debates about justice. For example, injustices can be invoked to motivate citizens to live up to their commitments in distributive justice, providing an additional rationale for complying with egalitarian demands based on the intuitive plausibility of principles like corrective justice.⁶⁶ As such, reparations arguments can often “substitute for egalitarian arguments when the latter are resisted.”⁶⁷ However, the distributive justice arguments do the normative work: “[i]f a current distributive arrangement offends against the prevailing standards of egalitarian justice, there is a reason of justice to take action and to rectify the situation, independently of how the arrangement came about.”⁶⁸ On this way of thinking, distributive justice is paramount. There would be no case for reparation if redressing an injustice required “the world [to] become distributively less just.”⁶⁹ Thus, Leif Wenar argues, if one favored an egalitarian principle of distributive justice and if “in America blacks and whites were now perfectly equal in wealth, power, and prospects,” then “you would not insist on reparations for the injustices of slavery.”⁷⁰

The evasive maneuver denies that injustices are on the agenda for theorizing justice. The reductionist maneuver allows the Rawlsian to account for the significance of past injustices without abandoning the abstract, forward-looking orientation of Rawls’s theory, thus escaping Simmons’s dilemma. The basic move would not treat past and future injustices asymmetrically, nor would it require denying that past injustices matter. However, an implication of the reductionist maneuver is that, if an injustice does not disrupt equal opportunity or effect an unjust distribution, then it lacks normative significance and so does not call for reparation.

So the basic move is central to Rawls’s project. On this move, theorizing justice requires abstracting from injustice-related considerations. As such, the basic move denies that injustice and reparation have fundamental importance. Recruiting Rawlsian liberalism to ground a theory of reparation requires some response to the basic move. This response cannot revise too much of Rawls’s project, or else the resulting theory will not be a species of philosophical liberalism. In particular, we would need to show that there is no contradiction in holding injustice-related considerations relevant to the formulation of principles of justice, while continuing to screen other kinds of particularities (even some—like race, gender, and class— that are highly correlated with serious injustices). We also need to show the inadequacy of evasive and reductionist maneuvers—that is, to establish that fair terms of cooperation cannot evade questions related to injustice or reduce them to other questions that philosophical liberalism already addresses.

⁶⁶ Tan (2007), at 287.

⁶⁷ *Id.*, at 281.

⁶⁸ *Id.*, at 285.

⁶⁹ Wenar (2006), at 402.

⁷⁰ *Id.*

III. Why the Basic Move Fails

The basic move fails. Injustice-related considerations are fundamentally relevant to establishing a well-ordered society. The failure of the basic move can be appreciated indirectly, by analogy to reasonable disagreement about the good. Rawls saw such disagreements as inevitably arising from incompatible (but reasonable) comprehensive doctrines. For Rawls, accommodating reasonable disagreements is critically important to formulating fair terms of social cooperation. The indirect argument is that injustice-related considerations matter in the same ways that considerations related to reasonable disagreement matter. The case accommodating the former is at least as strong as the case for accommodating the latter.

This indirect argument, in turn, suggests a more direct argument against the basic move. Injustice-related considerations matter because they prevent realization of the ideal of political justification. These considerations also block the inference that fair terms of political cooperation will be stable for the right reasons and legitimate. Therefore, liberal principles of political justice must confront injustice-related considerations at a fundamental level, which requires a principle of reparation.

A. The Indirect Argument

Injustice-related considerations matter to justice in the much same way that reasonable disagreement matters. Suppose that a society derived basic terms of social cooperation from a particular comprehensive doctrine—say, the principles of justice as fairness from Kantian premises. These terms would meet the objective requirements that Rawls expects of a political conception of justice. They would specify rights, liberties, and opportunities; assign priority to these freedoms in political life; and provide a measure for the distribution of all-purpose means to all. Yet these terms could not, on their own, govern a well-ordered society because they are derived from a specific comprehensive doctrine. Reasonable people who adhered to alternative comprehensive doctrines (say, Catholicism) could disagree with the metaphysical assumptions implicit in the argument for the principles of justice as fairness. The moral basis for political liberalism is respect for other citizens. Imposing these terms of cooperation in this way would fail to respect the adherents to reasonable doctrines like Catholicism, because their accepting the argument for these terms would require them to reject the comprehensive doctrine to which they adhere.

Reasonable disagreement, then, is endemic and threatens to impair the political relationship. Given disagreements about the good, justifying terms of political cooperation solely by appeal to a comprehensive doctrine provides non-adherents to that doctrine with a good reason to reject those terms, even if the terms meet the objective requirements for a viable political conception of justice. If some people have reason to reject ostensibly fair terms, then coercively imposing such terms on those people would be inconsistent with respecting their freedom and equality. Such terms would also not be stable for the right reasons. Non-adherents might have prudential reason to conform to these terms, but this conformity would fall short of the compliance that is crucial to stability for the right reasons. Also, arrangements that were justified in this way would

fail to satisfy the Liberal Principle of Legitimacy. Given their Kantian derivation, not all citizens could be expected to endorse these terms in light of their common human reason.

If reasonable disagreement threatens the possibility of political justification, then it poses a fundamental theoretical problem. A theory of political justice cannot avoid these challenges by construing them as a contingent feature of political societies, or seeing them as topics in non-ideal theory. Such evasions are ruled out by what Rawls calls the fact of reasonable pluralism, the notion that diversity of “reasonable comprehensive religious, philosophical, and moral doctrines” is a “permanent feature of the public culture of democracy.”⁷¹ Nor can reasonable disagreement be reduced to some other phenomenon, like fair equality of opportunity or distributive justice. The Catholic’s reasonable disagreement about the derivation of Kantian terms of political cooperation would matter even if these principles ensured that Catholics would have access to public offices and adequate shares of social resources. Pointing to these factors would in response to the Catholic’s objection would be a *non sequitur*, since a disagreement about the good is categorically different than a disagreement about the distribution of goods.

The challenge of reasonable disagreement cannot be evaded or reduced. It must be accommodated. In Rawls’s theory, the commitment to public reason provides this accommodation, guarding against the impairing effects of reasonable disagreement. As noted above, public reason requires that debates over constitutional essentials and basic justice (as well as the conduct of officials within political institutions) be conducted on a shared public basis, one that does not presuppose any particular commitment to a comprehensive doctrine. Public reason helps realize the reciprocal element of the ideal of political justification: when resolution of these issues adheres to public reason, each person can be expected to accept and comply with ostensibly fair terms of political cooperation, and each can expect others to do so as well.

Consistently with the element of toleration, public reason also limits the kinds of criticisms that may be leveled at those who, based on tenets of their comprehensive doctrines, have reasons to reject ostensibly fair terms. Rawls sees the commitment to public reason as constitutive of reasonable comprehensive doctrines. Given this commitment, comprehensive doctrines may only be criticized as unreasonable—that is, as incompatible “with the essentials of public reason and a democratic polity.”⁷² In general, citizens’ attachment to their comprehensive doctrines are products of their exercising moral powers. Given this origin, some divergence among these doctrines is inevitable. Therefore, principles of political justification cannot generally invalidate doctrine-based objections without disrespecting the adherents to those doctrines.

When the dictates of public reason are realized, adherents to reasonable doctrines have good reason to accept terms of political cooperation, even if these terms are incompatible with doctrinal tenets. Having “embed[ded] their shared political conception in their reasonable comprehensive doctrines,” it is sensible for these citizens to “judge

⁷¹ PL, at 36.

⁷² LOP, at 132.

(by their comprehensive view) that political values either outweigh or are normally (though not always) ordered prior to whatever nonpolitical values may conflict with them.”⁷³ Such citizens “may well judge from within their reasonable comprehensive doctrines that political values are a very great values to be realized in the framework of their political and social existence....”⁷⁴

The commitment to public reason is a fundamental constraint on debates about the terms of political cooperation. To see why this constraint must be fundamental, consider the possibility of a multi-stage account of political justification. Suppose at the first stage, “true” principles of political cooperation are developed in accordance with a Kantian comprehensive doctrine. Assume that these principles satisfy the objective requirements that Rawls requires of an adequate version of political liberalism. Adherents to other comprehensive doctrines might disagree with the case for these principles based on the method of their derivation. Yet these disagreements could be accommodated at a later stage (*e.g.*, by modifying the content of these principles in light of alternative doctrines, or else providing exemptions to the principles to adherents of incompatible doctrines). Under Rawls’s framework, this account of justification would be deficient because it would fail to respect adherents to alternative comprehensive doctrines in the way that the ideal of political justification requires. Terms of cooperation justified in this way would not be stable for the right reasons, nor would they satisfy the Liberal Principle of Legitimacy.

In sum, reasonable disagreement threatens to impair the political relationship in light of the ideal of political justification, and the fact of reasonable pluralism requires theorists of justice to assume that such disagreement will be endemic. Public reason fundamentally constrains how political justification proceeds. In doing so, public reason guards against the threat of impairment, insulating the terms of political cooperation from objections based on their incompatibility with comprehensive doctrines.

Injustice-related considerations also bear on political relationships in a way that calls for accommodation at a fundamental level. Each step of the argument for why injustice-related considerations matter parallels the argument for why disagreement-related considerations matter. First, someone’s connection to injustice can have normative significance in the same way that her adherence to a comprehensive doctrine can. For example, Tommie Shelby argues that a “shared experience of racial oppression and a joint commitment to resist it” can ground racial solidarity.⁷⁵ Shelby identifies five features that are jointly sufficient to establish robust group solidarity: mutuality of identification with the group; a special concern or disposition to act on behalf of group members; shared goals and values (which are, in part, constitutive of group identity); loyalty; and mutual trust (which both grounds collective action and guards against exploitation).⁷⁶ Shelby argues that several prominent accounts of the basis for African-

⁷³ PL, at 392.

⁷⁴ PL, at 393.

⁷⁵ Shelby (2005), at 11-12.

⁷⁶ *Id.*, at 69-70.

American solidarity cannot satisfy these features.⁷⁷ Shelby's preferred account grounds black solidarity on common oppression: African-Americans' shared encounter with injustice provides a (metaphysically uncontroversial) framework for solidarity. The existence of anti-black racism "calls on those who suffer under it to act collectively to end that oppression or at least to reduce its impact on their lives."⁷⁸ Shelby argues that a solidarity based on common oppression can meet each of the elements of robust group solidarity described above. Although Shelby does not address this question directly, his injustice-based account of solidarity seems to generalize to any group that has been systematically subjected to injustice or oppression.

If Shelby's argument is sound and generalizes, then adhering to a comprehensive doctrine (like Catholicism) resembles having a connection to an injustice (like African-Americans and the history of racialized oppression in the United States) in important ways. Both kinds of connections can facilitate solidarity, and so enable some of the most valuable interactions in a person's life. More importantly, both kinds of connections can shape someone's outlook on the good life, recruiting what Rawls calls a citizen's "moral powers."⁷⁹ Practicing Catholics exercise their moral agency in adhering to Catholic doctrine. This adherence must be respected in the justification of political arrangements. Likewise, Shelby's argument suggests that the injustices to which African-Americans have been subjected play a crucial role in defining what it means to be African-American. To the extent that someone sees her African-American identity as relevant to living a well-lived life, this adherence also deserves respect in the justification of political arrangements.

Second, some injustice-related considerations can also provide citizens with reasons to reject ostensibly fair terms of political cooperation. Everyone has compelling background reason to accept fair terms of political cooperation, which are a "very great value[] to be realized."⁸⁰ Yet, when faced with ostensibly fair terms of political cooperation whose justification is localized within a particular comprehensive doctrine, the adherent to a reasonable comprehensive doctrine might say the following: "Even if these terms are fair, they are justified in such a way that accepting them would require repudiating much of what makes my life meaningful. Compromising in this way would violate my self-respect, and it is unfair for you to expect me to make this kind of compromise." Because attachment to injustices resembles attachment to comprehensive doctrines in the relevant respects, the former provide *prima facie* reason to reject ostensibly fair terms of political cooperation just as much as the latter do. If objectively

⁷⁷ Shelby argues essentialist explanations, which base solidarity on shared biological characteristics, are empirically invalid. Nationalist explanations, which base solidarity on a common struggle for political self-determination, face insuperable collective action problems. Collective identity explanations posit a collective and distinctive black identity. Yet, according to Shelby, such theories are "unnecessary for forging effective bonds among blacks, would create (or exacerbate an already) undue constraint on individual freedom, and [are] likely... to be self-defeating." Shelby (2002), at 235.

⁷⁸ Shelby (2002), at 232.

⁷⁹ PL, at 19.

⁸⁰ PL, at 393.

fair terms abstract from the existence of injustice, then a citizen with the appropriate connection to an injustice might say the following: “Even though these terms are ostensibly fair, they are justified in a way that denies the significance of the injustice to which I am connected. Thus, I cannot accept these terms without denying that the underlying injustice matters. Yet denying that this injustice matters would be a violation of my self-respect, and it is unfair for you to expect me to make this kind of compromise.” Injustice-related considerations, like disagreement-related considerations, seem to be “stubborn consensus-hindering facts,” and a consensus-oriented normative theory must “adjust [its] recommendations to the reality of” the former just as much as the latter.⁸¹

If some adjustment is necessary, what form should it take? For disagreement-related considerations, this adjustment is the commitment to public reason, which serves as a fundamental constraint on justifying terms of political cooperation. It will not do to grapple with disagreement-related considerations only after the true, justified principles of political justice have been identified. Rather, disagreement-related considerations bear on what principles can be justified in the first place. Similarly, injustice-related considerations pose a fundamental obstacle to justifying terms of political cooperation. Ignoring this obstacle fails to respect the citizens whose political relationships are impaired by injustice. Thus, a multi-stage strategy of accommodating the injustice-related considerations is not enough. Injustice must be accounted for in the formulation of terms of political cooperation, rather than after these terms have been worked out. What form that accommodation must take is a problem I discuss below in connection with the direct argument against the basic move. However, any satisfactory accommodation of injustice-related considerations will include some form of reparation, if that concept is understood broadly to encompass all political gestures that essentially reference and respond to the grievances arising out of an underlying injustice.

Moreover, injustice-related considerations cannot be evaded or reduced. The evasive maneuver is inadequate because injustices (like reasonable disagreements) give people good reason to reject ostensibly fair terms of political cooperation. Likewise, the reductionist maneuvers do not respond to the challenge posed by injustice. Because injustices (like reasonable disagreements) threaten the possibility of political justification, they can impair the political relationship even when they do not generate unequal opportunities or produce unfair or inadequate shares of social resources.

The indirect argument against the basic move is that injustices threaten to impair the political relationship in the same way that reasonable disagreement does. In light of this threat, both types phenomena must be accounted for in the justification of terms of political cooperation. It is not enough to assume that injustices had never happened, just as it is not enough to assume that people converge in their views of the good. Yet the basic move calls for exactly this kind of abstraction. Therefore, the basic move should be rejected.

⁸¹ Krasnoff (1998), at 273.

B. The Direct Argument

The indirect argument suggests that injustices matter to theorizing justice because they can impair the political relationship. This point can be made more straightforwardly by examining how certain injustices frustrate realization of the ideal of political justification. This ideal requires political arrangements to be justified by principles that all citizens would (consistent with their reasonable comprehensive doctrines) have reason to publicly accept (consistent with the element of reasonableness) and expect that others could also accept (consistent with the criterion of reciprocity). When the justification for terms of cooperation satisfies the elements of reasonableness, reciprocity, tolerance, and publicity, these terms can be said to be legitimate and stable for the right reasons.

Injustice-related considerations provide some citizens with reasons to reject ostensibly fair terms of political cooperation. Left unaddressed, these reasons preclude realization of the ideal of political justification, which in turn denies that ostensibly fair terms could be stable or legitimate. Not all injustices have this impairing effect, but some do. Accounting for these reasons (and responding to the injustices that generate them) is a fundamental theoretical problem. Yet the basic move denies that accounting for these reasons could be a basic theoretical problem. So the basic move should be rejected.

