

# Reparations for the Future

*Leif Wenar*

Survivors of the Holocaust demand reparations from the German state. The families of the disappeared require reparations in Argentina. In the United States, African Americans claim reparations for slavery and Jim Crow, while Japanese Americans receive an apology and compensation for the wartime internments. Former colonies press for reparations from former colonial powers. The indigenous populations of North America and Australia assert entitlements for compensation for the dispossession of their lands, as those dispossessed by the communist governments of Eastern Europe assert entitlements to their former property.

All of these claims for reparations have mobilized popular support, and all share a degree of intuitive plausibility. The challenge to the theorist is to judge whether and which of such demands are grounded in sound principles of political normativity, so as to be able to select out the valid claims and to measure how the urgency of these claims compares with other demands on the public agenda. The most basic question for those considering the justifications of reparations is how to orient their theories within the space of reasons. Do valid claims for reparation rest at the deepest level on reasons we have for redressing a past injustice? Or do they rather rest on reasons we have to improve our current relations so that we can get along better in the future? Are valid reparative demands backward- or forward-looking?

Here I will explain my suspicion that—beyond a limited principle of reparation whose justification is overdetermined—backward-looking considerations add no weight to claims for reparations. Only forward-looking factors give us reasons to repair historical injustice. This may appear a surprising result, but it seems to me unavoidable once we become alert to the reasons why some reparative demands get a hold onto us while others do not. Reparations, when they are due, are reparations not for the sake of the past, but for the sake of the future.

## I. A Limited Principle of Reparation

The backward/forward distinction in justification goes to the reasons that ground normative principles of action on the most fundamental level. Backward-looking justifications are based on ground-level reasons we (allegedly) have to make the present match the past. Like retributive theories of punishment, backward-looking reparative theories are often phrased in terms of metaphors:

they speak of the importance of restoring a moral balance, or of mending the torn fabric of the political order. Forward-looking justifications, by contrast, look only to the reasons we have to make the world better from now on.

Forward-looking reasoning may refer to past events, but when it does so this is only to determine how to improve the future. So survivors may gather to discuss how they can get out of the desert, given that the captain has broken his leg in the crash; and a new team of negotiators may wonder how two warring peoples may be brought to live in peace, given that they've loathed each other for decades. Forward-looking reasoning may rely on historical information to diagnose what is needed in the current situation, but when it turns to history this is in the spirit of the adage that to find a cure it helps to know what bit you.

Within the debate between backward- and forward-looking justifications for reparations, there is an important principle of reparation that can be grounded within either approach. Its justification is overdetermined. This principle has a limited scope, but it explains much of the force of our judgments in the cases where reparative demands seem most secure.

The principle says that a person or corporate entity that has been unjustly harmed should be restored as close as possible to the pre-harm baseline, insofar as the harm disrupted sensible expectations about the rights or resources that the victim would enjoy. This principle lies behind much of ordinary tort law, where compensation for injury and return of property are the paradigm. The principle also makes sense of clear cases of what we might call "extra-legal torts," such as the unjust harms inflicted on those interned during the Holocaust and the families of the Argentinean disappeared. This limited principle of reparation is a fixed point in our understanding of interpersonal normativity, and it is the template from which more complex principles of reparation have been elaborated.<sup>1</sup>

This principle of reparation is limited, however, because it refers to a descriptive instead of a normative baseline for harm. It is only what agents actually expect, not (as in Rahul Kumar's account of reparative justice<sup>2</sup>) what they can legitimately expect, that triggers this principle's requirement of reparation. The principle does have two peripheral normative components: we normalize actual expectations somewhat by referring to what people could *sensibly* expect in the circumstances, and only *unjust* harms are eligible for repair. Yet the principle's most important moving part is not normative, but descriptive.

