



## Rectifying International Injustice: Principles of Compensation and Restitution Between Nations

Daniel Butt

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# Compensation for Historic International Injustice

Daniel Butt (Contributor Webpage)

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## Abstract and Keywords

This chapter examines claims that compensation should be paid as a result of the lasting harm and benefit caused by historic injustice. It argues that present day parties who have benefited from the automatic effects of past wrongdoing may possess compensatory duties if others are still disadvantaged, insofar as the victims and beneficiaries are not in a state of moral equilibrium. It argues that any claims relating to compensation must make reference to some account of counterfactual reasoning in order to assess the degree of harm which has been suffered. The question of identifying the morally relevant counterfactual is something which has been frequently misunderstood, particularly in relation to exploitation. Having considered, and dismissed, objections stemming from the 'non-identity problem', the chapter concludes by putting forward a substantive defence of the claim that benefiting from injustice can give rise to rectificatory duties, even when the receipt of benefit is involuntary.

*Keywords:* harm, benefit, moral equilibrium, counterfactual, exploitation, non-identity problem, involuntary, rectificatory

## 4.1 INTERNATIONAL COMPENSATORY JUSTICE

It was previously observed that it is difficult to consider the history of international relations without becoming readily aware of the scale of international historic injustice. This chapter addresses the question of the effects of this injustice, in asking whether current generations have obligations to pay compensation for historic wrongs. The idea that one political community can cause injury to another in such a way as to give rise to claims for reparation is

not a new one, although historically such reparations have tended to reflect the superiority of military victors rather than any coherent account of compensatory justice. Having accepted the principles of just international interaction, which hold that states have (at least) minimal duties of non-intervention in relation to non-nationals, it follows that states can act unjustly in relation to non-nationals and, accordingly, that such actions can be harmful. It is in such circumstances that issues relating to compensatory justice emerge. Compensation necessarily refers to some kind of harm or loss. Questions of compensatory justice arise when we feel that a given entity has suffered in some regard, and that this loss should be made up. As such, a claim that compensation should be made necessarily means a departure from the common law principle of 'risk bearing', which holds that losses should generally lie where they fall.<sup>1</sup> Cane describes the principle as follows:

The shifting of a loss — or making one person compensate another for some misfortune — involves an alteration of the *status quo* and so it involves administrative expense. Therefore (it is usually asserted), the onus is on those who wish to shift a loss to justify the shift. Unless there is some good reason for shifting a loss, it should be left to lie where it falls.<sup>2</sup>

In saying that one agent has a duty to compensate another, we maintain that there are reasons of justice why the loss should be shifted from the latter to the former. The standard account of rectificatory justice outlined in Chapter 2 gives one such compelling reason for such a redistribution of loss. **(p.98)** In circumstances where one individual has wrongfully caused another to incur a loss, it seems straightforward to hold the wrongdoer responsible for her actions and require her to shoulder the loss herself. Thus, we require that she compensates the victim of her actions, by acting in such a way so as to improve her victim's circumstances, and thus erase the loss. Why do we require her to act in this way? The answer is that we think it is unfair if the loss is not transferred. As stated in Chapter 2, insofar as we are holding wrongdoers responsible for paying for the costs of their harmful actions, rectificatory justice and distributive justice are perfectly complementary.

Such a claim concerning the fairness of shifting a loss need not only be made in connection with losses incurred as a result of others' malfeasance.<sup>3</sup> Distributive justice is centrally concerned with the fair distribution of benefits and burdens. The idea of compensating individuals for losses, or other deficiencies, recurs repeatedly in a range of different accounts of what constitutes a fair societal distribution. Luck egalitarians, for example, maintain that individuals should be compensated when they suffer the effects of undeserved, unpredictable 'brute luck', but not when they suffer losses as a result of deliberately exposing themselves to certain kinds of risk. Elizabeth Anderson goes so far as to argue that, for luck egalitarians, 'the fundamental aim of equality is to compensate people for undeserved bad luck — being born with poor native endowments, bad

parents, and disagreeable personalities, suffering from accidents and illness, and so forth'.<sup>4</sup> The idea is that there is something unfair about the loss caused by bad brute luck being borne exclusively by those individuals who happen to be unlucky rather than by society as a whole; and conversely, that it would also be unfair to make other members of society pay for losses for which particular individuals are responsible.