To make the direct argument more concrete, consider the following scenario, which I'll call "Alternative Reconstruction." It is 1865. Rather than ratifying the Reconstruction Amendments through an undemocratic political system, the U.S. federal government announces a foundational commitment that no citizen will have reason to reject general principles of political cooperation in favor of alternatives. The federal government abolishes the practice of slavery, grants full citizenship to all former slaves, and undertakes reforms to ensure the fair value of rights to political participation. This democratic process generates terms to govern the basic structure of American society that are fair under the relevant substantive criteria. These terms acknowledge that former slaves are in a worse position than many white tenant farmers, despite experiencing similar levels of material deprivation. As such, former slaves are given special priority in the provision of social resources and eligibility for public offices.

In Alternative Reconstruction, former slaves would have good reason to accept these terms of political cooperation. The principles are fair, and they respect the freedom and equality of all U.S. citizens. Former slaves might also have reason to endorse these principles, to recognize their moral value and to require future revisions to political arrangements to satisfy the standard of reasonable non-rejection.

However, it also seems plausible that former slaves would have reasons to reject these terms of political cooperation. As Thomas Pogge contends, "the manner in which present social rules have once been instituted can affect present moral reasons for action in regard to these rules."⁸² The reasons for rejection that arise out of an injustice like slavery can be appreciated in a few distinct ways. First, former slaves would have good reason to resent the perpetrators, to hold them in contempt. Therefore, they might object

⁸² Pogge (2004), at §3.

to including these people within the relevant justificatory audience. Second, former slaves might well doubt the credibility of political commitments arising out of a political system that perpetuated slavery. Indeed, former slaves might have reason distrust *any* product of a political process that once enslaved them, however fair the product or the system itself looked from an objective perspective. Finally, former slaves might object because these principles do not fundamentally reference or respond to slavery. Principles that abstract from injustices like slavery might be less likely to protect against similar kinds of injustices in the future, at least compared to principles that referenced such injustices more directly. Abstractly justified principles would deny that the grievances of former slaves arising out of slavery must (or should) bear directly on the political arrangements of a just society. Yet these grievances would likely form an important part of the self-conception of formerly enslaved persons. Therefore, denying that these grievances matter directly to what justice requires might disrespect those who were enslaved by denying that their grievances figure directly in the determination of what justice requires. The contractualist liberal holds that reasonable non-rejectability is a general requirement of political justification. Formerly enslaved persons who were motivated to find principles for the general regulation of behavior could reject abstractly justified principles in favor of candidates that specifically referenced and responded to the injustice of slavery (so long as these candidates also met the objective requirements that Rawls envisions as constraining varieties of political liberalism).

Alternative Reconstruction illustrates that injustices can provide certain people (in this scenario, the victims of an injustice) reasons to reject ostensibly fair principles of political cooperation. This possibility is made salient by the reasonableness element of the ideal of political justification. If an injustice gives some people reasons for rejecting ostensibly fair principles, then (under the element of reciprocity) others are unjustified in expecting or demanding them to comply with such terms.

Likewise, the element of tolerance prevents certain ways of responding to these injustice-based considerations. Everyone has good background reasons to want political cooperation on terms that all can accept. Yet, in our world at least, political arrangements almost never embody or produce such terms. If ostensibly fair terms were proposed to govern political arrangements, our strong background reasons of justice might lead us to scrutinize (and perhaps deny) putative objections to these terms. This scrutiny could take the form of criticizing those who object to ostensibly fair terms based on injustice-related considerations. For example, we might respond to some objections based on injustice by denying the accuracy of the objector's claim. In the Greenwood case, for example, one might portray African-American citizens as instigators of the riots or lawbreakers in order to discount or deny the significance of this injustice. In Alternative Reconstruction, an African-American's grievance arising out of slavery might be disputed on the grounds that some African-Americans owned slaves, or that slavery actually benefitted those who were enslaved in comparison to some counterfactual baseline, or that many slaves preferred the conditions of their enslavement to available alternatives. Further, one might criticize the invocation of an injustice on standing-related grounds. "Perhaps," we might say, "this injustices gives some people (like victims) grounds for objecting to fair terms of political cooperation. However, you are not a victim, but the descendant of a victim."

You would not have exited if not for the injustice. Therefore, this injustice lacks the requisite significance *for you*, although it might be sufficiently significant for someone else.”

Toleration precludes each of these ways of criticizing injustice-related considerations and, by extension, of denying or minimizing the significance of an injustice. These criticisms aim to deny the truth or internal validity of complaints arising out of injustices. Yet this mode of criticism misapprehends why injustice-related considerations matter in the first place. The point of political liberalism is not to derive true principles of political justice, but reasonable ones. Therefore, if political arrangements are reasonable, it is inapt to criticize them on the grounds that they are false. The same holds for objections to political arrangements: it matters that these objections are reasonable, not that they are true (or even valid).

Consider the analogous limitations on criticizing objections from comprehensive doctrines. A Catholic might invoke church doctrine to reject a constitutional right to birth control. In such a case, it would be inappropriate (and inapposite) to respond that Catholic teaching doesn’t *really* rule out this right to birth control. Doctrinal prescriptions are often indeterminate or disputed among adherents to a doctrine. More importantly, this response is beside the point. It would be inappropriate to respond “Catholic teaching is incoherent on this matter, so it should not form the basis for public policy.” This response fails to exhibit the kind of respect that grounds the ideal of political justification. Rather, the appropriate response is that invocation of Catholic doctrine is insufficient to justify an argument about a constitutional essential, given the demands of public reason.⁸³

Likewise, certain ways of challenging the normative force of injustice-related considerations seem problematic. In the Alternative Reconstruction scenario, if someone objected to ostensibly fair terms of political cooperation based on considerations related to slavery, then it would be inappropriate to deny that the conditions faced by enslaved persons were more advantageous than those faced by White tenement farmers in the South. The same holds for the criticism that persons ensnared in chattel slavery actually benefitted from the practice, at least compared with similarly situated Africans who were not enslaved. Both of these criticisms would pose internal challenges to complaints based on injustice-related considerations, but neither is consistent with the type of tolerance required by the ideal of political justification.⁸⁴

Thus, injustice-related considerations prevent the realization of the ideal of political justification. These considerations sometimes provide certain citizens with reasons to reject ostensibly fair terms of political cooperation. Given the requirement of

⁸³ On what Rawls calls the “wide view” of public political culture, such a doctrine-based consideration might appropriately motivate someone to provide a public reason for a position like this, but the former would not be a substitute for the latter. LOP, at 152-6.

⁸⁴ On the other hand, it would be appropriate to respond that someone’s reasons for accepting ostensibly fair terms of political cooperation outweigh or override her injustice-based reasons for rejecting them. I analyze this criticism in the discussion (in chapter 6) of how historical distance affects the case for reparation.

reciprocity, these reasons constrain the terms that other citizens may reasonably expect or impose. Also, the element of toleration rules out certain ways of criticizing these rejections, although it does not prevent the criticism that rejection is unreasonable.

Because injustice-related considerations preclude the ideal of political justification, they also block two of its most important inferences. First, if some have reason to reject ostensibly fair principles of political cooperation, then it is inappropriate to infer that a system regulated by these principles will be stable for the right reasons. Recall that this kind of stability requires compliance, rather than merely conformity, with political arrangements. Citizens must do more than behave in the way that legal and political institutions prescribe in order for society to exhibit this kind of stability. They must also have an allegiance to the moral ideals and values of the operative political system. Injustice-based considerations can frustrate this kind of identification, and so rule out the possibility of Rawlsian stability.

Consider the Alternative Reconstruction scenario. The terms of political cooperation proposed here might protect the rights of the formerly enslaved person and advance her interests significantly in comparison with non-state arrangements. If the relevant standard of political justification were the protection of rights or mutual advantage, then these terms would be justifiable despite the existence of past injustice.⁸⁵ However, these standards are too flimsy to be stable because they cannot be expected to secure the allegiance of all citizens. On a thicker standard like Rawls's, political justification requires more than establishing that a citizen's rights would be protected or her interests furthered by political arrangements. We must also establish that she has good reasons for allegiance to these arrangements. Yet grievances arising out of injustice provide strong barriers to some people's identification with a political society, and thus threaten the possibility that political arrangements will secure the compliance (and not just the conformity) of all.

Injustice-related considerations also cut against the Liberal Principle of Legitimacy. Recall that legitimacy is an essentially second-personal judgment: political arrangements are not legitimate in the abstract, but rather have the right to rule over specified individuals. On the other hand, justification is an essentially third-personal judgment: the justification of terms of political cooperation can proceed based on criteria that anyone can appreciate. The notion that legitimacy follows justification is thus a category mistake that, after Simmons, I called the "conflation problem." As noted above, realizing the ideal of political justification helps avoid this conflation problem. When this ideal is realized, then terms of political cooperation are justified to you, in terms that you can accept. This mode of justification allows the derivation of an essentially second-personal conclusion (that a state is legitimate over X) from essentially third-personal premises (that a state exhibits the relevant properties of justification). The justness of

⁸⁵ A libertarian standard might deny that the terms involved in Alternative Reconstruction provide sufficient rectification. However, this standard could be met by folding the requirements of rectification into distributive justice—that is, by providing victims of injustice with extra social resources in order to make good on the rights violated by injustice. See Nozick (1974), at 231.

these terms can, independently of your consent and consistently with your freedom, give someone else the right to rule over you.

Yet injustice-related considerations can block the inference that a government that operates according to ostensibly fair political arrangements has the right to rule over specific people. If you have reasons to reject ostensibly fair terms of cooperation, then these terms are not justified to you. If terms are not justifiable to you, then Simmons's conflation problem retains its sting. The general justification of particular terms would not establish that institutions governed by these terms have the right to rule over you.

Thus, injustices matter because they preclude the realization of the ideal of political justification. This notion explains why the basic move fails, why these injustices cannot be abstracted away or reduced to other kinds of problems. It also explains why the evasive maneuver, which denies that questions of reparation are on the agenda for theorizing justice, does not succeed. This move simply begs the question. If injustice-related considerations can impair the political relationship in the way I have argued, then reparation should be on the agenda for theorizing justice.

IV. A Rawlsian Rejoinder

Recall that the basic move seems to be a linchpin of Rawls's method for theorizing justice. As such, a Rawlsian would not give up on the basic move easily. Perhaps, it might be objected, I have inflated the possible significance of injustice-related considerations. Injustices do not, in general, prevent realization of the ideal of political justification. Everyone has strong background reasons to accept fair terms of political cooperation. These background reasons might trump or outweigh any reasons to reject such terms that are generated by someone's connection with an injustice. Moreover, no plausible conception of social stability would allow that every deviation from what justice permits or requires threatens to destabilize the entire social order. Some injustices, while objectionable, are nevertheless "within the limits of political experimentation."⁸⁶

Moreover, the Rawlsian might argue, the reductionist maneuver captures the significance of most injustices. Many injustices matter solely because they violate people's rights, or because they deprive people of fair opportunities, or because they make it more difficult for people to lead meaningful lives. Thus, the significance of these injustices can be fully accounted by principles of political justice. If such principles are sufficiently broad, then they can capture what matters about many injustices. As such, philosophical liberalism need not specifically account for injustice-related considerations or address reparation as a distinct topic in political morality.

Consider the example of redlining.⁸⁷ Redlining was a policy whereby U.S. financial institutions (led by the Federal Housing Administration) declined to finance or

⁸⁶ Kutz (2004), at 302.

⁸⁷ For the sake of analytic clarity, both of the injustices described here (redlining and inadequate legal representation) are considered in isolation from the background patterns of racialized injustice that increase the salience of these injustices. I make this abstraction to present the Rawlsian rejoinder in its strongest light, not because I think that it is plausible in either case.

guarantee mortgages of certain borrowers in certain neighborhoods. This policy exacerbated the racial segregation of urban neighborhoods because African-Americans could only finance mortgages in neighborhoods that were predominantly (or exclusively) populated by other African-Americans. Redlining seems plainly inconsistent with a just political arrangement. But what is the wrong in redlining? Taken in isolation from the patterns of racialized injustice in this country, the main injustice of redlining (and the patterns of residential segregation that it facilitated) can be appraised in terms of equality of opportunity and distributive justice.⁸⁸ In the United States, many important opportunities and goods (like education and political influence) are distributed locally. Redlining denied African-Americans access to these important opportunities and goods. However, if the wrongs in redlining are violations equal opportunity and distributive justice, then providing these opportunities and goods would seem to ameliorate the significance of this injustice. Elizabeth Anderson argues that, in response to residential segregation, justice requires political arrangements to facilitate racial integration, which should be defined in terms of “comprehensive intergroup association on terms of equality.”⁸⁹ Anderson’s argument implies that, if an injustice like racial segregation involves deprivation of opportunities and resources, then providing those opportunities to the victims of the injustice is a sufficient response. If this implication is sound, then the injustice of redlining (considered abstractly) could not provide independent reason to reject ostensibly fair terms of political cooperation. Rather, fair terms would identify a practice like redlining as unjust and provide an adequate response to it.

To take another example, consider the inadequate legal representation provided to many contemporary Americans who are charged with crimes. The 6th Amendment to the U.S. Constitution guarantees that everyone accused of a crime will have the “Assistance of Counsel for his defense.” This guarantee has been interpreted to require that counsel be effective,⁹⁰ and also that the state or federal government finance the legal representation if the accused is unable to do so.⁹¹ Yet in practice many states provide meager funding for the defense of indigents, and as a result many of those accused of crimes lack access to effective counsel. The inadequacy of this funding is problematic, independently of whether a person actually committed the crime for which she is accused. But what is the wrong in inadequate criminal representation of indigents? Consider the case of someone who is accused of a crime that she actually committed, yet lacks access to effective legal counsel in order to contest the charges against her. The failure to provide effective counsel violates the accused’s constitutional rights. Yet the wrong in this scenario can be appreciated by straightforward application of principles of justice: denying the right to counsel is problematic because, on any plausible principles of political justice, violating someone’s rights is problematic. Likewise, an adequate remedy for this injustice can be derived from principles of justice. If the rightfully accused has not yet been tried, then she should be afforded access to effective counsel. If the

⁸⁸ Anderson (2010), ch. 2.

⁸⁹ Anderson (2010), at 112.

⁹⁰ *Strickland v. Washington*, 466 U.S. 668 (1984).

⁹¹ *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

rightfully accused has already been tried and convicted,⁹² then she should have collateral avenues for contesting her conviction and be provided effective counsel for doing so. In any case, the injustice of violating the right to counsel doesn't provide reasons for the accused (or anyone else) to reject ostensibly fair terms of political cooperation, since these terms both identify her treatment as wrongful and provide an adequate remedy for this injustice.

Thus, the Rawlsian might provide the following rejoinder. Redlining and inadequate legal representation (considered in isolation) are injustices, but they do not necessarily impair the political relationship. To be sure, these injustices have normative significance and call for remedy. But this call can be fully appreciated within the existing Rawlsian framework, including the basic move. There is no need to account for considerations related to these injustices in formulating principles of justice, nor need principles of injustices include specific provisions for redressing these injustices. These injustices do not, by themselves, preclude realization of the ideal of political justification. They do not rule out the possibility of stability for the right reasons, nor do they automatically render political arrangements illegitimate.

I think this Rawlsian rejoinder is powerful. Many injustices can be fully appreciated and addressed within any viable principles of political justice. However, the Rawlsian rejoinder is incomplete. Demonstrating how requires identifying a subset of injustices whose significance cannot be fully (or even mostly) redescribed in terms of rights violations, or unequal opportunities, or inadequate resources. Since, on my argument, this subset of injustices threatens to impair the political relationships in light of the ideal of political justification, I will call them *destabilizing injustices*.