The principle thus applies only to those whom injustice has made worse off than they actually were. The principle will help individuals who have been enslaved, and those whom injustice has deprived of a husband or wife, father or mother. The principle will not help, however, those born into slavery; or born into discrimination or colonial domination; or born into the misery that can follow expropriation. These unfortunate individuals and groups, who could not sensibly expect better than they have, are not within the ambit of the principle's scope for reparations. They may have claims against the injustice of their plights: they may have claims, for example, to one-time payouts, income support, job training,

supplemental pension provision, special rights, and so on. But if they do, these will be straightforward claims of distributive and not reparative justice.

The limited principle of reparation can be supported on either backward-looking or forward-looking grounds. Backward-looking justifications will draw on images of restoring balance to the moral order. For forward-looking justifications, one central value furthered by the principle is the deterrence value of requiring aggressors to return victims to their pre-aggression condition. There is also a second future-looking supposition that a victim whose life plans were disrupted will gain more from, say, the return of a plundered resource than the aggressor will lose from having to return the stolen good.

As with the question of whether the deepest reasons for punishment are backward- or forward-looking, it will be difficult to convince someone with a prior tendency toward one orientation or the other to pivot around on the question of what type of reasons ground this limited reparative principle. I will just report that many find the forward-looking rationales for the limited principle sufficient to give the principle the weight it carries in straightforward cases of reparative demand. These forward-looking rationales can explain, for example, the strength of familiar tort claims such as damage to property and person, as well as the force of extra-legal tort claims like those made by individuals dispossessed by communist regimes.

However, both of these forward-looking rationales can be weak in particular types of cases, or fade quickly. In some types of cases (such as colonialism) the threat of having to pay future reparations may not be much of a deterrent. And after time the utility that, for example, an unjust expropriator can extract from the resources that he has incorporated into his plans will outstrip the utility that could be gained by restoring the resources to their original owner. This fading out of the reach of the principle may seem appropriate. The forward-looking rationales for the limited principle allow for analogues to criminal law statutes of limitation and common-law doctrines such as adverse possession and accession.<sup>3</sup> Yet the principle so interpreted is still strong enough that we may not feel the need for any backward-looking reasons to ballast it.

However, those partial to backward-looking approaches to reparations will not be satisfied with the limited principle's narrow scope. Because the limited principle uses a descriptive instead of a normative baseline, it excludes much that backward-looking theorists believe a theory of reparations should attend to. The limited principle of reparations only takes notice of injustice insofar as it worsens the state of a person or group. It does not detect injustice's continuing effects—how the shadow of injustice darkens the lives of those born after the injustice begins.<sup>4</sup> Addressing the continuing effects of injustice, many backward-looking theorists believe, is a goal that any adequate theory of reparations must reach.

One straightforward response to these backward-looking theorists is to point out that reparations are about repair, and that repair is about restoring to a previous condition. One cannot repair what was never whole. A boy born into slavery cannot be restored to a just condition that he was never in. This also holds for those

born under Jim Crow, and the grandchildren of those who lost their property when Polish land was nationalized. Injustice is unfortunately the default state for many persons and groups, and lives that have never been whole enough to be broken literally cannot be fixed. If backward-looking theorists wish to move beyond the limited principle of reparations, they will have to explain why these descendants of injustice merit special reparative treatment.

## II. The Troubles with Looking Back

Beyond the mere semantics of “reparations,” there are three substantial reasons that should make us suspect that backward-looking arguments are not the best way to move beyond the limited principle to a more robust account of reparations. The first is the depth of the difficulties facing the attempt to make backward reasoning fit our judgments about which injustices should be repaired. The second is a supposition that reparative principles have no purchase independent of current distributive concerns. And the third is the often noted but as yet undeveloped potential for forward-looking arguments to extend reasoning about reparations beyond what the limited principle provides.