As Chapter 3 made clear, international libertarians do not believe that principles of distributive justice extend across state boundaries. The international libertarian vision of the world is one which rejects patterned redistribution across national boundaries, and instead maintains that political communities should be able to exercise self-determination in shaping their own futures. The fact that distributive principles do not extend across different peoples means that there will inevitably be inequalities between modern day states, for a range of different reasons. Some of these reasons will be matters of chance, to do with levels of natural resource holdings, geographical location, and so on. Others will reflect decisions which previous generations within different communities have made. International libertarians do not hold that any of these kinds of historical reasons for difference are cause for concern from the perspective of justice. As such, their default position on losses is that they should lie where they fall, unless they result from wrongful harm, defined in terms of violations **(p.99)** of the principles of just international interaction. Chapter 6 examines the question of the circumstances under which it is reasonable to hold a political community collectively responsible for the actions of its leaders; for now it is sufficient to maintain that international libertarians can accept the claim that the standard account of rectificatory justice, which holds wrongdoers accountable for the costs of their actions, applies to international relations. They do not, however, seek to rectify inequalities between political communities which arise in the absence of wrongdoing, whatever their cause. An 'international luck egalitarian' would presumably seek to compensate political communities who were the victims of bad brute luck, such as being harmed by an unpredictable natural disaster, for example, but international libertarians are not committed to compensating for the effects of bad luck. If the victims of the natural disaster are reduced below some minimal threshold of well-being, then it may be that non-nationals have duties of assistance to them, but otherwise the loss is left to lie where it falls. If this means that later generations have a lower standard of welfare than they would have enjoyed if the natural disaster had not taken place then this is certainly unfortunate, but it is not unjust.

The situation, however, becomes more complicated when one confronts situations where wrongful harm is not rectified. Suppose that it is still clearly the case that a given political community is being harmed as a result of a past infringement of the principles of just international interaction. Those morally responsible for the commission of the wrongful action in question are now dead. What should happen to the extant loss? Should it be shifted to another party or

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parties, such as, perhaps, the descendants of those responsible for the injustice in question? Or should it stay with the community which was historically wronged, and be seen as their bad luck — unfortunate, but not unjust? In this chapter, I argue that present day parties who are benefiting from the act in question may face compensatory duties to rectify historic injustice. It is important to appreciate that this is a controversial argument given the background international libertarian account of distributive justice. The conclusion need not be controversial for many theorists who are broadly egalitarian in a domestic context. Any loss stemming from injustice clearly looks to be arbitrary from a moral point of view. Domestic egalitarians are likely to compensate such a loss, along with other morally arbitrary deficiencies, in the short term, and, as Chapter 2 argued, such losses are unlikely to have lasting effects across generations in any case, as a result of periodic redistributions of resources. But in a broadly libertarian context it is indeed controversial, as it seems to contravene the common libertarian principle that one can only owe obligations to others as a result of one's own voluntary actions. I challenge this principle in Section 4.4. Before this argument is **(p.100)** presented, however, it is necessary to examine the question of what it means to say that present day parties are benefiting, or being harmed, as a result of the effects of historic injustice. Section 4.2 is concerned with the type of counterfactual which is involved in assessing whether or not individuals or groups have been harmed by a given act of injustice. I outline the common way in which such calculations are normally made, but reject this as inappropriate for the task of assessing the harm caused by historic acts of injustice, particularly in relation to exploitation. I then describe an alternative form of counterfactual.

Although in what follows I do argue that it is theoretically possible that present day parties may possess compensatory duties as a result of temporally distant wrongdoing, this does not mean that an acceptance of the rectificatory project means that we need to determine whether compensation be paid for each and every recorded instance of international injustice. The key issue here concerns the net effect of historic injustice. The question we face is whether modern day states can be said to be in a state of moral equilibrium with one another in relation to historic wrongs. By a 'moral equilibrium' I mean a situation where it does not seem as if any given party has particularly gained or lost relative to other as a result of injustice. Such a situation can come about in two ways. The first is simply the case where the effects of injustice are no longer significant. Imagine the situation within a modern day, industrialized state, characterized by high levels of education, equality of opportunity, and social mobility. It seems implausible to maintain that, for example, most of the income differentials in such countries are likely be the result of historic events (such as a civil war 500 years ago) rather than more recent domestic interaction. The situation might be rather different, however, if society is not homogenous in, for example, ethnic terms, and there are clear characteristics which separate the descendants of

victims and oppressors. If social mobility is, in such cases, linked to membership of particular ethnic groups, then historic injustice may continue to cast a shadow. We can assume that the redistribution of wealth within domestic societies will lessen the importance of historical injustice, whether this be through state action or the workings of markets, only insofar as different groups tend to be affected equally by these mechanisms. One may make a similar point in relation to international injustice. Inequalities between political communities are generally harder to overcome than inequalities within communities, and are often self-perpetuating. The point can be seen by considering those examples of historic injustice which involve the physical removal of property. It is one thing for there to be an unjust appropriation of property within a particular sphere of distribution; the property in question remains within the system and is likely to be redistributed again in the future, by one mechanism or another. But the case **(p.101)** where resources are literally removed from one sphere and incorporated into another seems rather different. The point here is simply that one should not assume that the passage of time will necessarily wipe out the effects of historic injustice — it may do so, but it may not. Imagine, for example, a case where one state wrongs another at a critical stage in its industrial development. This might confer a competitive advantage upon the wrongdoer in terms of international trade at a vital moment, allowing it greater bargaining power in terms of the shaping of institutional rules governing further interaction. Thomas Pogge argues that ‘large inequalities, once accumulated, have a tendency to intensify’ within the global economy.<sup>5</sup> If these inequalities initially obtained as a result of wrong doing, then the lasting effects of injustice will be profound. In many cases, the effects of injustice will no longer be significant, but this cannot be taken for granted.