Broadly, destabilizing injustices (like injustices generally) involve violations of rights, denials of opportunities, and impediments to equal or adequate levels of social resources. However, destabilizing injustices also involve a profound kind of disregard for victims of the victims of injustice and others.⁹³ This disregard can interact with other wrongmaking features of the injustice: a wrong that both harms and disregards someone has greater significance than a wrong that harms without disregarding.⁹⁴ It might be argued that all injustices manifest some form of disregard. Even granting this premise, not all injustices are destabilizing injustices. Some injustices manifest disregard, but do not disregard anyone in particular. Other injustices manifest disregard of particular people, but do not destabilize political relationships because the reasons generated by the manifested disregard pale in comparison to everyone's generic background reasons to accept and comply with mutually justifiable terms of political cooperation.

⁹² Presumably, if the rightfully accused has already been tried and acquitted, then the provision of inadequate counsel to her lacks normative significance, and there is nothing to remedy.

⁹³ *E.g.*, Kumar & Silver (2004), at 152; Loury (2007)

⁹⁴ *E.g.*, Shaw (2012), at 175. This interaction partly explains Seana Shiffrin's intuition that the case for reparation might be lessened (although not eliminated) if contemporary political institutions reflected "economic and social equality." Shiffrin (2009), at 338. The disregard manifest in slavery seems to mean more because the groups that suffered this injustice are highly correlated with the groups that are disadvantaged by economic and social inequalities.

By contrast, destabilizing injustices enunciate a special kind of disregard for their targets. This disregard, in turn, provides targets with reasons to reject ostensibly fair terms that do not specifically reference the injustice. Of course, the targets of a destabilizing injustice (like the targets of injustices generally) have compelling background reasons to accept and comply with such terms. However, in the wake of this disregard, accepting or complying with such terms would be incompatible with the target's self-respect. If such terms were justified abstractly, then accepting and complying with them would ratify that the injustice makes no fundamental difference in political morality. Because the targets of a destabilizing injustice would have reason to reject such abstractly justified terms in favor of terms that specifically referenced and responded to the injustice, others (under the criterion of reciprocity) may not reasonably expect or demand compliance with these terms. Having such an expectation would be inconsistent with the mutual respect that grounds the ideal of political justification.

Which injustices are destabilizing injustices? I am not sure that it's possible to provide necessary and sufficient conditions for identifying this subset. As I discuss in chapter 6, it is plausible that the standards for establishing when disregard destabilizes vary over time and across particular democratic societies. I only point out that some injustices do (or could) manifest this level of disregard. The institution of chattel slavery seems like a paradigmatic example of a destabilizing injustice. Chattel slavery systematically brutalized enslaved persons, systematically violated their rights, denied them opportunities for meaningful political participation, and precluded them from obtaining the social resources necessary to lead meaningful lives. This system also manifested extreme disregard for those who were enslaved. The Alternative Reconstruction example is meant to show that this disregard could provide reason for rejecting terms of cooperation that guarded against the other objectionable aspects of chattel slavery.

Some might reject this intuition in the Alternative Reconstruction case. Perhaps our background reasons to accept and comply with ostensibly fair terms of cooperation are so strong that no past injustice (and no amount of disregard) could provide a basis for rejecting such terms. This robust view of our background reasons regarding mutual justification is reflected in Leif Wenar's assertion that "if in America blacks and whites were now perfectly equal in wealth, power, and prospects," then "you would not insist on reparations for the injustices of slavery."⁹⁵ Given how radically the Alternative Reconstruction scenario departs from historical reality (not to mention how far contemporary American society is from racial equality), I am reluctant to deny Wenar's assertion on its face. However, I think it's possible to criticize Wenar's assertion from within the Rawlsian framework. Wenar's assertion rules out the conceptual possibility of destabilizing injustices. Even if chattel slavery does not strike you as a destabilizing injustice, some forms of injustice could preclude prospective realization of the ideal of political justification. The logic of Wenar's assertion denies this possibility, implying that the background reasons to accept and comply with mutually justifiable terms are so powerful that an injustice more degrading than chattel slavery could not provide reasons

⁹⁵ Wenar (2006), at 402

for rejection, even if accepting those terms were inconsistent with maintaining one's self-respect.

However, the power of these background reasons in the face of injustice conflicts with their power in the face of reasonable disagreement. Recall that, on Rawls's view, adherents to reasonable comprehensive doctrines would have reason to reject ostensibly fair terms of political cooperation that were justified by direct appeal to Kantian premises in elaborating the protection of certain rights (or to Catholic doctrine in the formulation of family planning policy). Imagine a reformulation of Wenar's assertion in terms of comprehensive doctrines: "If in America Catholics, Muslims and atheists were now perfectly equal in wealth, power, and prospects," then "you would not insist on the justification of constitutional essentials based on public reasons." This reformulation is implausible. Justifying terms solely according to the comprehensive doctrines of some would be disrespectful to citizens who did not adhere to one or both of these doctrines. Citizens would have good reason to reject these terms and their justification, even in light of their strong background reasons to accept ostensibly fair terms.

Thus, Wenar's assertion presumes that our background reasons to accept fair terms of cooperation are so powerful that they cannot be undermined by any possible injustice. Yet, on Rawls's view, these reasons are not so powerful as to nullify objections to ostensibly fair terms that are justified solely by appeal to specific constitutional doctrines. Further, as argued above, citizens' attachments to injustices closely resemble their attachments to comprehensive doctrines. So it is problematic for a Rawlsian to advance Wenar's assertion in the Alternative Reconstruction scenario. This assertion should be avoided, not only because it is counterintuitive, but also because it takes an inconsistent view about the strength of our background reasons to accept and comply with fair terms of political cooperation.

In sum, I think the Rawlsian rejoinder succeeds in part. Reductionist maneuvers sometimes work. The significance of many injustices can be fully redescribed in terms of equality of opportunity and distributive justice. Injustices like these do not call for abandoning the basic move. However, the reductionist maneuver does not work for destabilizing injustices. These wrongs manifest disregard for victims (and others) sufficient to generate reasons for rejecting ostensibly fair terms of political cooperation. These injustices impair the political relationship by precluding realization of the ideal of political justification. They undermine the possibility of stability for the right reasons and liberal legitimacy. A Rawlsian must account for destabilizing injustices as a fundamental theoretical question of justice, rather than as a topic to confront after principles of justice have been worked out. To provide this accounting, the philosophical liberal needs a way to address and specifically respond to these injustices—that is, a theory of reparation.

Chapter 6- A Liberal Theory of Reparation

In this chapter, I build the analysis offered in chapter 5 to derive a theory of reparation based on philosophical liberalism. As I noted above, philosophical liberalism construes of the normative ideal of the political relationship as one where basic terms of political cooperation are mutually and reciprocally justified to those over whom they apply. Construed in this way, liberalism is congruent with the relational conception of reparation. The liberal ideal of political justification explains the normative impetus to seek fair terms of political cooperation through fair procedures. It also explains how a society can be stable for the right reasons. Certain injustices impair this relationship in light of its justificatory ideal. In these circumstances, the Liberal Theory of Reparation calls for reparation as a way of valuing these political relationships.¹ The Liberal Theory offers a motivationally powerful case for reparation, since anyone has strong reasons to value political relationships that realize the ideal of political justification. It also generates appropriate reasons for making reparation, since the gestures that it licenses or requires would be required respect the freedom and equality of those to whom they are directed. As such, the Liberal Theory captures reparation's phenomenology.

Aside from providing a powerful and appropriate case for reparation, the Liberal Theory has considerable strengths as a theory of reparation. Philosophical liberalism offers systematic answers to many of the most pressing questions of the framework that I introduced in Chapter 3. Using insights from Rawls's project and the vast literatures it has spawned, the Liberal Theory can resolve (or dismiss) questions about collective responsibility, the viability of reparations claims by those who were not victims of an injustice, and how historical distance changes the case for reparation. The Liberal Theory is non-reductionist, since it offers a case for reparation that cannot be fully redescribed or alleviated by meeting other political goals. Finally, the Liberal Theory offers a standard for discrimination: an injustice calls for reparation if it would provide reasons to reject ostensibly fair political arrangements.

Part I provides an overview of the Liberal Theory of Reparation, as well as an explanation of how (on this approach) reparation ameliorates injustices. Part II examines the Liberal Theory according to the framework developed in chapter 3. Part III applies the Liberal Theory to the case of reparations for U.S. slavery. Part IV offers a brief conclusion.

I. An Outline of the Liberal Theory

The core of the Liberal Theory can be understood as answering three questions: Why make reparation? What does reparation involve? What does reparation do?

¹ In this respect, my discussion of the Liberal Theory draws from several other works that see reparation as having an essentially relational structure (*e.g.*, Radzik (2008); Walker (2006)), as well as others that see the political relationships impaired by injustices as providing the impetus for reparation. *E.g.*, Murphy (2010); Shiffrin (2009); Kutz (2004); Kumar & Silver (2004). My approach builds on these efforts in several respects, including the degree to which it harnesses Rawls's political philosophy.

Why make reparation? For the philosophical liberal, destabilizing injustices threaten the possibility of political justification. These injustices give some citizens good reasons to reject ostensibly fair terms of political cooperation, reasons that can override the normally compelling background reasons that people have to accept and comply with such terms. Reparation is redress that appropriately responds to complaints arising out of these injustices. Reparation characteristically ameliorates the significance of injustices by reducing the normative force of injustice-based considerations. An injustice would not generate exactly the same practical reasons (including reasons for rejection) after reparation as before.

The Liberal Theory is way of accommodating and responding to these injustices, lessening (and perhaps removing) their threat to the political relationship. Within this theory, the following principle captures the facial justification for reparation:

Liberal Principle of Reparation (LPR): When a destabilizing injustice threatens realization of the ideal of political justification, reparation is called for as a way of valuing political relationships that are impaired by the injustice.

LPR applies only to destabilizing injustices. It does not apply to injustices whose significance can be more or less fully captured in the currency of political justice (*e.g.*, rights violations, denials of opportunities, and the availability of inadequate resources). Nor does it apply to injustices that, while significant, fail to generate reasons for rejecting ostensibly fair terms of political cooperation. Note also that LPR invokes political relationships in making the case for reparation. To use the terms introduced in chapter 2, LPR adopts the relational conception of reparation, rather than the compensatory conception.

On the Liberal Theory, reparation addresses the impairing effect of destabilizing injustices on the political relationship. As discussed above, disregard of victims (and sometimes others) is the *sine qua non* of a destabilizing injustice. Every destabilizing injustice manifests the view that victims (and, often, other people) do not matter. Disregard interacts with other aspects of a destabilizing injustice in determining how much the political relationship is impaired. For example, say that two injustices harmed victims in roughly the same way, but one conveyed greater disregard for victims than the other. The former injustice would be more significant than the latter. Harm has greater significance when intertwined with disregard.

What is the reparative burden? A second set of questions concerns what reparation requires. This is what, in chapter 2, I called the problem of establishing the reparative burden. Theories of reparation based on the compensatory conception can determine the reparative burden relatively straightforwardly. What's owed in reparation is equivalent to the debt created by the underlying injustice. However, because the Liberal Theory adopts a relational conception of reparation, calculating the reparative burden is more difficult and conclusions about what reparation requires are inevitably

less precise. Reparation responds to the normatively salient features of injustices. But what are the salient features of destabilizing injustices?

Destabilizing injustices matter in part because of the disregard that they exhibit. Thus, reparation must address this disregard in order to ameliorate. Any successful gesture of reparation will counter the disregard that's implicit or explicit in the underlying injustice.² Responding to injustice-related considerations presupposes a regard for the victim or claimant. Because LPR calls for these kinds of responses as a matter of basic justice, the principle exhibits a fundamental respect for those who have the appropriate connection to a destabilizing injustice. LPR also calls for specific gestures that repudiate the disregard manifest in an underlying injustice. These gestures can be seen as attempts to dissociate political entities with particular injustices that were committed within their ambits. Meir Dan-Cohen sees this process as one of revising the “temporal dimensions” of a state, akin to the process by which a state shifts its “geographic border” in order to change its jurisdiction and responsibilities.³ A redressive gesture that did not repudiate and counter the disregard implicit in a prior injustice would ameliorate imperfectly, if at all. Such a gesture would replicate or ratify the disregard in an injustice, and so would violate what I have called the non-replication requirement. Many of the material aspects of reparative gestures (like the diversion of resources to some claimants or for certain projects) work to concretize the enactment of regard and repudiation of disregard.⁴

Beyond calling for redressive gestures, meeting the reparative burden might also require adjusting the terms of political cooperation. My conclusion here is more tentative because it is difficult to specify in the abstract which adjustments might be required. Moreover, there are limits to how far terms of political cooperation can be adjusted and still be considered just. Recall that everyone has strong background reasons to accept and comply with fair terms. If addressing the objections of victims and claimants required propounding terms that were unfair, then claimants, payers, and others would have reason to reject them. Everyone has good reason to reject terms that do not protect fundamental rights, afford equal opportunities, or provide social resources. Therefore, meeting the reparative burden cannot require compromising on any of these fundamentals. However, reparation might call for at least the following adjustments.

One kind of adjustment concerns the theoretical relationship between justice and legitimacy. Recall that Rawls sees legitimacy as “a weaker idea than justice,” one that

² See, e.g., Radzik (2009), at 85-6; Walker (2013a), at 216-220.

³ Dan-Cohen (2007), (2009); Winter (2011), at 806; Shiffrin (2009), at 335. There is no contradiction between my claim that the Liberal Theory sees repudiation as a basic function of reparation for political injustices and my argument, in chapter 2, that repudiation is not a requirement for reparation as such. In some contexts, reparation might succeed in ameliorating the significance of an underlying wrong even if it does not repudiate the wrong. However, it is difficult to imagine a gesture that ameliorates impairments to the political relationship while leaving intact the disregard implicit in a destabilizing injustice.

⁴ E.g., Meyer (2006), at 417; Shiffrin (2009), at 335-6; Radzik (2009) 98-100.

“imposes weaker constraints on what can be done.” Yet while legitimate laws and procedures need not

be just by a strict standard... they cannot be too gravely unjust. At some point, the injustice of the outcomes of a legitimate democratic procedure corrupts its legitimacy, and so will the injustice of the political constitution itself.⁵

Rawls sees injustices as in principle capable of delegitimizing, but only if they are “too gravely unjust.” In the wake of a destabilizing injustice, meeting the reparative burden might require adjusting this formula to reference the distribution (rather than merely the gravity) of injustices. Suppose that a specific group of people has been systematically subjected to injustices in the past. It seems plausible that fair terms of cooperation should be more sensitive toward (and assign a greater delegitimizing effect to) future injustices perpetrated against that group than to injustices generally. In the Alternative Reconstruction case, for example, perhaps injustices that would otherwise fall short of destabilizing might nonetheless have a delegitimizing effect if they were perpetrated against African-Americans.

Another kind of adjustment might require changing the terms of political cooperation. Recall that, on the reductive maneuvers described above, the effects of certain injustices can be accounted for in defining the basic rights, establishing the standards of fair opportunity, or defining the least advantaged groups for the purposes of distributive justice. However, making reparation might call for a more radical adjustment to the terms of political cooperation, depending on the salient features of past injustices.

For example, reparation might require adjusting how rights are protected. Take the injustice of slavery, which both manifested profound disregard and violated the basic rights of enslaved persons. This violation of rights is objectionable on its own terms, and any plausible principles of justice will call for the protection of basic rights that enslavement violates. Yet pointing to this general case for rights might not be enough to alleviate the impairment wrought by this injustice. Amelioration could also require providing extra safeguards against future violations of the rights of victims through unofficial practices. For instance, in the Alternative Reconstruction case, terms of cooperation that criminalized chattel slavery would seem objectionable if they nevertheless permitted informal arrangements (like tenant farming) that replicated many of the liberty-infringing elements of slavery. Rawls’s idea of the “fair value” of liberties could provide this kind of protection against informal violations of liberties. For Rawls, ensuring the fair value of liberties requires both formal protection of liberties and policies to guarantee that these liberties have worth or usefulness for all citizens.⁶ However, Rawls limits the requirement of providing “fair value” to political liberties, on the grounds that applying this guarantee to all basic liberties would entail an objectionable

⁵ PL, at 428.