The theoretical quandaries in the literature on reparations divide into two types of puzzles, the first surrounding counterfactuals and the second surrounding the identity of successors. The puzzles surrounding counterfactuals concern how much is owed to those to whom reparations are due. It is often alleged that the amount owed is the difference between the level that the claimant is now at, and the level the claimant would have been at had the injustice not occurred. In Nozick’s famous image, we replace the frame of the movie where the injustice occurred with a frame that is injustice-free, and run the film forward to the present to discover from that possible world what the claimant in our world is now entitled to. Yet there are any number of epistemological problems in performing this cinematic thought experiment, concerning the unknowability of free decisions in other possible worlds, the ripple effects of any unjust intervention on market prices, whether a language that an imperialist destroyed would have died out in any case, and so on.<sup>5</sup>

Such difficulties concerning counterfactuals have troubled backward-looking attempts to go beyond the limited principle. Instead of saying more about this, though, I will just note that counterfactuals do not trouble the limited principle itself. The opposite impression may sometimes arise from an unhelpful fixation on the case of monetary damages. When an amount of money is unjustly taken, the malfactor must return not only the original sum but also the interest that would have accrued on that amount over the period where the sum was not held by its rightful owner. It is this “interest on the capital” factor that has focused theorists’ attention on the counterfactual sequence from the infraction to the present, even for cases where not monetary loss but rather death, injury, or cultural damage has occurred.

Yet for the purpose of determining what is due under the limited principle, the focus on counterfactuals is a mistake. The only value relevant to compensation under that principle is measured by the difference between the state of the claimant at the baseline and the state of the claimant after the injustice has taken place. What the claimant is now owed is an increase equal to the gap caused by the injustice. This is the value that “capital plus interest” aims at: the current value equal to the past loss. But if all we really need to know for the sake of operating the limited principle is how much harm an injustice has caused, our task is easier. We can leave aside counterfactual speculation and focus on the more tractable question of the magnitude of the loss due to the injustice.

The second set of puzzles in the literature on reparations, and the set more important for our evaluation of backward-looking extensions to the limited principle, surrounds what has been called the “existential worry.”<sup>6</sup> Backward-looking theory is particularly concerned to capture the reparative demands of individuals and groups that fall outside the scope of our limited principle: distant descendants of victims, and those born into an unjust state created by a past injustice. The theoretical problem that confronts backward-looking theory with these kinds of claimants is that injustice can be an “identity-fixing fact.” As Kumar describes the existential worry, for a person to have been wronged by another it has to be the case that the wronged party is worse off than they otherwise would have been had the wrongdoing not occurred. But the identity of the wronged party is not independent of the wrongful conduct.<sup>7</sup> Unconceived children of the enslaved, oppressed, and expropriated would not have been born without the enslavement, oppression, and expropriation. So it is difficult to say how these very people have been made worse off by injustice, since without the injustice they would not have existed. This is a genuine obstacle in efforts to expand the class of claimants beyond those alive at the time an unjust harm took place.

Kok-Chor Tan’s proposal that we focus on corporate entities instead of individuals at first appears to overcome this difficulty. Tan, writing on reparative claims flowing from the injustices of colonialism, argues that it is the nation or people—not the descendants of individuals who lived under colonialism—which demands reparations for past harms. Since a people persists from the time of the injustice to the present, there need be no worries about identity. The very same entity that once suffered now claims. “Colonialism was an assault against the collective identity of a people, and present individual holders of the identity can demand reparations for this assault given that they are now the trustees of the community, even if they were not themselves personally wronged.”<sup>8</sup>

This move to corporate claimants may be plausible in some cases, yet it cannot satisfy the backward-looking theorist.<sup>9</sup> For the move to corporate claimants puts the case of colonialism back within the scope of the limited principle. Here we have an extant and continuing nation or people that has been unjustly harmed, and so an entity that may have claims to be restored to a pre-harm baseline. The backward-looking theorist will need to show that there are cases for colonial

reparations that lie beyond the reach of the forward-looking construal of the limited principle applied to such entities, and such cases are likely to be controversial. Moreover, most backward-looking theorists want their principles to explain a much wider range of cases than Tan's move to corporate entities allows. If we must limit our attention only to corporate claimants, then the claims of individuals such as the later descendants of the Argentinean disappeared or the later descendants of the Polish landowners cannot get off the ground.