The second way a moral equilibrium between different parties may be said to come about is if all parties involved have both harmed and been harmed in roughly equal measure. This point may be made on a theoretical and a practical level. Theoretically, it is possible that the effects of two harms may serve to cancel each other out. Thus, if A harms B, causing ten units of damage, and B harms A, also causing ten units of damage, then we may reasonably conclude that there is no need for either side to pay the other compensation.<sup>6</sup> Of course, it is unlikely that many parties will be in this precise situation of equivalence, but it is also unlikely, in a large number of cases, that we will be able to say who has actually gained and who has lost as a result of historic injustice. This practical objection is related to the epistemic difficulties a number of authors have identified with attempts to rectify historic injustice. It should be noted that these difficulties are likely to be more pronounced in some cases than in others within an international context. It does indeed seem likely that, given the nature of interaction between, say, the United Kingdom and France (and, significantly, the degree to which this interaction has resulted in intermingling of the two populations, as with, for example, the influx of Normans into the predominantly

Anglo-Saxon English population at the time of the Norman Conquest) it is going to be impossible plausibly to maintain that one community is suffering from historic injustice more than the other. Although this might in fact be the case, practical limitations on our knowledge mean that any attempt to draw up a balance sheet will inevitably prove arbitrary from a moral point of view. When nations are located in close geographical proximity and have developed at roughly the same time, such a situation is likely, though not certain, to be the norm. Arguments for compensation for injustice in such cases are likely to allude to relatively recent acts, when an equilibrium is disturbed by one (or more) state's aggressive foreign policy. Thus, within a west European context, arguments relating to **(p.102)** compensation for historic wrongs today typically centre around the Second World War.

But there are other kinds of international relations which do not fit this pattern: most notably, those between the colonial powers and their former territories. Such relations have typically taken place over much shorter periods of time, and our knowledge of the history of these relations is frequently fairly substantial. In such cases, the historic losses suffered as a direct consequence of injustice tend to be one-sided, as the power differentials between the different nations, and the limited extent of their historical interaction, make it harder to argue that any kind of equilibrium has been reached. In such cases, one cannot assume that each community has historically harmed the other to equal degree, since colonies have never been in a position to act in a reciprocal way towards their masters or former masters.

The real world context of this question, then, is provided by two closely related arguments which historians of colonialism have addressed. The first of these concerns the development of the West. In simple terms, the question is whether the West has benefited from colonialism. The second question concerns the West's former colonies, and asks about the effects of colonialism on present day generations. Are people still in fact suffering as a result of ancient wrongs, or might it be that they have even benefited from the fact that they were treated in a way which we now recognize as being unjust? These questions of the lasting legacy of historic injustice, both in terms of harm suffered and benefit gained, lie at the heart of this chapter. As we shall see, what it means to speak of 'harm' and 'benefit' is complicated, and frequently misunderstood.

### 4.2 IDENTIFYING THE MORALLY RELEVANT COUNTERFACTUAL

What does it mean to say that a group of people is entitled to compensation as a result of a given act of injustice? In simple terms, it must be maintained that the group in question is still suffering in some sense from the act of injustice in question. The whole point of compensation is to provide counterbalancing benefits to offset losses. What is required here is some notion of a counterfactual. Superficial accounts of compensatory justice define this counterfactual very simply, as being the state of affairs which would have obtained had the act of

injustice in question not occurred. In this section, I show that this formulation of compensatory justice, as it stands, is inadequate. It is indeterminate as to the nature of the counterfactual to which it appeals, and its most **(p.103)** conventional interpretation leads to unacceptably counter-intuitive outcomes. In particular, I argue that the conventional account of compensatory justice is inadequate when it comes to considering a particular kind of injustice that has characterized a great deal of international history, which is best described as non-consensual exploitation.