⁶ JAF, at 148-9.

form of perfectionism.⁷ Regardless of whether Rawls's restriction of fair value to political liberties is defensible generally, it seems unwarranted in the case of liberties that have previously been violated by a destabilizing injustice. Formal rights violations give rise to powerful objections. Ameliorating these objections requires establishing that rights violated previously won't be violated in the future. Yet, if the violation of liberties is part of what explains the destabilizing effect of an injustice, then such a guarantee would ring hollow if it applied only to formal deprivations and never to informal deprivations.⁸ Thus, meeting the reparative burden might require guaranteeing prospectively the fair value of all liberties that have been violated by a destabilizing injustice, and not merely political liberties.

Another way that meeting the reparative burden could alter terms of political cooperation concerns distributive justice. If an injustice involves some people being deprived of resources, then fulfilling the reparative burden might require guaranteeing that the holdings of these people are not significantly burdened by this injustice. Yet this adjustment would conflict with Rawls's stipulation that, for the purposes of distributive justice, "the least advantaged" is not a rigid designator—that is, that the people for whose benefit social inequalities must be arranged are "simply the individuals who are worst off under that particular scheme."⁹ In the Alternative Reconstruction case, for example, the injustice of chattel slavery undeniably disadvantaged African-Americans. Fulfilling the reparative burden might require setting some absolute target of material provision of those who were victimized by slavery (*e.g.*, direct entitlement to a discrete amount of property holdings and sufficient means to extract value from those holdings). It might also require a broader commitment to ensuring that African-Americans do not occupy the rung of "least advantaged," regardless of the absolute level of social resources that accompanies that distinction.

Finally, meeting the reparative burden would seem to require adjustments to the institutional arrangements that are governed by principles of justice. Special political institutions might be required to advocate on behalf of victims and others who were disregarded by an injustice. Likewise, something like a truth commission might be necessary to diagnose the extent or pervasive effects of an injustice, or to further the kinds of moral considerations that are typically supported through criminal justice institutions (the existence of which is required as a matter of basic justice).¹⁰ If so, then the creation of specific institutions would be directly entailed by principles of political justice, rather than a matter for political debate. This entailment differs from the general way that Rawls envisions the implementation of principles of justice. Rawls's discussion of the four-stage sequence through which principles of justice are adopted and

⁷ *Id.*, at 151.

⁸ Moreover, guaranteeing fair value prospectively to liberties that had been violated previously could be publicly justified as a way of removing or alleviating the impairing (and destabilizing) effect of past injustices. This case would avoid the perfectionism that concerns Rawls.

⁹ JAF, at 59.

¹⁰ *See, e.g.*, Murphy (2010), ch. 5; Allais (2011), at 352-7; Verdeja (2006), at 451. I explain a further reason to think that specialized institutions are required to effectuate reparation *infra*, at pp. 171-173.

implemented assumes that principles are adopted behind the veil of ignorance at an initial stage. These principles are then implemented (with commensurate lifting of the restrictions on knowledge) through a constitutional convention, a legislative stage, and finally through the administration and interpretation of laws that embody these principles.¹¹ Yet, if meeting the reparative burden calls for implementing specific institutional features as a matter of justice, then considerations that seem most relevant at the third and fourth stages would instead be topics at the first stage.¹²

Thus, the reparative burden requires (at a minimum) gestures that counter the disregard implicit in a destabilizing injustice and enact regard for the victim or claimant. For many injustices, meeting this burden might also require adjusting the terms of cooperation or changing the ways that these terms are justified or implemented.

What does reparation do? A third set of questions concerns how reparation makes a normative difference. Here, too, the Liberal Theory can be contrasted with views (like the “wrongful harm” version of corrective justice approaches) that utilize the compensatory conception of reparation. On such views, an injustice creates debts, and reparation ameliorates the significance of an injustice by fulfilling (in whole or in part) the debts that arise out of the injustice. This debt-fulfillment account is straightforward but implausible because (among other things) it cannot explain the ameliorative deficiencies of gestures that replicate wrongmaking features of an underlying injustice.

On the Liberal Theory reparation is best seen as providing reasons, rather than fulfilling debts. From the discussion in Chapter 5, it is possible to identify several ways that injustice-based considerations might ground reasons for rejecting ostensibly fair terms of political cooperation. First, injustices might provide victims with reasons to reject terms of cooperation that are ostensibly fair, but justified abstractly. Abstractly justified terms do not essentially reference any particularities, including injustice-related considerations. In the Alternative Reconstruction example, the abstract justification of terms of cooperation implies that no particular injustice (including chattel slavery) matters fundamentally. Yet someone’s connection to an injustice might reasonably undergird her personal and social identity. The former slave could not act on her background reasons regarding mutual justification without compromising her self-respect. Thus, the former slave would have reasons of self-respect to reject abstractly justified terms of cooperation.

The Liberal Principle of Reparation and the gestures of reparation that it licenses directly confront these self-respect based reasons for rejecting fair terms of political cooperation. LPR calls for gestures that counter the disregard manifest in an injustice. LPR lessens the tension between accepting fair principles of political cooperation and

¹¹ TJ, at § 31.

¹² Alternatively, to the extent that the institutional arrangements necessary to fulfill a reparative burden are neither constitutional essentials nor matters of basic justice, their importance to the ideal of political justification suggests that this ideal applies more broadly than Rawls envisions. Quong (2004) and others raise similar criticisms about Rawls’s limitations on the scope of public reason.

seeing an injustice as normatively significant. An analogy can be drawn with public reason. If a democratic society abides by public reason, there is no essential conflict between being committed to political liberalism and being committed to a reasonable comprehensive doctrine. One need not deny the latter to endorse the former, and vice versa. Likewise, if ostensibly fair principles of political justice are coupled with LPR, then the victim of injustice need not deny that slavery mattered fundamentally in order to meet her commitment to mutual justification.

Second, injustice might provide reasons based on personal integrity not to identify with a particular political arrangement, regardless of whether it is governed by just principles. If an injustice generates these kinds of barriers to identification for some, then it would be inappropriate to infer that political arrangements governed by ostensibly fair principles of cooperation would be stable for the right reasons. Rather, those with the requisite connection to an injustice would have good reasons not to endorse such arrangements. Indeed, a victim of injustice who, immediately after the cessation and redress of an injustice, saw no barriers to identifying with her former perpetrators might be criticized as abject. Given these barriers to identification, a scheme governed by ostensibly fair principles might secure conformity from victims of injustice, but it would not secure their compliance.

Reparation directly affects the destabilizing threat of these integrity-based reasons. The mechanics of this process can be appreciated by analogy in the interpersonal context. Some wrongs involve an affront to dignity. In the wake of such wrongs, it might be impossible to maintain your dignity while interacting with the wrongdoer in certain ways. Such interaction would ratify the demeaning message about you that is implicit in the wrong. Yet you have compelling reason to interact with people in general, and (in some circumstances) you might also have good reason to interact with people who have wronged you in particular. In these cases, reparation provides an avenue for you to interact without compromising your integrity. Perfect reparation “answers [the victim’s] normative expectation that the wrongdoer own [and] regret” the “inadequate commitment to regulating himself in accordance with legitimate interpersonal norms” is implicit in an underlying wrong.¹³ When a gesture of reparation fully answers the charge implicit in a wrong, then interaction with a wrongdoer does not necessarily ratify the disrespect implicit in the wrong.

The Alternative Reconstruction case suggests that similar mechanisms apply in the political context. Genuine reparation for a grievous wrong like slavery would require at least repudiating the practice of slavery and countering the disregard that animated this practice. Perhaps gestures of reparation would change whether the disrespect manifest in slavery is a normative barrier for former slaves (and others) to identify with the political society that perpetuated slavery. More plausibly, reparation would seem to diminish the barrier to identification that slavery presents. Given this effect, there are fewer (and less

¹³ Martin (2010), at 553.

compelling reasons) that oppose someone's generic reasons to identify with just arrangements in the limited sense that the ideal of political justification calls for.¹⁴

Third, an injustice might generate reasons to reject ostensibly fair terms that favor or could favor the perpetrators of an injustice. Call these reasons from justified resentment. These resentment-based reasons would provide victims (and others) with grounds for choosing terms of cooperation that are less-than-fully-fair over terms that were ostensibly fair, but could result in the privileging of wrongdoers.¹⁵

Unlike its direct effect on the force of reasons for self-respect and integrity, reparation does not straightforwardly undermine reasons based on justified resentment. However, genuine reparation can indirectly ameliorate by facilitating a political form of forgiveness.

Here is a brief background on the sense of forgiveness that I have in mind. In general, forgiveness is a type of normative power: when A forgives B for ϕ 'ing, A thereby changes the normative significance of B's ϕ 'ing for A and for others.¹⁶ People disagree about which reasons arising from an underlying wrong are changed by forgiveness,¹⁷ just as they disagree about the effects of other exercises of normative

¹⁴ Notice that the concern here is whether a destabilizing injustice like slavery gives victims and others reasons not to identify with arrangements in the limited way that Rawls envisions, rather than whether reparation actually facilitates this kind of identification. In the terms discussed above in chapter 4, the Liberal Theory is concerned about identification as a normative phenomenon, rather than as an empirical one.

¹⁵ Reasons from resentment might also ground the contention that wrongdoers are outside the "scope" of those for whom terms of cooperation must be justifiable. On the "issue of scope," see Julius (2006); Besch (2011). That someone outside the scope of justification might have reason to reject terms does not render those terms unjust, nor (under the criterion of reciprocity) does it give others reason to reject those terms.

I am unsure that wrongdoing could ever place someone outside the scope of justification. After Scanlon and Rawls, the requirement that terms of cooperation be justifiable to everyone affected by them applies in virtue of agency, rather than based on particular exercises of agency. To borrow Linda Radzik's distinction, one's place within the scope of justification is a function of moral status (the capacity to make or demand moral justifications), not moral standing (one's "reputation [within the moral community] as a morally good and trustworthy person"). Radzik (2009), at 82. Perpetuating an injustice might well compromise a wrongdoer's moral standing, but it would not deny her moral status (which is unconditional).

However, if wrongdoing could jeopardize someone's place within the scope of justification, then reparation would seem to provide grounds for restoring this status. Genuine reparation counters the aspects of wrongdoing (*e.g.*, disregard for the victim and norms of conduct) that could compromise someone's status. If a gesture of redress does not counter these aspects, then it would be deficient as reparation.

¹⁶ See Owens (2012), at 52-3.

¹⁷ Owens suggests that forgiveness changes whether the underlying wrong appropriately grounds resentment and indignation of the wrongdoer: "Once the wrongdoer has been forgiven in the relevant sense, it is no longer apt for [the wrongdoer] to feel guilty and it is positively inapt for others to blame [the wrongdoer]; both resentment and indignation are now out of place." *Id.*, at 51. Others might dispute Owens's account of what is involved in forgiveness. For example, Hieronymi's view allows that a wrongdoer might have a reason to regret ϕ 'ing after having been forgiven for ϕ 'ing. Hieronymi (2001), at 550. Likewise, Garcia interprets Bishop Butler's influential account as holding that forgiveness is compatible with resenting a wrongdoing (although not a wrongdoer). Garcia (2011)

powers. The normative power involved in forgiveness doesn't capture all that forgiveness entails. There are important non-normative aspects of forgiveness, such as the forgiver's change in attitudes that are prompted by a wrong¹⁸ and prospective commitment to internalize certain costs associated with a wrong.¹⁹ Indeed, focus on these non-normative aspects leads some commentators to reject political forgiveness as illiberal (or at least deviant) because political interactions do not have the sentimental aspects that interpersonal interactions do.²⁰ However, the non-normative aspects of forgiveness seem to vary across the "different types of relationships we can occupy vis-à-vis our wrongdoers."²¹ Forgiveness is intelligible within a relationship-type (like the political relationship) whose ideal does not involve strong sentimental attachments. Within such relationships, forgiveness mostly involves these normative changes.

Thus, it is possible to envision a political form of forgiveness that is compatible with the largely unsentimental ways that liberals construe the political relationship. Granting political forgiveness changes the way that an injustice bears on the political relationship. Normally, victims of a wrong or injustice at least have a privileged standing to complain and (by implication) to forgive a grievous injustice.²² Recognizing the normative power involved in forgiving helps explain this privileged standing. In general, a normative power (like promising or consenting) changes the status of an action. Say that A promises B to ϕ or consents to B's ϕ 'ing. In doing so, A changes the status of ϕ 'ing; this change applies not only between A and B, but also for others. Forgiveness is also a normative power: when A forgives B for ϕ 'ing, A effects a change in the significance of ϕ 'ing for A, B, and others. A political form of forgiveness changes the significance of ϕ 'ing for the political relationship. Say that ϕ 'ing represents a destabilizing injustice (like chattel slavery) and A is a person who was subject to chattel slavery (and so uncontroversially has the requisite connection to the injustice). The injustice of chattel slavery might provide A with reasons (based on justified resentment) to reject ostensibly fair terms of political cooperation if those terms advantage B. Because of the criterion of reciprocity, A's reasons to reject these terms provide other citizens with reasons not to propose such terms or expect A to comply with them. Yet A's normative power to forgive allows her to change whether chattel slavery continues to generate these reasons for rejection. If A were to grant forgiveness, then slavery would neither justify A's rejection of ostensibly fair terms nor preclude others from expecting or demanding that A comply with such terms. This political form of forgiveness does not fully expiate the significance of an injustice. For example, even if chattel slavery could not justify rejecting fair terms of cooperation after A grants political forgiveness, this practice might still be invoked as a basis for objecting to certain political gestures (say, the memorialization of the Confederate Stars and Bars). Likewise, in the Alternative

¹⁸ See Hampton & Murphy (1988), at 15.

¹⁹ Hieronymi (2001).

²⁰ See Diegeser (2001), 16-18; Griswold (2007), at 141-2.

²¹ Garcia (2011)

²² See Wallace (2007), at 29. Others argue that victims have exclusive standing to forgive, given the costs involved in forgiving. *E.g.*, Walker (2013b).

Reconstruction scenario it would not be irrational for a formerly enslaved person to change the way that chattel slavery affects the possibility of political justification, yet harbor resentment against the perpetrators of his prior enslavement.

Why would anyone ever want to grant political forgiveness? The best explanation has to do with our strong background reasons to justify our terms of political cooperation to each other. As Scanlon contends, standing in a relationship of mutual recognition (under which we act in accordance with principles that others could not reasonably reject) is “appealing in itself—worth seeking for its own sake.”²³ These relationships allow us to harmonize our own freedom and agency with the freedom and agency of others. As discussed above, Rawls sees the political relationship is a relationship of mutual recognition. By generating reasons of justified resentment, destabilizing injustices preclude the possibility of mutual justification. The normative power of political forgiveness gives the victim authority to remove some of the impediments to mutual justification at will. Thus, like any other normative power, the power of forgiveness is valuable because it allows its bearer to achieve something of value by the exercise of her will.

Reparation facilitates this political forgiveness. Genuine reparation answers the charge implicit in justified resentment, thus undercutting the basis for justified resentment (at least in part). Likewise, decisions to forgive can be subject to rational criticism. Too-quick forgiveness might reflect servility or superiority,²⁴ both of which could impair one’s relationships with others. Genuine reparation renders these criticisms inapt. By repudiating the underlying injustice and conveying the victim’s political equality, reparative gestures rebut the criticism that someone’s forgiveness is abject or servile.