Furthermore, the move to corporate claimants seems incapable of explaining many cases in which we believe that claims of corporate entities have standing. This is because injustice can be an identity-fixing fact for peoples as much as for individuals. The identity of a people has often been formed through resistance to oppression. Where before there were only diverse kingdoms or subject tribes, movements of national liberation have often taken up the unifying idea of a common national identity to forge a weapon against foreign domination. Yet then colonialism cannot be seen as a harm against a people, since the people only begins to exist as colonialism is rejected from the newly born body politic. To take a slightly different kind of case, the existence of the corporate entity made up of African Americans is inconceivable without the injustice of slavery. It is difficult to say that the corporate group of African Americans now living is worse off because of slavery, since without slavery no such corporate group would exist. Tan's move to corporate entities may help to explain some claims for colonial reparations, but it does so at the price of making other reparative claims more difficult from a backward-looking perspective.

### **III. The Primacy of Distributive Justice**

The struggles of backward-looking theorists to frame generally applicable and intuitively resonant principles of reparations makes me suspect that no such principles are available. The limited principle of reparations is powerful, but it has a plausible forward-looking justification and goes only so far. If there were backward-looking justifications for reparative principles that overcame the problem of identity and captured the cases that seem obvious, it seems we should have made more progress in finding them. This fact, combined with the persistence of demands by claimants outside the scope of the limited principle, makes me suspect that reparative arguments regarding these claimants only get their power from forward-looking distributive considerations instead of from backward-looking reparative considerations of independent force.

Sometimes theorists describe the reason for putting forward reparative arguments simply as a strategy for advancing distributive justice. Here is Tan giving an explicitly strategic argument for reparations: "Arguments about reparation can supplement arguments about global equality by providing additional motivation for compliance with the demands of egalitarian justice . . . The core moral principle behind the idea of reparation speaks more immediately to the moral sensibility of most individuals, and hence is better able to move them to action, than the

claim that one has positive duties of justice to assist strangers.”<sup>10</sup> In this quote there is a class of people who are not doing well by the standards of a principle of distributive justice (here an egalitarian principle), and reparative arguments are introduced to help boost the chances that this group will get the distributive shares they deserve. Reparative arguments here draw their force explicitly from distributive concerns.

Now Tan does not assert that his major reparative argument draws its force from distributive concerns, but it seems plausible to me that other reparative arguments do so. Consider first that principles of reparative justice must explain not only when reparations are due, but also when they are not due—and that reparative claims are only made on behalf of those potential claimants who are perceived as suffering a *current* injustice. Robert Penn Warren asked, “Would the descendants of a mill girl in Lowell, Mass., who died of lint-lungs in 1845, have a claim on Washington DC in 1965?” The question has force not only because of perceived difficulties concerning counterfactuals and identities, but because we get no sense that “the descendants of a mill girl!” are now worse off than they should be under plausible distributive norms.

We find the same phenomenon at the level of potential corporate claimants. We do not hear calls for reparations from the Germans for the Allied bombings of Dresden, or from the United States for the Japanese surprise attack on Pearl Harbor, or for that matter from the United States for the British arson of the White House in 1814. These are events which many at least believe were historical injustices, but we do not hear demands for reparations from these believers because there is little sense that those who could potentially claim reparations under backward-looking principles suffer from an unjust distribution of rights or resources *at present*.

Indeed there seems to be a proof to show that reparative claims beyond the limited principle have little if any force independent of forward-looking distributive considerations. For if reparative principles did have independent force, they could not only support but also counteract principles of just distribution. Yet it is not plausible that they really do so.

Take some distributive principle (as Nozick said in the Wilt Chamberlain argument, “your favorite”<sup>11</sup>). Imagine this favored distributive principle to be instantiated in the world as it is now. Now imagine that reparations beyond the limited principle would require us to dislodge this distribution of perfect justice, so that the world would become distributively less just. I doubt that many of my fellow theorists would be willing to make that transition. If in America blacks and whites were now perfectly equal in wealth, power, and prospects, you would not insist on reparations for the injustices of slavery. Or, if you favor a difference principle, imagine that such a principle is exactly realized, and that only whites are in the worst-off group. Would you then require that these worst-off white citizens be made still worse off, so as to better the situation of better-off blacks? If not, then you do not believe that such reparative claims have significant force of their own, separate from their overlap with principles of just distribution.