Let us accept that circumstances can arise where it is appropriate for one community to pay compensation to another. The paradigm case concerns instances where one community injures another, which is to say both that it harms (or, we might say, damages the interests of) the other, and acts unjustly in so doing. As Chapter 3 suggested, some notion of injustice or wrongdoing is important here to distinguish what we might think of as rights-violating actions from actions which set back another party's interests, but do so in a legitimate way (through, for example, fair competition). This is still a long way from maintaining that any historic actions give rise to contemporary compensatory duties, for we still need an account of what it is to suffer as a result of historic injustice. It is often suggested that, whatever we think about colonial practices themselves and the motives of those who perpetuated them, it does seem as if they have been beneficial in the long run, in that current day members of the former colonies now enjoy a better standard of life than they would do had colonialism never occurred. Let us call this the Counterfactual Observation. A version, in relation to the descendants of slavery, is put forward by Ellen Frankel Paul:

If not for the slave trade, most of the descendants of the slaves would now be living in Africa under regimes known neither for their respect for human rights, indeed for human life, nor for the economic well-being of their citizens. The typical denizen of one of these states, I dare speculate, would envy the condition of the black teenage mother on welfare in one of this country's worst inner cities. Starvation, war, tribal depredations, infant mortality, disease, and hopelessness are the standard condition of many regions of Africa, for example, Ethiopia and Somalia.<sup>7</sup>

The observation is sometimes presented as a defence of the colonial practices themselves, whereby it is suggested, by implicit or explicit reference to some kind of consequentialist reasoning, that the ends justified the means. In this crude form, the argument is manifestly inadequate even on simple consequentialist grounds. When we are considering the consequences of an action, we cannot (for example) simply measure the amount of utility at one particular point in time, such as the present day, and compare it with the amount of utility at the point in time directly before the action occurred to determine whether the action was justified or not; we need to give consideration also to other time periods

which were affected by the action. So it might be, for example, that present day members of nation X are indeed better off in the **(p.104)** current day than they would have been had colonial practice Y never occurred, but that this overlooks the fact that in the intervening period the members of nation X suffered tremendously, meaning that the total amount of utility measured across time is less than it would have been had Y never occurred. In such cases, the observation that colonial practices have proved beneficial in the long run *to present day nationals* need not lead one to the conclusion that the end justified the means, or that the practices were, in a wider sense, beneficial. But there is one sense in which it is commonly felt that the Observation is important, and this concerns the issue of contemporary compensation for historic wrongs. How can a claim for compensation be advanced for an event which has actually benefited the person making the claim?

The problem here concerns the role that counterfactual reasoning is normally understood to play in calculating appropriate compensation. As stated, claims for compensation must, by definition, refer to some kind of loss or harm. The purpose of compensation (ideally, at least) is to cancel out this loss. It is far from the case that a loss necessarily gives rise to an entitlement to compensation, but in order for there to be an entitlement it is a necessary condition that there be a loss of some kind. Thus Goodin articulates the common understanding of compensation when he writes that, 'Compensation is supposed to provide the "full and perfect equivalent" of what was lost, and so to restore completely the *status quo ante*.'<sup>8</sup> This reference to the restoration of the *status quo ante* can be misleading, as it is, in fact, generally accepted that the situation which should be brought about is not the equivalent of the state of affairs before the injustice was perpetrated, but the state of affairs which *would* have obtained had the unjust action not occurred. Thus Nickel writes that, 'Compensatory justice requires that counterbalancing benefits be provided to those individuals who have been wrongly injured which will serve to bring them up to the level of wealth and welfare that they would now have if they had not been disadvantaged.'<sup>9</sup> The claim, then, is that we need to devise a *counterfactual* account of how the victim would have fared had the offence never been committed. This is Nozick's account of full compensation:

Something fully compensates a person for a loss if and only if it makes him no worse off than he would otherwise have been; it compensates person X for person Y's action A if X is no worse off receiving it, Y having done A, then X would have been receiving it if Y had not done A. (In the terminology of economists something compensates X for Y's act if receiving it leaves X on at least as high an indifference curve as he would have been on, without it, had Y not so acted.)<sup>10</sup>



This is what is normally meant when it is claimed that individuals or groups are entitled to compensation. Insofar as they have suffered as a result of an **(p.105)** act of injustice, they will be compensated to the extent that they are moved to a position equivalent to their counterfactual position. Now the problematic nature of the Counterfactual Observation becomes clear. How can a claim for compensation be made by a party who has actually benefited as a result of injustice?

In fact, for some, it now begins to look as if the entire project of compensating for historic injustice is conceptually flawed. A number of writers have referred to a variant of the Counterfactual Observation in relation to compensating for ancient wrongs, termed the non-identity problem. Typically, such approaches take their lead from Derek Parfit's writing on personal identity in *Reasons and Persons*.<sup>11</sup> The idea is that unjust actions can make a difference to who actually exists in later time periods, since they affect the circumstances in which procreation takes place. Each individual grows from a particular pair of cells, an ovum and a spermatozoon. If their parents had mated at a different time, it is almost certain that a different pairing of spermatozoon and ovum would have taken place, resulting in a different person. Were it not for the acts of injustice in question, present day individuals would not exist. So how can they claim that they have been harmed?<sup>12</sup> There are a number of possible responses from the viewpoint of international compensatory justice. The first is to place emphasis on the group membership of the individuals who are to be compensated, and claim that it is the group which has suffered rather than the component individuals of the group.<sup>13</sup> Although it might be true that there is a sense in which individual members of the group have benefited from the historic act in question, it might be possible to claim that it, *qua* group, has suffered. This is evidently a way around the non-identity problem which is particularly accessible within an international context, given that the entities we are dealing with are continuous political communities. It is not an unproblematic response, since these communities are nonetheless composed of individuals, and one may reasonably question how it can be that a collective is worse off even though all its members individually have benefited.<sup>14</sup> I return to the issue of group membership in Chapter 6, where I outline a model of harm to collectives which is not vulnerable to the non-identity problem. However, I do not, in fact, believe that the account of counterfactuals I give in this section is susceptible to the objection. Insofar as it generates counterfactuals in a non-probabilistic fashion, it is able to make reference to a counterfactual state where the individuals who claim compensation exist, but where the unjust action did not occur. This move is controversial, philosophically speaking, in terms of certain understandings of personal identity and possible worlds.<sup>15</sup> Should my account be rejected for such reasons, however, I should stress that my argument here is not dependent on my providing a solution to the non-identity problem. I am very dubious, in fact, as to whether we should allow **(p.106)** the non-identity problem to play any role at all