So, on the Liberal Theory, reparation does not directly change how justified resentment generates reasons for rejecting terms of political cooperation. Moreover, while reparation might facilitate political forgiveness, it does not make forgiveness a *fait accompli*.²⁵ However, reparation can change whether the impediments arising from justified resentment are inescapable.

²³ Scanlon (1998), at 162.

²⁴ Novitz (1998).

²⁵ It is possible to argue that reparation increases the rational pressure for forgiveness. Perfect reparation (coupled with our strong background reasons to cooperate on just terms) makes it obligatory for a victim or claimant to grant political forgiveness for an injustice. On this argument, the failure to grant political forgiveness might be said to wrong the wrongdoer. (Perhaps the refusal to forgive is an inappropriate form of grudge holding.) Another possibility is that these circumstances render political forgiveness otiose—all of the ameliorative effect of forgiveness is achieved by someone’s having compelling reasons to forgive, and her actually forgiving has no effect on the significance of the wrong or injustice.

This “rational pressure” argument does not succeed if forgiveness is always supererogatory, as some contend. See Calhoun (1992), at 81; Corlett (2006), at 36; Govier & Verwoerd (2002). However, others think it conceivable that a wrongdoer’s taking the “necessary steps to repent and apologize for his wrongdoing” could give the victim a *pro tanto* duty to forgive wrongdoing. Gamlund (2010), at 658. I am unsure whether forgiveness is necessarily supererogatory, and so I don’t know whether the rational pressure argument is correct. As such, this discussion of what reparation does is at least partially incomplete. This incompleteness problem applies to almost any account based on the relational conception of reparation.

To summarize this section, the Liberal Theory can be expressed in terms of the schematic utilized in chapters 2-4:

(1) **What do injustices do?** Destabilizing injustices provide claimants with compelling reasons to reject ostensibly fair terms of political cooperation, thus impairing the political relationship by precluding realization of ideal of political justification.

(1a) **Why make reparation?** According to the Liberal Principle of Reparation, you should contribute to making reparation because you have reason to value political relationships with claimants (and others) that are impaired by a destabilizing injustice.

(2) **How to calculate the reparative burden?** What reparation requires is a function of the degree to which an injustice impairs the political relationship by manifesting disregard toward, violating the rights of, and harming victims or claimants.

(3) **What does reparation do?** Reparation undermines the strength of some reasons for rejecting fair terms of political cooperation. Reparation also indirectly affects other reasons for rejection by justifying a political form of forgiveness.

II. The Liberal Theory and the Framework

The brief sketch provided in the previous section leaves open many aspects of the Liberal Theory. These gaps can be filled in by evaluating the Liberal Theory under the framework that I proposed in chapter 3.

Justification—On the Liberal Theory, reparation is justified *prima facie* as a way of valuing the political relationship. Destabilizing injustices impair this relationship in light of its normative ideal of political justification. Thus, someone who values the political relationship has compelling reason to make reparation in order to alleviate these impairments.

The Liberal Theory does not provide a definitive solution to what, after Rawls, I called the “priority problem.” Meeting reparative burdens is not necessarily more urgent than meeting other basic commitments in justice. Nor is making reparation a substitute for meeting basic commitments. Neglecting reparation or any other basic commitment to justice (like the protection of basic rights or the provision of fair equality of opportunity) could impair political relationships by providing some citizens with reasons to reject terms of social cooperation. Thus, the relationship between LPR and the principles

governing the protection of basic rights and the provision of opportunities does not seem to be one of strict priority. If making reparation is incompatible with, say, protecting basic rights, then it seems plausible that political communities could differ on which goal is more important. As such, the comparative priority of reparation seems to be a species of decisions that Henry Richardson terms “our call”—that is, decisions that a democratic people have the authority to make and about which their judgment determines the correct answer.²⁶ However, fulfilling the commitment to LPR would seem to have greater priority, on the whole, to meeting commitments to distributive justice. The failure to realize LPR can compromise the legitimacy and stability of political institutions, while (as Rawls argues) the failure of political institutions to perfectly realize distributive justice does not necessarily destabilize in this way.²⁷ Therefore, the Liberal Theory denies Wenar’s assertion about the priority of distributive justice to reparation. Contrary to Wenar, we should prefer to make reparation for a destabilizing injustice even though doing so might cause the world to “become distributively less just”²⁸ because the failure to make reparation would compromise the commitment to political justification, which is more fundamental than the commitment to distributive justice.

Who may claim reparation? The Liberal Theory offers a broad answer to this question of claimant justification. Reparation may appropriately be demanded by (and directed to) anyone whose political relationship is directly impaired by an injustice. This set is not limited to the victims of an injustice, nor to victims and their descendants. For example, the injustice of chattel slavery conveyed degrading attitudes about African-Americans in general, in addition to depriving many African-Americans of basic rights, opportunities, and resources. In light of these degrading attitudes, African-Americans who were not enslaved nevertheless have good reason to see slavery as impairing their political relationships. In defining claimant justification broadly, the Liberal Theory rejects Janna Thompson’s “exclusion principle,” which holds that an individual or collective may claim reparation “only if they were the ones to whom the injustice was done.”²⁹

The case for broad claimant justification can be appreciated by analogy with liberal accounts of the religious accommodation. Many liberals allow that religions can have normative significance, for example by grounding (some) claims to accommodation from generally applicable laws. If religious affiliation has this significance, it does so in virtue of citizens’ connection with a religion. This argument suggests that an expansive view of who may assert facially valid claims to religious accommodation. A more exclusive view might deny whether some citizens had the requisite connection to a religion to assert a facially valid claim to accommodation. Yet this more exclusive view would invite problems: establishing that someone is not a genuine adherent to a religion (and thus justice does not require accommodating her) would presuppose some criteria

²⁶ Richardson (2008).

²⁷ PL, at 427-8; see also Weithman (2011), at 319.

²⁸ Wenar (2006), at 402.

²⁹ Thompson (2001), at 116.

for what a genuine adherent is. This reification is a category mistake because it suggests that accommodation is justified by some intrinsic property of a religion (one not realized in accommodating those who aren't genuine adherents), rather than based on the independent value of claimants' having conscientious convictions that are realized in religious adherence.³⁰ The standard for determining who may claim religious accommodation should be inclusive, then, because what matters is not the religion in the abstract, but how people are connected to it.

This inclusive logic also applies to claims for reparation. On the Liberal Theory, victimization by an injustice is neither necessary nor sufficient to ground a claim for reparation. Justifying a claim to reparation is not fully determined by whether someone was directly victimized by an injustice, or even whether she was harmed by it.³¹ Rather, what matters most is whether the injustice provides her with reasons to reject ostensibly fair terms of cooperation. Of course, these reasons for rejection are most likely to arise for the people most directly degraded or most severely harmed by an injustice. But some who are not harmed by an injustice can also have these reasons for rejection. If an injustice manifests profoundly degrading attitudes toward someone's group and seriously harms others in her group, then accepting terms of cooperation might be incompatible with maintaining her self-respect or loyalty to her group. Likewise, suppose that one is the victim of an injustice that does not manifest profoundly degrading attitudes toward her. This injustice could have normative significance, yet fall short of generating reasons to reject ostensibly fair terms (especially considering the force of our background reasons

³⁰ Scheffler (2007), at 115.

³¹ This feature suggests that the Liberal Theory avoids conceptual difficulties associated with the non-identity problem. Recall that the non-identity problem applies to identity-fixing injustices, raising the question of how an event could harm or wrong people who would not exist if that event had not taken place. If the claimant justification of reparation requires showing that a claimant was harmed by an injustice, then it appears that no identity-fixing injustice could ground a claim to reparation. Thus, reparation could not be ultimately justified for injustices that are both distant and serious, since these wrongs would be causally implicated in the existence of all potential claimants. If harming someone is a comparative determination, then someone could not be harmed by an event if she would not exist in any world in which the event did not take place.

The Liberal Theory does not see harm as a prerequisite to claimant justification. On the Liberal Theory, what matters is not whether someone is harmed by an injustice, but rather whether an injustice gives someone reasons to reject ostensibly fair terms of cooperation. Rahul Kumar, among others, argues that moral contractualists can see identity-fixing injustices as having this kind of normative significance. See Kumar (2003) and Kumar (2009). If Kumar's argument goes through, then it is intelligible for someone to claim that an identity-fixing injustice impairs her (extant and potential) political relationships. Thus, on the Liberal Theory, the non-identity problem does not pose an insuperable conceptual barrier to the claimant justification of reparation.

At the same time, the dependence of one's identity on an injustice might have some effect on the normative significance of that injustice for her. The force of your complaints based on an injustice would seem to be reduced if (a) you would not exist if not for an injustice; and (b) you value your life. Indeed, the diminution in force of your complaint might alter whether an injustice generates reasons for rejection that are powerful enough to override your (normally compelling) background reasons to cooperate on ostensibly just terms. If non-identity has this effect, then the same injustice might have greater significance for victims whose existence does not depend on the occurrence of the wrong than for descendants whose existence is contingent in this way.

to comply with just terms). Thus, the Liberal Theory provides a broader criterion of claimant justification than does Thompson's exclusion principle.

The question of payer justification asks who may be expected to make reparation. On the Liberal Theory, the burden of making reparation falls on everyone whose relationship is impaired by an injustice. Destabilizing injustices generally impair political relationships by preventing realization of the ideal of political justification. Given the criterion of reciprocity, this impairment affects everyone in a political society, rather than merely the direct perpetrators or victims of an injustice. Everyone has powerful background reasons to ensure that political arrangements realize the ideal of political justification. Realizing this ideal is valuable in itself, since abiding by mutually justifiable terms is "worth seeking for its own sake."³² Realizing this ideal is also valuable because it ensures stability for the right reasons and liberal legitimacy. Thus, a citizen's reasons to contribute to making reparation for a destabilizing injustice are entailed by her reasons to value her political relationships.

On the Liberal Theory, then, reparation is a social burden because destabilizing injustices generally impair political relationships. In so conceiving reparation, the Liberal Theory further departs from Thompson's exclusion principle, a corollary of which is that reparation may appropriately be demanded from only those who directly perpetrated or otherwise bear outcome responsibility for an injustice.³³ Indeed, the Liberal Theory denies that payer responsibility presupposes any distinct account of outcome responsibility (that is, an independent method for attributing the consequences of an action to someone "in such a way that, other things being equal, the resulting benefits and burdens should fall to her").³⁴ Because articulating a plausible account of outcome responsibility is notoriously difficult, the Liberal Theory sidesteps a challenge that confounds many other theories of reparation.

Conception—The Liberal Theory accounts for reparation's phenomenology, plausibly explaining how reparation ameliorates. Before substantiating this argument, a quick recap about the *explananda*. Reparation is a success term, describing a redressive gesture that ameliorates the significance of a wrong or injustice. In chapters 2-4, I laid out several aspects of any plausible story about how reparation ameliorates. Reparation has a bipolar structure: (at least some) injustices ground complaints by victims, and reparation (sometimes) responds to these complaints. Reparation also has a distinctive causal structure: a gesture's etiology matters to how much (or whether) it ameliorates. As part of this causal structure, reparation has an expressive dimension. Successful reparation conveys appropriate attitudes about its targets, and avoids conveying certain inappropriate attitudes. Reparation also has an intentional dimension: the reasons for which a gesture is made can determine how much (or whether) it ameliorates. In general, a non-replication requirement applies to reparation. Gestures of reparation must avoid replicating the wrongmaking features of an underlying injustice. Finally, reparation also

³² Scanlon (1998), at 162.

³³ Thompson (2001), at 116.

³⁴ Miller (2001), at 244-5.

has a sensitivity requirement: the case for reparation must depend at least somewhat on the agent to whose grievance the redressive gesture responds. A theory of reparation should capture each of these aspects, or else explain why an aspect is inessential to how reparation ameliorates.

The Liberal Theory meets all of these tasks. The Liberal Theory is based on the relational conception of reparation, since the political relationships impaired by an injustice provide the impetus for making redress. This relational conception provides a straightforward explanation of reparation's causal structure. Gestures that realize a valuable state of affairs through a deviant causal structure run afoul of the normative ideal of the political relationship. Part of valuing a relationship requires that you act for the right reasons, as well as that your actions do not convey inappropriate attitudes towards your relative. The normative ideal of the political relationship can fill in the details here, specifying which expressions and reasons for actions are appropriate. Further, the Liberal Theory has a straightforward explanation of the sensitivity and non-replication requirements. A gesture that replicated wrongmaking features of an injustice would not be able to change the way that the injustice impaired the political relationship. A gesture that was insensitive to the grievance of the claimant would fail to treat the claimant as a "self-authenticating source of valid claims,"³⁵ which is a component of the normative ideal of the political relationship.

Perhaps the most difficult task for the Liberal Theory is accounting for reparation's bipolar structure.³⁶ Views that adopt the compensatory conception of reparation (coupled with Thompson's exclusion principle) can easily account for this bipolar structure: injustices create debts for victims against wrongdoers, and gestures of reparation respond to these debts. The Liberal Theory rejects both the compensatory conception and the exclusion principle. However, the Liberal Theory can still account for this bipolar structure by seeing destabilizing injustices as giving rise to grievances by claimants. These grievances generate reasons for rejecting fair terms of cooperation. Reparation responds to these grievances, and so exhibits a bipolar structure.³⁷

Collectivity—The Liberal Theory provides a straightforward way to appreciate the collective nature of injustices. Philosophical liberalism assumes that injustices bear some connection to political society, either through the pervasive effects of the basic

³⁵ PL, at 32.

³⁶ Indeed, this challenge is potentially fatal to liberal views of reparation like K.C. Tan's, which reduce questions of reparation to questions of distributive justice. See Tan (2007). Because distributive justice does not obviously have a bipolar structure, it is unclear how a liberal view like Tan's could capture this aspect of reparation's phenomenology.

³⁷ Moreover, the Liberal Theory sees the claimant as retaining the normative power to change the significance of an injustice via granting political forgiveness. This responsiveness differentiates the Liberal Theory from views (like Nozick's version of the legitimacy-based approach or "wrongful harm" versions of the corrective justice approach) that adopt the disequilibrium thesis. On such views, the claimant's forgiveness would not change the impetus for making reparation for an injustice.

structure or the irrelevance of doing/allowing distinction regarding a state's connection to injustice.³⁸

The Liberal Theory establishes that reparation is a collective burden, even for citizens who did not directly perpetrate an injustice. There are at least two arguments for this conclusion. First, destabilizing injustices generally impair political relationships and prevent realization of the ideal of political justification. Everyone has good reason to contribute to making reparation because everyone has reason to value these relationships and the realization of this ideal. The second argument presumes that the doing/allowing distinction does not apply to state actions. If this argument is correct, then the state can be seen as bearing direct remedial responsibility for any destabilizing injustice, with individual citizens responsible derivatively in terms of their membership in political society.³⁹

The Liberal Theory makes a largely prospective case for why reparation is a collective responsibility. Reparation is called for because of the way that an injustice impairs political relationships now and going forward. If an injustice does not impair the political relationship prospectively, then it does not call for reparation under LPR. Because of this prospective formulation, the Liberal Theory can avoid conceptual difficulties associated with backward-looking accounts of responsibility (such as discounting,⁴⁰ tracing,⁴¹ and connecting outcome and reparative responsibility⁴²).

History—The Liberal Theory sees historical distance as affecting the case for reparation, albeit in a way that differs from the predominant understanding. To see how distance matters on the Liberal Theory, it will help to draw out this contrast.

The Liberal Theory rejects (at least in part) Jeremy Waldron's supersession thesis, which contends that the passage of time and overall beneficial changes in circumstances can render an injustice normatively inert. For Waldron, supersession expiates the significance of an injustice: a superseded injustice no longer calls for reparation. As discussed in chapter 4, Waldron's thesis can be seen as two different claims. The first claim is that all injustices are supersession-apt, or capable of having their normative force expiated. The second claim is that widespread, beneficial changes in social circumstances subsequent to an injustice (as are typically associated with liberal progress over time) are sufficient to achieve supersession.⁴³

The Liberal Theory straightforwardly denies Waldron's second claim about sufficiency. This claim would deny the analytic distinctiveness of reparation. On the

³⁸ Supra, at p. 34.