#### IV. Looking Forward to Justice

On average, the individuals and groups that fall outside of the limited principle of reparations, but for whom reparative demands are often made, are badly off. They are, on average, at the low end of distributions, either of power, wealth, or what Rawls called the social bases of self-respect. Here we think of the aboriginal peoples of Australia and North America, blacks in the United States, and some nations that were formerly imperial colonies.

This fact should make us suspect that many who make backward-looking reparative claims on behalf of these groups are arguing strategically in the way that Tan recommended. These theorists likely believe that these groups are unjustly low within the relevant distributions, and that reparative arguments can further the cause of distributive justice. Were reparations to cut against a just distribution, they would abandon their support for the reparative claims.

Yet reparative arguments do in fact have a tighter connection with distributive arguments than those who argue strategically imply. Reparations beyond the limited principle are important, when they are, not as a means but instead as a precondition to distributive justice. In philosophical parlance, we might say that such reparative justice may be related to distributive justice not instrumentally, but transcendentally. Reparations beyond the limited principle can be necessary to prepare the soil in which future justice may flourish.

In the cases of indigenous peoples, and the descendants of slaves, and perhaps former colonies, what was damaged in the past was the possibility of future moral relations with the dominant individuals or groups. Justice, taken as relations of mutual recognition and trust, cannot now go forward in these contexts because of the lingering presence of the past in the minds of both groups. The past wrong is relevant because it poisons the groups' future life together. We could say that historical injustice has bitten both those who share an identity with the victims and those who share an identity with the aggressors, and that reparations can heal both groups to the point where the two can share healthy relations from now on.

In some extreme cases of historical injustice, the dominant group failed even to recognize the humanity of the victims. This was the case with chattel slavery, and in modern times in the Nazi holocaust. As Christopher Kutz says, the function of reparations within a context where even this basic acknowledgement of moral status has been lacking is to enable a new political community, one "less likely to create classes of victims, with a future lived in the shadow of its past."<sup>12</sup> An apology or a monetary payment can be an official recognition of the existence and the status of a formerly unrecognized group. This kind of recognition is clearly a necessary condition of a polity in which any kind of distributive justice is possible.

In most cases, historical injustice involved not a complete lack of recognition but rather a denial of basic rights or fair distributive shares to the group now making the reparative claim. The aboriginal peoples with whom treaties were broken and the African Americans who lived under Jim Crow were recognized as moral agents, but were denied the full respect that such agents are due. This past



denial of respect can warp present identities in ways that make it impossible for individuals to work together within cooperative schemes. As Tan puts it, “Unacknowledged past wrongs not only distort parties’ perception of each other, but it can also infect their self-perception. Victims may internalize the morally inferior status they have in the eyes of their aggressors, while violators may come to have a distorted sense of their own moral superiority.”<sup>13</sup> In such cases, reparations can help to enliven the importance of according equal status to all members of a political community, and so can have good effects both on those who share attributes with the past victims and on those who share attributes with the past aggressors.

Trust is essential to any ongoing system of social justice. Without trust, honest dialogue and a willingness to compromise are hard to sustain. Without trust each side sees the political agenda as a field to be seized for its immediate policy goals—for who knows what the other side will do on the morrow. A lack of trust is particularly corrosive in the context of distributive injustice, and as has already been noted distributive injustice is a typical sequel to historical injustice. It may be particularly hard, for example, for American blacks to accept arguments that affirmative action programs are overall bad for minorities when these arguments are made by whites. Similarly, those who live in former colonies may reasonably suspect the arguments of former colonial powers concerning the desirability of opening their markets to free trade. As Kumar has written, historical injustice can be “an important source of the corruption of public reason,”<sup>14</sup> and the spring of this corruption of public reason is the distrust flowing from the historical wrongs.