in our theorizing over what should actually happen in the real world. The conclusions of the non-identity problem in the field of compensatory justice are so counter-intuitive as to be absurd.

Consider the following example. I negligently disregard the safety of my factory. One night, the factory blows up, and leaks a chemical into the water supply. If pregnant women drink this water, their children will suffer physical defects for the rest of their lives. These defects will not be so serious as to mean their lives are not worth living, but they will cause regular pain and inconvenience. Two pregnant women do drink the water. They conceive their children twenty minutes apart. The first child is conceived five minutes prior to the factory exploding. The second child is conceived fifteen minutes afterwards. When the factory explodes, the parents of the second child are sufficiently disturbed by the noise that they interrupt their intercourse. This seemingly makes a difference as to whether a given individual exists, since it is highly unlikely that precisely the same conjunction of spermatozoon and ovum would have occurred had this disturbance not taken place. So it looks as if the first child conceived will be entitled to compensation for my culpable negligence, but the second one will not, since she would not exist had my factory not exploded. Analogous examples are routinely given in the literature on the rectification of historic injustice in order to support the conclusion that compensation need not be paid in the real world for historic injustice. Generally, one might note, it is one of a list of reasons why compensation need not be paid, although if the non-identity objection holds, then it is seemingly sufficient in itself to rule out the compensation claim. Is it really plausible to think that, in the factory case, compensation should be paid to the first child but not to the second? Would anyone actually propose such a course of action in the real world? The suggestion seems positively offensive if one considers, for example, real world environmental catastrophes, such as the 1984 Bhopal disaster, or the 1986 Chernobyl disaster. Children who were conceived in the locality of the Union Carbide pesticide plant in Bhopal or the Chernobyl nuclear power plant following the disaster may, in a sense, be said to owe their existence to these disasters. But would anyone seriously argue that, in the event of their suffering health problems, they should not be compensated on account of the non-identity problem? My view is that the non-identity problem can be resolved, but even if one rejects the following account, it does not necessarily follow that one should conclude that compensation should not be paid. It may be that we should see the problem as a paradox of philosophical interest until such a point as it can be properly explained, should such a thing be possible, but not something which should guide actions in the real world. In any case, the controversy over identity is emphatically not the context in **(p.107)** which real world debates relating to historic injustice take place. When the political opponents of reparations argue that former colonies have benefited from colonialism, or that the descendants of slaves are now better off than they would be had their ancestors not been

forcibly taken from Africa, they are not referring to Chapter 16 of *Reasons and Persons*. They are instead making an argument about such factors as GDP, economic development, the rule of law, and quality of life. It is to this real world debate that my argument is primarily directed.

How, then, should the Counterfactual Observation be addressed? As has been seen, in asking whether modern day parties have been harmed by injustice, we make reference to some kind of counterfactual account of how they would be had the injustice not occurred. This is a complicated matter. It raises two related problems in particular, one of which has received rather more critical attention than the other. The first problem concerns the effects of the unjust act. How are we to judge how the victims of injustice would have fared had the unjust act not occurred? The second concerns the characterization of the unjust act itself. In terms of the first problem, the difficulty is that we clearly cannot know for certain how the victim of injustice would have fared had the unjust action not taken place. Suppose I lock Pedro in my cellar for an hour. It is possible that, had I not done so, Pedro might have gone to the shop and purchased a winning lottery ticket, having chosen his numbers at random. It is, therefore, possible that my actions mean that Pedro is millions of pounds worse off than he would have been had I not acted unjustly. It is also possible that Pedro might have been struck by a bolt of lightning and been killed. Perhaps my actions have saved his life. Which is the relevant counterfactual to employ? The standard way of answering this question is to say that we ask what is the most probable outcome, in the absence of my action. Thus Kershnar writes:

The purpose of the relevant counterfactual is to determine those effects that result from the injuring act. To do so, the relevant possible world should include the condition of a person wrongfully injured in the actual world in the most similar world in which the injuring act did not occur ... Hence, we determine the conditions on the relevant possible world by assuming that the conditions in it are identical with those in the actual world up until the time of the injury, *and then envisioning the most probable outcome if the injuring act had not occurred*.<sup>16</sup>

Thus, for Kershnar, the criterion for identifying the relevant possible world is that of probability. It is unlikely that Pedro would either have been killed or have become a millionaire; it is much more probable, let us suppose, that he would have gone home for a nap. On the probability account, this is the approach which should be employed. This also reflects the standard version of **(p.108)** the non-identity objection, which, as A. John Simmons notes, involves 'a tacit assumption that a significant injustice *necessarily* alters subsequent conditions for the conception of offspring.'<sup>17</sup> This is normally interpreted as meaning that had the act of injustice not taken place, it is highly unlikely that a given sperm would have fertilized a given egg. But it is not *impossible* that this could have occurred, nonetheless. We could tell a hypothetical story whereby the same

sperm united with the same egg, even if conditions for conception were different. Even if the act of injustice meant, for example, that the parents of a given child were relocated from one area to another, and were unlikely to have met had the act of injustice not taken place, we cannot say, for certain, that this could not have happened, even if we have to tell an extremely implausible story in order to describe how it could have happened. What is clear is that such a story would not be the most likely outcome, in the absence of the unjust action. It is not the most probable counterfactual, in the absence of injustice. But is this in fact how we use counterfactuals within compensatory justice?

It is useful here to look at the account of harm to others put forward by Joel Feinberg. In his article, 'Wrongful life and the counterfactual element in harming', Feinberg writes of harming as having two components: '(1) it must lead to some kind of adverse effect, or create the danger of such an effect, on its victim's *interests*; and (2) it must be inflicted wrongfully in violation of the victim's *rights*.'<sup>18</sup> Feinberg contrasts this particular notion of harm with the broader, ordinary use of harm referring to any state of adversely affected interest, whatever its cause. Certainly, insofar as we are here concerned with the unjust actions of agents, it is this prior sense of harm which is relevant. Feinberg holds that it is a necessary condition for A to be said to harm B that the 'counterfactual test' is met. In its original formulation, this reads as follows:

B's personal interest is in a worse condition (usually but not always lower on the interest graph) than it would be in had A not acted as he did.

This is contrasted with what Feinberg calls the 'worsening test' (not a necessary condition for showing harm) which requires that:

B's personal interest is in a worse condition (lower on the interest graph) than it was before A acted.

The point here is obviously significant for our purposes. Feinberg is maintaining that a person can be harmed by an action even though that person is better off than they would have been had the action not been performed. He cites cases of causal overdetermination, where the harm a victim suffers as a result of an act of injustice is actually less than the harm they would have suffered had the offender not so acted (for example, a businessman is injured in an accident caused by the reckless conduct of his taxi driver, but as a result misses an aeroplane flight which in fact crashes).<sup>19</sup> Feinberg suggests **(p.109)** that we consider a 'doubly counterfactual' formulation in such cases.<sup>20</sup> Is it necessarily the case that there is no possible world whereby the businessman is neither harmed by the taxi driver nor dies in the plane crash? It seems not: we can imagine a world where the car accident does not occur, but where the businessman does not catch the plane for some other reason, or where the plane does not crash. It may well be clear that 'the most probable outcome if the

injuring act had not occurred' would be that the businessman would indeed have caught his plane. Yet this is not the counterfactual we choose to use in our everyday experience of compensatory justice. It is certainly clear that the taxi driver would not be able to use the fact of the aeroplane's crash as a defence against the charge of negligence. The fact that his actions, in all probability, saved the businessman's life does not affect his compensatory duties. As various writers note, it is commonplace to accept that an individual can be owed compensation when an unjust act illegitimately sets back one of her interests, even if the action in question does not cause her a net harm.<sup>21</sup> James Woodward makes such a claim:

... people have relatively specific interests (e.g. in having promises kept, in avoiding bodily injury, in getting their fair share) that are not simply reducible to some general interest in maintaining a high overall level of well-being and ... many moral requirements function so as to protect against violations of such specific interests. That an action will cause an increase in someone's overall level of well-being is not always an adequate response to the claim that such a specific interest has been violated.<sup>22</sup>

For some, this claim is sufficient to allow the rectificatory project to resist the non-identity problem. So Cécile Fabre writes:

... the fact that someone has not been harmed overall by a particular act does not preclude the possibility that he has been harmed along a particular dimension. Thus, even if existing Maoris have not been harmed overall by the act of dispossession of which their ancestors were victims, they may nevertheless have been harmed by it ...<sup>23</sup>

The important point for our current purposes is the claim that when it comes to the identification of the morally relevant counterfactual, we do not in fact necessarily look to the most probable outcome in the absence of the act of injustice. Instead, it may be possible to construct a different counterfactual, in order to calculate what compensation is owed in response to a violation of a specific interest. To be clear, in some cases it might be highly improbable that this situation would ever have come about, but it still constitutes the morally relevant counterfactual.