³⁹ See Pasternak (2011).

⁴⁰ Cowen (1996).

⁴¹ Kershnar (2002), at 261-2.

⁴² Miller (2001).

⁴³ Supra, at p. 89.

Liberal Theory, destabilizing injustices provide reasons for rejecting ostensibly just institutions, even if the injustice is causally implicated in overall increases in social welfare. Therefore, the byproducts of just institutions could not override injustice-based objections, since these objections call into question the legitimacy of those institutions in the first place.

The Liberal Theory is more interestingly contrasted with Waldron's argument that all injustices are supersession-apt. Here, too, the Liberal Theory differs from Waldron's position, albeit in more subtle ways. Waldron sees reparation in terms of the compensatory conception, and this commitment explains much of the plausibility for his argument that all injustices are supersession-apt. If injustices create debts and debts concern states of affairs, then a debt would be appear to be fulfilled if the victim fared at least as well (if not better) in the occurrent state of affairs as in the one that would have arisen if not for the injustice. However, I have argued that we should reject the compensatory conception generally, and the debt model for appraising the significance of wrongs in particular. Moreover, if the Liberal Theory allowed the significance of an injustice to be extinguished collaterally, then the case for reparation would lose its analytic distinctiveness. Also, the Liberal Theory doesn't see reparation as eliminating the significance of an injustice directly, in the way that Waldron's view does. It is easy to understand how a debt can be expiated through redress, but it is less clear how the force of a reason (*e.g.*, one based on self-respect, integrity, or justification) could be similarly expiated.

Nevertheless, a main intuition behind Waldron's supersession thesis—that the significance of an injustice typically fades over time—is highly plausible. All other things equal, chattel slavery exerted more normative force (and called more urgently for reparation) in 1865 than it would in 2015. Also, some injustices are sufficiently remote that they no longer seem to call for reparation.⁴⁴ The Liberal Theory can account for this fading effect without adopting the compensatory conception of reparation or Waldron's supersession thesis.

On the Liberal Theory, injustices matter because of how people are connected to them. Your connection to an ongoing or recent injustice might directly implicate important abstract values, like self-respect, integrity, and mutual justification. You also might have a vicarious connection to an ongoing or recent injustice. An injustice that expresses degrading attitudes towards your group can matter a great deal to you, even if this injustice does not also harm you or violate your rights. Distant injustices, by contrast, do not offer a direct mode of connection: most distant injustices could not have violated your rights or harmed you. With sufficient distance, your vicarious connection to a distant injustice comes to resemble your connection to a tradition, providing what Samuel Scheffler calls "traditional reason."⁴⁵ Scheffler argues that traditional reasons have

⁴⁴ Some reject the fading intuition, arguing that the passage of time does not diminish (and indeed might compound) the significance of an injustice or change whether it calls for reparation. *See, e.g.*, Booth (2011), at 757; Herman (2001), at 250; Sanderson (2011), at 180. The argument offered here provides reasons to doubt this claim.

⁴⁵ Scheffler (2012), at 287.

distinct normative content that can neither be reduced to the “values, principles, or ideals” that a tradition serves, nor fully explained by the value of someone’s subscribing to a tradition.⁴⁶ Rather, Scheffler argues, traditional reasons matter partly because several abstract considerations speak in favor of adhering to (some) traditions⁴⁷ and partly because traditions allow us to establish “at homeness” in time.⁴⁸ These features differentiate traditional reasons from culture-based reasons, which “do not represent an independent class of reasons over and above the reasons deriving from the values and principles that people recognize.”⁴⁹

Scheffler leaves open the force of traditional reasons, including whether they “can ever be binding or obligatory.”⁵⁰ However, based on Scheffler’s explanation of why that traditional reasons matter in the first place, it seems that the force of such reasons is limited. For Scheffler, much of why traditional reasons matter has to do with the abstract considerations they further. Yet these abstract considerations might conflict with traditional reasons. For example, acting in adherence to a tradition might be a way to act loyally towards particular people “who adhered to the tradition.”⁵¹ Yet the tradition itself might express demeaning attitudes about specific adherents. If so, then there would be a conflict between acting according to a tradition and realizing an abstract consideration (namely, loyalty) that explains the value of acting according to a tradition in the first place. In light of this conflict, it seems plausible that the traditional reason has less force than the abstract consideration.

As with traditional reasons, much of the normative force of distant injustices can be explained in terms of abstract considerations like self-respect, integrity, and mutual justification. For the most part, there will be no conflict between reasons based on distant injustices and these more abstract considerations. However, when there is conflict, the abstract considerations would seem to win.

If these arguments are sound, then the Liberal Theory can explain the fading intuitions that give Waldron’s arguments about distance much of their appeal. You might be directly or vicariously connected to an ongoing or recent injustice. However, as distance from an injustice increases, your connection to it resembles a traditional reason. A distant injustice still generates special reasons, but these reasons are more easily defeasible by abstract considerations than the reasons directly or vicariously arising out

⁴⁶ *Id.*

⁴⁷ Scheffler labels these considerations “convention, habit, wisdom, guidance, value, loyalty, and integrity.” *Id.*, at 294.

⁴⁸ *Id.*, at 306 (“Participation in a tradition may help to compensate for our lack of control over our mobility in time, it may enable us to domesticate time, it may assure us of our own reality as temporally extended creatures and, by incorporating us into a custodial chain designed to preserve things (other than ourselves) that we value, it may help to enhance the perceived significance of our lives and diminish the perceived significance of our deaths.”)

⁴⁹ *Id.*, at 288.

⁵⁰ *Id.*, at 308.

⁵¹ *Id.*, at 294.

of an injustice. However, the strength of your background reasons related to mutual justification remains constant. On the Liberal Theory, then, extremely distant injustices still matter, but not enough to ground rejection of ostensibly fair terms of political cooperation. Yet, on LPR, responding to these reasons for rejection is the *prima facie* justification for reparation. Therefore, the urgency of the case for reparation fades with historical distance.

Distinctiveness and Discrimination—The Liberal Theory provides an intertwined resolution of these last two elements of the framework. Destabilizing injustices call for reparation in an analytically distinctive way. As the Alternative Reconstruction example suggests, the case for the reparation of destabilizing injustices does not reduce to (and cannot be obviated by achieving) political goals like distributive justice or fair equality of opportunity. Even if these political goals were achieved, chattel slavery would still impair political relationships because of the profoundly demeaning attitudes that were manifest in this practice.

However, the Liberal Theory does not provide an analytically distinctive case for reparation of *every* injustice. Some injustices do not generate reasons for rejecting fair terms of political cooperation. To be sure, the existence of such garden-variety injustices is troubling. Just political arrangements would not allow for such injustices, and formulating principles to meet these injustices is an urgent topic in non-ideal theory.⁵² However, the significance of these injustices would be ameliorated by meeting our basic commitments to establish just political arrangements and realizing the ideal of political justification.⁵³ The Liberal Theory is thus reductionist regarding injustices that do not destabilize. The significance of these injustices can be redescribed in terms of other political goals that we already have sufficient reason to achieve, like the protection of rights, provision of fair equality of opportunity, achievement of distributive justice, and realization of the ideal of political justification.

Therefore, the Liberal Theory provides the following standard for discrimination: destabilizing injustices call for reparation distinctively, while non-destabilizing injustices do not. In limiting its focus to destabilizing injustices, the Liberal Theory is modest in a way that allows it to avoid concerns about demandingness that plague certain rights-based approaches⁵⁴ or legitimacy-based approaches like Nozick's.⁵⁵ These highly demanding views see the reparation of injustices as a precondition for achieving political justice. They call for the reparation of every injustice, no matter how distant or serious. An implication of highly demanding views is that reparation would be called for even if satisfying reparative burdens would require dismantling institutions that are widely beneficial and highly justified. Because the Liberal Theory provides grounds for discrimination, it avoids these implications.

⁵² TJ, at 216.

⁵³ See *supra*, at p. 136.

⁵⁴ *Supra*, at p. 91.

⁵⁵ *Supra*, at p. 105.

My proposed criterion for discrimination raises an important question: which injustices destabilize? As noted above, I do not have a fully determinate answer to this question, and I am doubtful that one is possible. Much of the answer turns on the description of the demeaning attitudes that an injustice manifests, as well as how these attitudes interact with other wrongmaking features of an injustice. Chattel slavery and genocide are paradigmatic cases of destabilizing injustices. These wrongs not only profoundly violate the rights and set back the interests of their victims, but also regard them as subhuman.

I am less confident that a global conclusion can be drawn regarding an injustice like the expropriation of private property. After Christopher Kutz, one might argue that certain instances of expropriation are wrong, but nonetheless within the “limits of political experimentation”⁵⁶ given a conventional view about the justification of property rights. Arguing from such a view about property rights, Kutz concludes that “[e]xpropriation on its own is not a categorical wrong like murder or political repression; it does not by its very nature vault to the head of the line for repair.”⁵⁷ In the terms I have used, expropriation would not necessarily be a destabilizing wrong. However, some tokens of expropriation convey profoundly demeaning attitudes toward their targets. Examples here include the expropriation and forced resettlement of indigenous peoples in North America and Australia. These policies of expropriation not only resulted in the loss of land and denial of subsistence, but also the suppression of institutions by which these peoples maintained their common identity.⁵⁸ Moreover, this suppression was a goal, rather than a byproduct, of these policies. These tokens seem like destabilizing injustices, in that they appear to provide the victims of expropriation (and perhaps contemporary members of these communities) with reasons to reject ostensibly fair terms of political cooperation. Likewise, imagine a society in which the political culture embedded a strong, non-contingent justification for property rights. The Rawlsian liberal might deny that property rights are or should be justified in this way. Yet despite this fact about justification, the abridgement of property rights in such a society might convey profoundly degrading attitudes towards the targets of expropriation. In such a scenario, the significance of these attitudes might well justify the claim that expropriation is a destabilizing wrong.

Ultimately, it is difficult to establish in the abstract which injustices are destabilizing. The philosophical liberal asserts that everyone has powerful background reasons for accepting and complying with fair terms of political cooperation. Therefore, only injustices that manifest a profound disregard would appear capable of generating reasons for rejecting such terms. Some cases (like genocide or slavery) seem to meet this standard *prima facie*. Whether other cases meet this standard depends on specific features

⁵⁶ Kutz, (2004), at 302. Kutz has in mind the expropriation of private property by communist and socialist regimes in Central and Eastern Europe in the 20th Century.

⁵⁷ *Id.*, at 285.

⁵⁸ *See, e.g.*, Sanderson (2012)

of the injustice itself (*e.g.*, the attitudes that it manifests towards its targets), as well as features of the political culture in which the injustice arises.

I think this open-endedness of the Liberal Theory is a virtue, since it mirrors the open-endedness about political justification that characterizes Rawls's later political philosophy. We all have good reasons to respect the freedom and equality of others. Complying with mutually justifiable political arrangements allows us to realize these reasons. Yet because of contingent features of various political societies, we can expect considerable variation in the political arrangements that can be justifiable to all those subject to them. Likewise, injustices depend on and create variations. Attitudes that are benign in one context might be profoundly demeaning in another. Injustices also create different standpoints, for example, the standpoints of wrongdoer and victim. The ideal of political justification requires taking these different contexts and standpoints seriously in appraising the normative significance of an injustice.

III. Applying the Liberal Theory: Reparations for U.S. Slavery

The discussion of the Liberal Theory so far has been abstract. What, if anything, does this view have to say about contemporary debates on reparation? In this section, I examine the case of reparations for chattel slavery in the United States. Given some caveats, the Liberal Theory most likely supports reparation for chattel slavery. My aim here is not to fully resolve this issue, so much as to show that the Liberal Theory focuses on the most salient features of the injustice of slavery and captures the relevant normative phenomenology (including what reparation's causal structure).

Before proceeding, I should note three caveats about the practical guidance that the Liberal Theory can provide. First, the Liberal Theory is admittedly abstract. Recall the Liberal Principle of Reparation says that, when a destabilizing injustice threatens realization of the ideal of political justification, reparation is called for as a way of valuing political relationships that are impaired by that injustice. LPR articulates a basic case for reparation, but it does not establish which injustices threaten realization of the ideal of political justification. Moreover, the Liberal Theory does not provide a detailed blueprint for arranging political institutions in order to effect reparation (beyond offering basic requirements like non-replication and sensitivity). My method here parallels Rawls's four-stage sequence for implementing principles of justice. Recall that, for Rawls, principles of justice are first formulated abstractly, then instantiated into a constitutional arrangement, then implemented through specific legislative enactments, and finally applied to specific cases "by judges and administrators, and [by] the following of rules by citizens generally."⁵⁹ LPR is a principle that would be articulated at the first stage of this sequence. Even in this abstract formulation, though, the Liberal Theory can make specific recommendations, including doubting the efficacy of judicial reparations and calling for implementing reparations through specialized institutions.⁶⁰

⁵⁹ Rawls, TJ, at 173-5.

⁶⁰ *Infra*, at pp. 171-173.

A second caveat is that the Liberal Theory has areas of indeterminacy that arise from the abstract way that LPR is formulated. Many of the core concepts in the Liberal Theory (such as what counts as a destabilizing injustice and what generic reasons we have to comply with and support just political institutions) are open-ended and contestable. People might disagree in good faith about whether a particular injustice generates reasons for someone to reject ostensibly fair terms of political cooperation. Likewise, it seems possible that the same type of injustice could be destabilizing in one political society but not in another. Moreover, as noted above,⁶¹ societies might well differ in determining the relative priority of reparations and other aspects of the more fundamental commitment to justice, like the protection of basic rights and provision of social opportunities. I do not think that any of these areas of indeterminacy is a major weakness of the Liberal Theory. Reparation is a part of the basic commitment to just political institutions, and this commitment can plausibly take different forms in different political societies. However, this indeterminacy limits the policy implications of the Liberal Theory.

A third caveat is that the Liberal Theory is rarefied. As I have noted in this chapter, the Liberal Theory differs from every other alternative theory of reparation in its explanation of why injustices matter, why reparation is justified *prima facie*, why citizens can be expected to contribute to reparation, and how reparation ameliorates the significance of injustices. Yet the specific responses that the Liberal Theory calls for might also be championed under other approaches. Take the reductionist position that sees reparation as a way of meeting commitments in distributive justice.⁶² As noted above, this reductionist position is not actually a theory of reparation because it redescribes the significance of injustices in terms of some other distributive justice and posits that meeting that goal would extinguish the significance of these injustices. This reductionist view and the Liberal Theory might overlap in the measures that they support, although not entirely. (As I note below, the Liberal Theory would call for a variety of other adjustments to the terms of cooperation that the distributive justice-based view would not also demand. Even when the Liberal Theory overlaps with a distributive justice-based approach, the former is far more concerned with how redress is implemented than the latter.) In any event, the full divergence between the Liberal Theory and alternative views can only be appreciated in a highly just society. In a world characterized by as much injustice as ours, the most immediate policy prescriptions of the Liberal Theory will almost certainly resemble those of other views.

The practice of chattel slavery in North America dates back to at least 1505. The slave trade in North America began in the 17th century. Chattel slavery was outlawed by the Thirteenth Amendment to the U.S. Constitution (which was ratified in 1865). By 1680, there were roughly 7000 slaves in the British North American colonies. By the

⁶¹ *Supra*, at p. 152.

⁶² E.g., Pierik (2006), Spinner-Halev (2012a), Tan (2007); Wenar (2006); Lyons (2004), at 1397-1404.