Backward-looking theorists have sometimes hypothesized in a counterfactual mode that descendants of victims would have passed down assets to their family members, thus making current descendants of victims legitimate claimants for money reparations. Yet it is not so much the inheritance of assets that is relevant for reparations as it is the inheritance of attitudes. Attitudes that aggressors hold toward victims, and that victims hold toward themselves, are passed down to children almost with their mothers’ milk. These attitudes can cascade down the generations to an alarming extent. A young African American who has heard the family stories may find it hard to trust the white Americans around her, given what people who looked like they do did to people who looked like she does not so long ago.

So past injustice can hinder future justice when it leaves an undergrowth of disrespect and distrust. Reparations can remove the hindrances to justice by clearing the ground so that trusting relations can take root. Those who share attributes with previous aggressors can signal with an official apology that they will not forget that the past injustice occurred, and that they will work to transcend the attitudes of superiority they may have inherited.<sup>15</sup> Similarly, they can offer to fund the cause of reparations in order to show that they are willing to sacrifice other ends for the sake of establishing sound moral relationships in the future.<sup>16</sup> Those who share attributes with previous victims can accept offers of reparations

in the spirit intended and with grace, likewise signaling that they are willing to extend trust to those making a sincere effort to create a more just social order.

Because these forward-looking reasons for reparations are based in the value of improving relations, they can support whatever reparative policies are appropriate to the particular context. What matters in reparations is what works, and what it means for such reparations to work is that they will help to build trust from now on. Apology may be apt in some cases, money payouts in others, a museum in the capital in others still. And the measures most likely to create a new sense of solidarity after reparations have been given are measures to secure distributive justice for all. Reparations to the descendants of past injustice can create conditions in which all sides can go forward to achieving justice together. In this sense, such reparations are reparations for the future.

### Notes

<sup>1</sup>The baseline of this limited principle can be specified in terms of different types of goods: utility, money, possession of specific cultural artifacts, and so on. What sort of reparations are due will depend on what type of metric is chosen; this is an important topic that I will not discuss further here.

<sup>2</sup>Rahul Kumar, "Responsibility and Rectification for Past Injustice: The Case of American Chattel Slavery" (typescript, February 2004).

<sup>3</sup>See Jeremy Waldron, "Superseding Historic Injustice," *Ethics* 103 (1992): 4–28, p. 15.

<sup>4</sup>The image of the shadow of injustice is from Janna Thompson, "Historical Injustice and Reparation: Justifying Claims of Descendants," *Ethics* 112 (2001): 114–35, p. 116.

<sup>5</sup>Waldron, "Superseding," 7–14; Richard Miller, "Comments on Tan" (typescript, December 2004), 8–9.

<sup>6</sup>Kumar, "Responsibility," 5.

<sup>7</sup>*Ibid.*, 6–9.

<sup>8</sup>Kok-Chor Tan, "Colonialism, Reparations and Global Justice," in *Reparations*, eds. Jon Miller and Rahul Kumar (Oxford: Oxford University Press, forthcoming). See also David Miller, "Inheriting Responsibilities" in the same volume.

<sup>9</sup>I do not mean to commit Tan to a backward-looking theory.

<sup>10</sup>Tan, "Colonialism," 5.

<sup>11</sup>Robert Nozick, *Anarchy, State and Utopia* (New York, Basic Books, 1974), 160.

<sup>12</sup>Christopher Kutz, "Justice in Reparations: The Cost of Memory and the Value of Talk," *Philosophy and Public Affairs* 32, no. 3 (2004): 277–312, p. 282.

<sup>13</sup>Tan, "Colonialism," 7.

<sup>14</sup>Kumar, "Responsibility," 15.

<sup>15</sup>Waldron, "Superseding," 6.

<sup>16</sup>Kutz, "Justice," 279.