This is evidently significant in terms of claims relating to colonialism. In general terms, the conventional account of compensatory justice is inadequate **(p.110)** for dealing with questions relating to exploitation, insofar as this involves using other agents as means to one's material ends, in ways which contravene their rights. As the Counterfactual Observation observed, it may often be the case that exploitative actions leave the victims of injustice better off than they would have been had the act of exploitation never occurred. Consider the familiar dilemma faced by many critics of the business practices of multinational

corporations. Such companies seek to cut costs and maximize profits by employing extremely cheap labour in developing countries. Defenders of such practices point out that the position of the workers in question is actually improved by the presence of these companies, in that the people who work for them are actually better off than would be the case if these companies were not present.<sup>24</sup> But this does not seem to be the relevant counterfactual to consider in cases of exploitation. This can be understood by thinking about the second of the problematic aspects of the identification of the morally relevant counterfactual: the characterization of the unjust act. What, exactly, do we mean when we say ‘the act of injustice did not occur’?

There is more than one just counterfactual to an act of injustice than the simple non-performance of the act in question. Instead, the act might be performed in a different, just way.<sup>25</sup> If I steal an item from a shop, I act unjustly. One account of the unjust act not occurring describes the case when I do not pick up the object at all. Another account describes the case when I pay for the item. The characterization of the injustice, in some cases, is deeply significant. Consider the following example. A is an impoverished farmer in a rural area with no dependents, who barely scrapes by and manages to grow enough food to support himself. B is a wealthy entrepreneur, who has recently acquired a (rather dangerous) underground diamond mine. He has no desire to go and mine the diamonds himself, so he kidnaps A and forces him to work in his mine for five years. At the end of this period, B has made a huge sum of money. He releases A, who returns home. During the course of his captivity, A has been taught a number of new skills, which allow him to get a better job. Does B owe A compensation? We would surely think so. But how is this to be measured? I would suggest that the relevant counterfactual here to the exploitation of A is not the possible world whereby B does not approach A at all, and consequently leaves his diamonds unmined, but rather that whereby A agrees to come and work for B in return for a fair wage, which reflects the dangerous nature of the work he is undertaking and, perhaps, the vast wealth which he is generating for A.<sup>26</sup> To be clear, this does not simply mean that B pays A the wage he would have earned had the transaction been consensual. We use this point as the counterfactual baseline, and then see how much worse off A is in the real world, given not just his wealth but **(p.111)** his general well-being. B may well owe A massive amounts of compensation for the suffering he has undergone relative to this baseline. The point here is that identifying the relevant counterfactual means that B cannot offset the benefit which accrues to A incidentally in the course of his exploitation. This outcome fits in with the account of compensatory justice which requires that we look to a counterfactual whereby the act of injustice did not take place. However, it does not assume that the only way this can come about is by nothing resembling the unjust act taking place, as a result of the agent who acts unjustly not acting at all. Instead it suggests that the relevant counterfactual is that whereby the act of injustice does not take place

because the agent acts in a similar way, but does so in accordance with justice. Both of these alternatives represent a just action. In one case, the agent does not interact with others. In the other, she interacts in a justifiable way.

It is my contention that it is this latter approach which is most useful when considering historic injustice such as colonialism. As a matter of fact, there has been a considerable degree of interaction between nations. The relevant counterfactual world is one in which this emerged as a result of consensual cooperation, in accordance with the principles of just international interaction, rather than by unjust actions on the part of the developed world. Once this is understood, we have a test for assessing whether modern day political communities are suffering or benefiting from historical injustice. In opposition to the Counterfactual Observation, the question which needs to be asked is: 'Would current generations be better off had historic interaction between colonial powers and their colonies been characterized by consensual and non-exploitative relations?' The important point here is quite how different this question is from that which is normally asked, which is along the lines of 'Would current generations be better off had there been no interaction between colonial powers and their colonies?' It should be clear that the baseline in the former case is much higher than the baseline in the latter case. Insofar as this is not recognized and the latter baseline is the one which is employed, a significant conceptual error is typically made in political debate on this issue.