1730s, the number of slaves who had been imported was 120,000. By 1825, the enslaved population of the United States was roughly 1,750,000.⁶³

Chattel slavery was a brutal practice, one both acknowledged by and formally supported through U.S. political institutions. Between the 16th century and 1865, slavery existed in every region of North America, although by the late 18th century it was heavily concentrated in southern states, where it was the dominant source of economic production. The specific circumstances of slavery differed according to the economic goals that slavery was designed to achieve and “the nature of the terrain, the richness of the soil, the availability of markets, the demographic balance between white and black, free and slave, and men and women, and the diverse origins of both slaves and slaveholders.”⁶⁴ In all these iterations, however, slaves were subjected to forced labor without compensation, and were routinely brutalized through rape, whippings, and other forms of torture. As one historian notes, while chattel slavery in the U.S. “did not have its origins in a conspiracy to dishonor, shame, brutalize, or reduce slaves on some perverse scale of humanity...it did all of those at one time or another.”⁶⁵

Although ostensibly a property-based institution (and so a subject of private law), chattel slavery was secured through a variety of mechanisms in public law. Without the “coercive power of the state, slavery would have been pragmatically (if not also conceptually) impossible.”⁶⁶ The practice was bolstered in the U.S. constitution through the “3/5ths Clause”⁶⁷ (which provided that enslaved persons counted as three-fifths of a free person for the purposes of representation and taxation), the fugitive slave clause⁶⁸ (which mandated that fugitive slaves be delivered to their owners) and the slave importation clause⁶⁹ (which foreclosed the federal government from regulating the importation of slaves until at least 1808).

Calls for reparation to enslaved persons began even before the practice of slavery was abolished. Many courts, even in southern states, recognized the legal notion that “wrongful” enslavement (that is, subjecting someone to conditions of slavery who was not, legally, enslaved) gave rise to claims for recovery based on assault and battery, as well as for recovery for the value of labor provided while wrongfully enslaved.⁷⁰ Calls for widespread reparation to all African-Americans were perhaps most prominent in the Reconstruction era, from 1865 until 1877. The most famous example of reparation was

⁶³ See, for example, the sources cited in *In re African-American Slave Descendants Litigation*, 375 F. Supp. 2d 721, 727-8 (N.D. Ill. 2005).

⁶⁴ Berlin (1998), at 7.

⁶⁵ *Id.*, at 5.

⁶⁶ Sepinwall (2006), at 211.

⁶⁷ U.S. Const. art. II, §1, cl. 3.

⁶⁸ U.S. Const. art. IV, §2, cl. 3.

⁶⁹ U.S. Const. art. I, §9, cl. 1.

⁷⁰ Brophy (2006), at 20.

General Sherman's Field Order 15, which decreed that 400,000 acres of confiscated land in Georgia should be temporarily allotted for use by freed slaves. Under the order, each family was to receive a parcel of 40 acres and the free use of Army mules in order to cultivate the plots. Yet Sherman's Field Order was revoked by President Andrew Johnson, who then used army forces to "forcibly evict the freed slaves and return the land to Southern whites."⁷¹ Among the various programs that constituted Reconstruction, none provided resources to freed slaves in order to compensate them for their unpaid labor or to specifically redress the disadvantages imposed by enslavement. Although various legislators have proposed bills providing material reparations based on chattel slavery, none have come close to being enacted.⁷²

To present the implications of the Liberal Theory as clearly as possible, I consider the question of whether chattel slavery calls for reparation in isolation from the myriad of formal and informal racialized injustices perpetrated against African-Americans in the wake of slavery's abolition. However, these subsequent injustices are relevant under LPR because they inform whether the degrading attitudes that animated slavery persist, and thus whether slavery is a destabilizing injustice for contemporary African-Americans.

Under the Liberal Theory, the threshold question is whether chattel slavery is a destabilizing injustice—that is, whether it generates reasons to reject ostensibly fair terms of political cooperation established according to a fair political process. Is the injustice of slavery sufficiently compelling to overcome our background reasons to accept and comply with just terms? If so, then the imposition of those terms could not meet a standard of mutual and reciprocal justification. It would be unreasonable to expect those who have such reasons to comply with such terms, and it would be inappropriate to infer that a society governed by such terms would be either legitimate or stable for the right reasons.

Resolving this initial question requires establishing what the wrong-making features of chattel slavery are. I will focus on three features that I have discussed in Chapters 5 and 6: rights violations, disadvantage, and degradation. Chattel slavery did not violate the legal rights of enslaved persons, since slaves were largely incapable of having such rights. That said, it seems uncontroversial that slavery violated the basic human rights of enslaved persons. Among these rights were the rights to be free and the right to compensation for one's labor. Slavery also disadvantaged enslaved persons in a variety of ways, not least by depriving them of the products of their labor and access to an adequate (or fair) share of social resources. Finally, slavery profoundly degraded enslaved persons. This degradation is, in part, a function of the extreme brutality of the practice in the United States. However, chattel slavery would have been profoundly degrading even if it had been practiced more humanely. Every regime of enslavement degrades the persons who are enslaved by denying their full worth as humans and by refusing to treat them as part of the audience for whom political decisions must be justified.

⁷¹ *Id.*, at 25.

⁷² *Id.*, ch. 6.

Given these features, chattel slavery is (as noted above) a paradigmatic example of a destabilizing injustice. The Alternative Reconstruction example introduced in Chapter 5 suggests that the specter of slavery would prevent realization of the ideal of political justification. On the Liberal Theory, the roles of federal and state governments in perpetuating chattel slavery would compromise their legitimacy in general, and in particular with regard to enslaved persons. Chattel slavery was authorized and supported by then-existing legal institutions. Based on the continuity in identity between the institutions that imposed slavery and their successors, enslaved persons would have powerful reasons to reject ostensibly fair terms of political cooperation involving the individuals and institutions that perpetrated slavery. These reasons for rejection would, in turn, disrupt the connection between justification and legitimacy implicit in the Liberal Principle of Legitimacy. Because formerly enslaved persons would have compelling reasons to reject terms that were abstractly justified, others would lack good reason to hold formerly enslaved persons to these terms. This is not to say that formerly enslaved persons might not behave in the ways specified by fair terms of cooperation and take advantage of the institutions specified by such terms. Such a scheme might generate conforming behavior by enslaved persons. However, because the standard of political justification would not be met, this behavior would fall short of obtaining the compliance (and achieving the stability) that contractualist liberalism calls for.

It is a further question whether slavery is a destabilizing injustice for contemporary African-Americans, none of whom were enslaved. I think the best reading of the Liberal Theory is that chattel slavery remains a destabilizing injustice, although the support for this conclusion is more tentative.

Consider once more the factors that made chattel slavery a destabilizing injustice with regard to enslaved persons: rights violations, disadvantage, and degradation. It is difficult to see how chattel slavery could have directly violated the rights of descendants.⁷³ Some argue that slavery violated the rights of descendants to inherit resources from their ancestors. However, even if such a right exists, it is difficult to see how its violation could count as a reason to reject fair terms of political cooperation, since the right to inheritance is only intelligible within a cooperative political scheme.

A more controversial question is whether chattel slavery disadvantages contemporary African-Americans. On one hand, contemporary African-Americans, many of whom are descendants of enslaved persons, have alarmingly different life prospects than those who are not. Summarizing an array of empirical research, Elizabeth Anderson notes that African-Americans “are worse off than the average American, and worse off than whites, on virtually all major objectives of well-being,” including access to capital (in 2005, the median net worth of African-Americans was less than 10% than that of whites), health outcomes (African-Americans are far more likely to suffer and die from preventable diseases than whites), education (“[b]lacks lag behind whites on every measure of educational attainment”) and political standing (African-Americans are far

⁷³ See, e.g., Brophy (2008).

more likely to be victimized by violent crime, incarcerated, and disenfranchised than whites).⁷⁴

On the other hand, not everyone accepts that the disadvantaged status of African-Americans justifies reparations for slavery. Some question whether these disadvantages can be attributed to the practice of chattel slavery, rather than intervening causes.⁷⁵ Furthermore, on a counterfactual test of harm, it not obvious that chattel slavery has seriously worsened the position of contemporary African Americans. Kershner envisions the following argument about why slavery did not harm the descendants of enslaved persons:

“Slavery may have had a net positive effect on the descendants by giving them access to advanced technology and greater wealth they would otherwise not have had access to. If we measure the comparative positions of current African-Americans and current Africans in terms of income, civil rights, education, or economic opportunity, slavery would have produced a net benefit for the descendants of slaves, and hence it does not support compensation.”⁷⁶

As noted above, one way to avoid these problems of establishing disadvantage is to posit a non-comparative notion of harm.⁷⁷ Another way is to identify a special harm that slavery imposes on contemporary descendants—for example, the denial of access to human capital from their ancestors.⁷⁸ Without addressing the validity of either of these responses, it is enough to note that both of them presume that the justification for reparation requires establishing that a claimant was harmed by the injustice of slavery.

The Liberal Theory avoids the potentially confounding problem of proving disadvantage. On the Liberal Theory, destabilization, rather than disadvantage, is what determines the case for reparation. An injustice like chattel slavery can destabilize (and thus call for reparation) even if it does not make the claimant worse off or violate her rights. Disadvantage and rights-violations are two important ways to establish that an injustice destabilizes, but they are not the only ways to do so. The bases of destabilization are informed by the relational conception of reparation that undergirds the Liberal

⁷⁴ Anderson (2010), at 23-4.

⁷⁵ E.g., Hackney (2004), at 1195 (“Causation... is a threshold issue in any discussion of reparations, even those that do not explicitly raise legal doctrinal concerns.”)

⁷⁶ See Kershner (2002), at 245, who attributes its logic to Paul (1991).

⁷⁷ For example, Seana Shiffrin articulates a non-comparative account of harm, on which to harm someone is to interfere with her agency in specific ways. E.g., Shiffrin (1999) and (2012). Shiffrin’s account of harm does not run aground on the non-identity problem because it does not posit a historical or counterfactual baseline in order to determine whether an action has harmed someone. Yet this response does not fully alleviate the problem with establishing disadvantage in the case of U.S. chattel slavery. Even on a non-comparative account of harm, it is not clear that chattel slavery harms the descendants of enslaved persons, since it is unclear that a long-abolished practice could directly constrain the agency of contemporaneous persons.

⁷⁸ See the discussion of Boxer and Sher’s argument, *supra*, at pp. 88-9.

Theory. A wrong that does not directly harm a victim or violate her rights can nevertheless impair her relationship with the wrongdoer, for example by manifesting attitudes toward the victim that are inconsistent with the normative ideal of the relationship-type. By contrast, on views that adopt the compensatory conception, a wrong that does not harm its victim or violate her rights creates no debt, and so does not call for reparation.

Given the mutual and reciprocal character of liberal political justification, the degrading attitudes manifested in slavery can impair the political relationship of contemporary African-Americans. I cannot provide a taxonomy of which attitudes conveyed by an injustice are sufficient to impede the possibility of political justification. Moreover, as noted above, the answer to this question resists the kind of abstract theorizing I am attempting to provide here. It seems plausible that, if the degrading attitudes that animated chattel slavery had been convincingly repudiated, then slavery would have lesser normative significance for contemporary African-Americans. Yet, in the wake of abolition, the stigmatization enacted by slavery “became... inseparable from the social meaning of race.”⁷⁹ Far from repudiating the degradations of slavery, events subsequent to abolition have cemented these attitudes in a variety of policies and institutions. Examples of the replication of these attitudes include the elaborate legal apparatus of Jim Crow, housing and educational segregation, and the gross racialized discrepancies in how citizens encounter coercive state authority (both through contact with police and carceral institutions).

This degradation could matter both directly and indirectly, providing contemporary African-Americans with two types of reasons for rejecting ostensibly fair terms of political cooperation. One set of reasons arises out of solidarity with their enslaved ancestors. If descendants of enslaved persons identify with their ancestors and their ancestors have degradation-based reasons for rejection, then (based on the normative significance solidarity) descendants would also have reasons for rejection. A second kind of reason concerns the degrading attitudes themselves. If degradation can generate reasons for rejection and the (unrepudiated) degrading attitudes towards enslaved persons were based on characteristics that their descendants share, then the expression of these attitudes would degrade the latter group as well as the former. Indeed, the degradations of slavery apply to anyone who shared these characteristics, regardless of whether her or she is a descendant of an enslaved person. Thus, the degradations of slavery would impair the possibility of political justification for all contemporary African-Americans. Moreover, given the generality of the delegitimizing effect of injustices,⁸⁰ slavery would destabilize the political arrangements of all citizens.

Of course, the abstract argument I have just sketched is unrealistic in several respects. It is fanciful to isolate the injustice of slavery from the injustices that succeeded it. More importantly, the terms of our political cooperation are far from just on any understanding of that term. Therefore, the barriers to realizing the ideal of political

⁷⁹ Lounsbury (2007), at 93.

⁸⁰ *Supra*, at p. 100.

justification are legion. Nonetheless, the implications of this argument are troubling. Even if we could consider the injustice of slavery in isolation and identify and implement fair institutional arrangements, the legacy of slavery would stand in the way of our achieving justice, legitimacy, and stability for the right reasons.

If chattel slavery was (and remains) a destabilizing injustice, what form should reparation take? The most commonly discussed form of reparation for chattel slavery involves distributing social resources to African-Americans. Yet, as many advocates note, reparation is not the only way to justify such measures. For example, many call for significant reallocations of material goods to contemporary African-Americans based on their relative disadvantage, independently of whether this disadvantage is attributable to chattel slavery.⁸¹ The material deprivation of African-Americans as a group is objectionable because it deviates from a fair distribution of social resources. As Seana Shiffrin notes, “the suffering of this population, and others, deserves attention as such. It should not be a requisite for economic and social reform that the serious obstacles faced by African-Americans be traced to slavery. There are other independent duties of justice to redistribute and not to leave groups behind.”⁸² Given the unjust of the distribution of social resources that characterizes contemporary American society, measures for distributing resources to African-Americans would dramatically improve the justness of social arrangements.

If the case for such measures is overdetermined, does it matter whether they are called for as a species of reparation or as a way of effecting distributive justice (or both)? I think so. Distributing resources through reparations requires greater sensitivity to institutional form than distributive justice does. In Chapter 2, I raised the possibility that a program of redress that is based on degrading reasons or expresses degrading attitudes about its recipients might not just be a poor reparations program, but fail to ameliorate the significance of a wrong.⁸³ This argument suggests a broader principle that the institutional form through which a candidate policy of reparation is implemented can determine whether that policy is a token of reparation. Such a constitutive view about implementation contrasts with the usual instrumentalist view about institutional design, which evaluates a program’s implementation based on whether (and how efficiently) it realizes an overarching goal. This instrumentalist logic is therefore agnostic about how a program is implemented. Agnosticism about institutional form is an explicit premise in many arguments that analyze reparation under the compensatory conception of reparation.⁸⁴ Agnosticism is also typical in discussions of distributive justice.⁸⁵ In these discussions, distributive justice is determined by analyzing states of affairs. How these

⁸¹ Tan (2007), at 285 (“[M]any of the social and economic disadvantages that African-Americans currently face can also be criticized on forward-looking terms, by reference to what egalitarian justice now requires. There is no need to invoke the past wrong of slavery to show why these current disadvantages are unacceptable.”) See also Darby (2010).

⁸² Shiffrin (2009) at 337.

⁸³ *Supra*, at p. 52.

⁸⁴ E.g., Posner & Vermeule (2003)

⁸⁵ E.g., Logue (2004), at 1356-1370.

states of affairs are brought about does not figure into this analysis.

Assuming, for the sake of argument, that agnosticism about implementation is appropriate in discussions of distributive justice, this view seems inappropriate in discussions of reparation. In particular, agnosticism runs afoul of reparation's causal structure. In political contexts, the manner by which a program is implemented can determine whether and how much it succeeds as reparation. As a conceptual matter (that is, independently of whether one accepts the Liberal Theory), the implementation of reparation programs has constitutive significance.

Beyond this constitutive notion of implementation, the Liberal Theory provides further guidance about how reparation should be implemented. Consider the conceptual requirement of non-replication—that a gesture of reparation should not reproduce features of the underlying injustice to which it responds. The Liberal Theory sees deprivation, rights violations, and degradation as important aspects of what made chattel slavery unjust. Therefore, it follows that the manner of implementing slavery reparations should not degrade, deprive, or violate the rights of claimants. Likewise with the conceptual requirement of sensitivity, or the notion that grievances of a claimant should matter to the case for reparation. If what Judith Shklar calls the “sense of injustice”⁸⁶ of claimants does not figure at all in procedure for implementing reparation, then implementation is deficient even if the procedures don't happen to offend these sentiments.

Because the constitutive view about implementation applies to reparation while (*arguendo*) distributive justice can proceed via agnosticism about implementation, some programs that work as distributive justice will be deficient as reparation. For example, consider lawsuits that comprised *In re: African-American Slave Descendants Litigation*. Nine class-action lawsuits were filed by descendants of enslaved persons in U.S. federal courts. The suits alleged that chattel slavery violated federal and state law and sought a variety of damages, including restitution for the value derived from slave labor. The defendants were companies that allegedly provided services (like transportation, finance, and insurance) to slaveowners, both before and after the passage of the Thirteenth Amendment. (State and federal governments are protected against liability for these suits by the doctrine of sovereign immunity, so none were named as defendants.) The trial court dismissed the claims before trial on several grounds. First, the court ruled that, even if the facts alleged were true, the plaintiffs would lack standing to sue because they did not “connect the specifically named Defendants or their predecessors and any of the Plaintiffs or their ancestors.”⁸⁷ Second, the court ruled that the plaintiffs' claims were not justiciable under the “political question doctrine,” which holds that courts should avoid deciding issues that fall under the purview of the legislature or executive.⁸⁸ Noting that slavery reparations had been “considered and rejected” by the U.S. Congress in the aftermath of the Civil War and that reparations for other injustices has been “addressed

⁸⁶ Shklar (1990), at 83.

⁸⁷ *In re African-American Slave Descendants Litigation*, 375 F.Supp.2d 721, 740 (N.D. Ill. 2005).

⁸⁸ *Id.*, at 755-6.

numerous times” by both Congress and state legislatures,⁸⁹ the court argued that reparation is part of the “business of the political branches.”⁹⁰ Third, the court found that the statute of limitations had expired on each of the plaintiffs’ claims and that none of the standard reasons to toll the statutes of limitations applied.⁹¹ Dicta in Judge Richard Posner’s appellate opinion upholding the trial court’s verdict in part suggests a further argument for rejection: the unlikelihood “that antebellum laws in northern states were intended to confer financial or other benefits on the twenty-first century descendants of slaves.”⁹²

Consider an alternative version of this case, which I’ll call Reparations Lawsuit. In this scenario, sovereign immunity insulates governments from liability, but that many of the procedural barriers to the plaintiffs’ claims against non-governmental defendants are inapplicable. The plaintiffs’ claims are tried to verdict, with defendants vigorously contesting liability on many grounds. One such ground (as noted in the dicta to Judge Posner’s opinion) is that the then-applicable laws of northern states were not meant to benefit the descendants of enslaved persons in southern states. Another is the philosophical argument based on the non-identity problem that slavery did not harm the plaintiffs, since contemporary African-Americans on the whole live worthwhile lives and would not exist if not for slavery. Still another argument is that reparations have already been paid in the form of the “trillions of dollars in transfer payments... to African-Americans in the form of welfare benefits and racial preferences” enacted by the passage of the Civil Rights Act and the advent of the Great Society.⁹³ Another argument is Samuel Kershner’s “offset” objection—that any amounts of reparation should be offset against the criminal behavior that is disproportionately committed by African-Americans and gives rise to an independent claim of compensation by victims of this behavior.⁹⁴ (Say that defendants substantiate Kershner’s speculation that the amount of “this offset [actually] exceeds the compensation” might be owed in slavery.⁹⁵) Yet these arguments do not persuade the court. The plaintiffs prevail against the defendants for a massive verdict, which is upheld on appeal. Defendants are compelled the court to pay the amount that the plaintiffs have claimed. Proceeds from this verdict are distributed equally to all African-Americans, many of whom are among the least advantaged persons in U.S. society.

As a tool of distributive justice, there is nothing inherently objectionable about Reparations Lawsuit, although it might be criticized as imprecise or inefficient in comparison with alternative mechanisms for distributing resources. In evaluating candidate mechanisms for distributive justice, what matters is how resources are

⁸⁹ *Id.*, at 766.

⁹⁰ *Id.*, at 765.

⁹¹ *Id.*, at 772-779.

⁹² *In re African-American Slave Descendants Litigation*, 471 F.3d 754, 758 (7th Cir. 2006).

⁹³ Horowitz (2003), at 14.

⁹⁴ Kershner (2002), at 261-2.

⁹⁵ *Id.*, at 262.

distributed before and after the intervention, not how those distributions are effectuated. Given the wealth gap described above, Reparations Lawsuit moves the U.S. closer to realizing many compelling principles of distributive justice, including Rawls's difference principle. On a distributive justice analysis of Reparations Lawsuit, the success of the program would not turn on whether the funds come from corporations rather than the U.S. government, whether government and non-government defendants strenuously denied the validity of the claims for reparation, or whether defendants only made payment because of legal compulsion.

However, each of these features would make Reparations Lawsuit deficient as a gesture of reparation. The substitution of private payers for governmental payers would be problematic because redress would not originate from the governmental entities that should be most concerned with the ideal of political justification (and who would thus be most directly affected by the reasons for rejecting terms of political cooperation that chattel slavery generates). Likewise, the arguments used to contest liability in this scenario convey degrading attitudes about claimants, ones that replicate some of the attitudes that (in part) explain what made slavery unjust in the first place. Conveying these attitudes would violate reparation's expressive requirements.⁹⁶ Finally, the payers' gestures would be prompted by the threat of governmental coercion, rather than the legitimate grievances of claimants. This seems to be the wrong kind of reason for making redress, since it does not essentially depend on the grievances of claimants. In sum, Reparations Lawsuit runs afoul of reparation's causal structure. The gesture of redress described in this scenario would ameliorate the significance of chattel slavery imperfectly, especially in comparison with a gesture that involved governmental payers who did not vigorously attempt to deny liability and responded more directly to the complaints of contemporary African-Americans.

My point here is not that governments should accede to every lawsuit for reparation. Rather, an appreciation of the constitutive importance of implementation and a clearer understanding of how reparation ameliorates suggests skepticism about judicial reparations. Given contingent features of our legal system (like the adversarial nature of adjudicating claims), pursuing redress through lawsuits is likely to lead to gestures that are, at best, imperfectly reparative. More broadly, the Liberal Theory's concern with the constitutive importance of implementation suggests that reparation should be carried out through specialized institutions that are capable of both providing redress and satisfying reparation's causal structure.⁹⁷

⁹⁶ See Murphy (2010), at 133 (contending that process of political reconciliation must both be animated by respect for moral agency of all parties involved and implemented in a way that conveys these values).

⁹⁷ The conclusion here is at odds with that of Eric Posner and Adrian Vermeule, who contend that reparations and other programs of transitional justice can be carried out through "ordinary" political institutions, like courts. E.g., Posner & Vermeule (2003) and (2004). Posner and Vermeule reach their erroneous conclusion because they adopt the compensatory conception of reparation, and so neglect that reparation has a causal structure at all (as well as Colleen Murphy's point that the process of implementing reparation must instantiate the values that animate it).

The discussion so far has concerned material transfers as reparation. Yet reparation for U.S. slavery would require more than such transfers of resources. In addition to the disadvantages that it arguably imposes on contemporary African-Americans, slavery destabilizes because of the human rights that it violated and the disregard of African-Americans that it enacted. Addressing these destabilizing aspects would require additional changes to the basic institutions and practices of American democracy. At a minimum, repudiating the degradations implicit in slavery would require behaviors like removing the informal and formal barriers to political participation by African-Americans; dramatically reforming our law enforcement practices, which both target and punish African-Americans disproportionately; and overhauling the mechanisms for distributing basic good like housing, education and health care, which reinforce racialized inequalities in life prospects.

Yet each of these reforms could be called for as a matter of meeting our most basic commitments to justice and bolstering the legitimacy of our political institutions. For example, Elizabeth Anderson contends that patterns of residential segregation explain the existence and persistence of the most troubling racial inequalities.⁹⁸ Anderson calls for social and residential integration as a way of alleviating these inequalities and the countering expressive injuries that they instantiate in the form of racial stigmatization.⁹⁹ For Anderson, racial integration (which entails comprehensive intergroup association on terms of equality) would remedy these group inequalities and eliminate racial stigmatization, so it is a basic requirement of justice.¹⁰⁰

Anderson's argument is powerful. The inequities she identifies would compromise justice and legitimacy independently of any connection to an injustice like slavery.¹⁰¹ Yet addressing these inequities as a matter of reparation would take a different form than addressing them as a matter of basic justice. Given the constitutive importance of implementation, institutional mechanisms for addressing these inequities must be congruent with reparation's expressive and intentional demands. For Anderson's purposes, policies that reduced or eliminated these inequities as a side effect of achieving some other political goal would satisfy the requirements of justice. Yet such policies would not directly address the disregard that is implicit in the inequities. Achieving the ideal of political justification requires a more direct confrontation. Timothy Waligore, extending Rawls's analysis, contends that "[w]hen state institutions have promoted the idea that certain citizens are unworthy of respect, these institutions must act affirmatively to correct for the legacy left behind."¹⁰² To be sure, a world in which residential

⁹⁸ Anderson (2010), ch. 2.

⁹⁹ *Id.*, ch. 3.

¹⁰⁰ *Id.*, ch. 8. Indeed, Anderson argues that a justice-based commitment to eliminating racialized injustices is incompatible with an effort to achieve reparation: the call for reparation based on "compensating for injustices in the past distracts attention from current injustices and is liable to encourage whites to feel that, once paid, they have done everything needed to end racial injustice, and to place all responsibility for continuing racial inequality on blacks alone." *Id.*, at 229, n. 19.

¹⁰¹ See, e.g., Shelby (2007).

¹⁰² Waligore (forthcoming), at *15.

segregation were eliminated as a side-effect of achieving some other public policy goal would be far more just than our current world. The point is rather that solving these problems in a roundabout way would imperfectly ameliorate the significance of slavery. In such a world, this injustice might still provide African-Americans with reasons to reject ostensibly fair terms of cooperation.

To the extent that slavery is a destabilizing injustice, the Liberal Theory suggests that making reparations for it should be an urgent political goal. The question remains how urgent this goal should be, especially if making reparations would require neglecting other commitments to justice (like fairly distributing social resources) or redressing other destabilizing wrongs (like the expropriation and genocide of Native Americans). On the question of priority, the Liberal Theory offers no definitive answer. Chattel slavery is not the only serious injustice in American history, and contemporary American society is characterized by many injustices that are not directly connected to slavery. These past and ongoing injustices also stand in the way of realizing the ideal of political justification, and so they threaten the legitimacy and stability of political institutions. Deciding which current injustices to eliminate and which historical injustices to redress seems to be within the purview of democratic authority; an abstract view like the Liberal Theory (or philosophical liberalism more broadly) can only establish that these past and present injustices must be addressed. However, the Liberal Theory does not give polities complete discretion about the relative priority of reparations for slavery. Redressing destabilizing injustices is, on the whole, more urgent than redressing historical or contemporary injustices that do not threaten the legitimacy of political society. Likewise, everyone has reason to reject terms of political cooperation that are unfair. Therefore, redressing chattel slavery cannot call for adopting terms of cooperation that would give other citizens reasons for rejection. Within these parameters, though, how to balance the repair of destabilizing injustices with the fulfillment of other commitments to justice is a question that polities work out for themselves.

In the case of reparations for U.S. slavery, the Liberal Theory reaches a conclusion that many other positions can reach. Justice requires reparation for chattel slavery, even though no enslaved persons are alive today. Like some of these alternative positions, the Liberal Theory suggests that redress might take the form of both material transfers and alterations to basic political arrangements. Yet the Liberal Theory reaches this conclusion in a more direct way than alternatives. What matters is not how much (or whether) chattel slavery harmed enslaved persons or contemporary African-Americans, nor whether the rights to compensation of enslaved persons can be asserted by contemporary African-Americans, nor even whether making reparation would be likely to decrease racial animosity. Reparation would be called for as a matter of justice even if the answers to all three of these questions were negative. According to the Liberal Theory, the answer to the question “Why make reparation?” is that the degradations of slavery impair the political relationships of contemporary African-Americans, giving them good reasons to reject ostensibly fair terms of cooperation. To be sure, the terms of our current political arrangements are far from fair, and a variety of other inequities stand in the way of realizing the ideal of political justification. Yet even in a world in which these inequities did not exist, slavery would still destabilize. The Liberal Theory also

suggests the need for specialized institutions for implementing reparation programs. It is unlikely that normal political institutions would be capable of fulfilling the requirements of sensitivity and non-replication that must be met if redress is to ameliorate the significance of chattel slavery.

IV. Conclusion

To summarize the main arguments of chapters 5 and 6, philosophical liberalism both needs and provides a theory of reparation. The liberal needs a theory of reparation because destabilizing injustices impair the political relationship and thus block the inference that just political arrangements will be stable and legitimate. On the Liberal Theory of Reparation, political relationships explain the normative impetus for reparation. The Liberal Theory can resolve all of the basic issues that a theory of reparation should resolve. It provides a powerful, distinctive answer to the question of facial justification: you should make (or contribute to making) reparation because you have powerful background reasons to value political relationships impaired by injustices. The Liberal Theory also provides a plausible explanation of how reparation ameliorates the significance of injustices, one that accounts for features of this story that elude other theories (particularly those premised on the compensatory conception). Moreover, because of its roots in philosophical liberalism, the Liberal Theory can resolve thorny questions about claimant and payer justification, collective responsibility, and historical distance that lead other theories to *reductiones ad absurdem*.

In summarizing the virtues of the Liberal Theory, it might help to contrast it with the predominant approaches described in chapter 4. Like corrective justice views, the Liberal Theory sees the case for reparation as a matter of basic justice. However, unlike “wrongful harm” versions of corrective justice views, the Liberal Theory can explain why disregard is a normatively salient feature of injustices, as well as why genuine reparation cannot be insensitive to the grievances of the claimant. Unlike John Gardner’s continuity version of the corrective justice view, the Liberal Theory can explain why reparation has a bipolar structure and why reparation made for inappropriate reasons is deficient.

In contrast with rights-based views, the Liberal Theory can offer a complete answer to the questions “Why make reparation?” and “How does reparation ameliorate?” Moreover, because of its roots in philosophical liberalism, the Liberal Theory is compatible with the denial that rights are normatively basic. Therefore, the Liberal Theory need not posit a metaphysically ambitious account of rights, nor an account of whether rights (or claims based on rights violations) can be descended in order to establish that injustices can call for reparation *prima facie*.

Like legitimacy-based approaches, the Liberal Theory sees certain injustices as compromising a state’s right to rule. However, most legitimacy-based approaches see injustices as delegitimizing state authority directly. By contrast, the Liberal Theory sees injustices as delegitimizing indirectly: destabilizing injustices block the inference (licensed by Rawls’s Liberal Principle of Legitimacy) that political arrangements which are both just and realize the ideal of political justification have the right to rule.

Moreover, the Liberal Theory (unlike many legitimacy-based approaches) can distinguish injustices that call for reparation from those that do not, thereby avoiding metatheoretical concerns about demandingness. Likewise, the Liberal Theory can allow explain how political forgiveness might change the normative significance of an injustice. As such, the Liberal Theory avoids the disequilibrium thesis that seems to be a reduction of many legitimacy-based approaches (as well as some corrective justice approaches).

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