In the above example, the relevant counterfactual was identified largely through intuitive deduction. It was suggested that it was simply unfair in cases of exploitation to apply the conventional account of counterfactual harm and benefit. This approach reflects Sher's account of how the relevant counterfactual should be identified. He argues for a normative conception of the morally relevant counterfactual, whereby what is considered is what the victim of injustice *should* have in a rectified world. He points out that it is not in fact necessarily the case that we believe that victims of injustice should be entitled to what they would have in a rectified world, to the extent that this overlooks **(p. 112)** the actions which they would have to perform in the rectified world to gain these entitlements; actions which they have not, in fact, performed. Sher uses the example of a student who is unjustly denied a place in law school. Had this not occurred, then the student would have become a prominent lawyer with a high degree of prestige and a high salary. Instead, he allows himself to be discouraged by his rejection and does not reapply the next year, and so has a far inferior life. Sher suggests that there are two reasons why we might not feel that he should be entitled to compensation relative to what he would in fact have had in the just world.<sup>27</sup> The first of these refers to what Sher calls 'the degree to which one's entitlements in a rectified world are generated anew by one's own actions there.'<sup>28</sup> Obviously, it would require a great deal of hard work to become a successful lawyer. Consider the following example. Three men, A, B, and C are all diamond miners (this time, of their own free will). Again, they have no family.

One day, A is kidnapped, and held prisoner for twenty years. The format of his prison is somewhat unusual, as he is kept in a luxury hotel, with access to a wide range of recreational activities. He is released after twenty years. In the course of these twenty years, B and C have become very rich through working in the diamond mine. However, they have had to work exceedingly hard to earn this money — the work involves a huge amount of physical effort. Assuming that all three are in equally good health, their different lifestyles notwithstanding, there does seem to be something unfair about the suggestion that A is entitled to the level of resources he would have had he not been kidnapped. Certainly he is entitled to something, but in the absence of the backbreaking effort of the other two, it does not seem to be the full equivalent of what he would otherwise have had.<sup>29</sup>

The second way in which entitlement seems to come into the picture concerns the subsequent actions of victims of injustice. Sher's point is that one of the reasons that the well-being of a victim might be inferior to that which she would have had in a world where no injustice had taken place may not be because of the 'automatic effects' of the act of injustice, but rather because of omissions for which they, and not the act of injustice, are responsible. An extreme example will make the point: suppose that one day, when I am walking to the shops, I encounter my childhood nemesis, the boy who bullied me at school. Reverting to type, he trips me up and I fall over. As a result of this, I decide that the world is against me, and I elect to spend the rest of my days skulking in my house brooding upon my misfortune, instead of pursuing my successful career as a popular circus performer. Now, in such a case I have been treated unjustly, but the vast majority of the blame for the difference between my actual and counterfactual positions seems to lie at my door. The suggestion is that I have allowed a trivial incident to blight my life; in short, I should have got over it. Thus the difference between actual and counterfactual (**p.113**) worlds is down to my omissions, and the normative counterfactual — what I 'should' have — is not the same as what I would actually have had the unjust action in question never occurred.

So far, all this seems correct. Sher, however, goes on to link this explicitly to compensation for historic wrongs, claiming:

Where the initial wrong was done many hundreds of years ago, almost all of the difference between the victim's entitlements in the actual world and his entitlements in a rectified world can be expected to stem from the actions of various intervening agents in the two alternative worlds. Little or none of it will be the automatic effect of the initial wrong itself. Since compensation is warranted only for disparities in entitlements which *are* the automatic effect of the initial wrong act, this means that there will be little or nothing left to compensate for.<sup>30</sup>



The first point to make about this claim, as Simmons notes, is that it does not necessarily say that automatic effects of injustice *cannot* last over long periods of time, simply that the necessary conditions of entitlement in fact become harder to satisfy the more time passes.<sup>31</sup> Furthermore, while Sher's claim about the likely effects of historic injustice may seem convincing within a domestic setting, it is not clear that the same can be said for the kind of international injustice currently under consideration. First, as was pointed out in Section 4.1, there are reasons to suppose that the effects of international injustice may be hard for victims to counter, in that it is hard to acquire alternative entitlements once one has been unjustly deprived of large quantities of one's natural resources and/or is at a competitive trading disadvantage relative to other nations. Secondly, we should be careful when blaming the lingering effects of historic injustice on the omissions of the victims not to underestimate the profound impact which injustice can have upon its victims, even when they do make reasonable efforts to 'get over' its effects. Of relevance here are Jeremy Waldron's comments as to the significance of historic wrongs to national and group identity.<sup>32</sup> Insofar as international injustice compromises the self-determination of a people, it can have a profound effect upon the national identity of members of the nation, and may indeed prejudice the ability of the nation to govern itself subsequent to the act of injustice.<sup>33</sup> A great deal of colonial practice was aimed explicitly at subjugating pre-existing ideas of communal identity; often, traditional cultural practices and traditions were repressed and identifiable communities were split asunder. Insofar as the ability of nations to adapt and prosper following the colonial period has been a result of colonial practices, the extent to which they should be deemed responsible for their omissions must be accordingly limited. Finally, it should be pointed out that the first claim identified above, whereby one **(p.114)** only acquires entitlements through actual performance of actions, has only a limited amount to say in relation to circumstances of exploitation, given that the objection is that the victims of injustice have not received their due deserts for actions they have indeed performed. I would suggest that the combination of these three observations limits the extent to which we should feel that the passage of time means that the automatic effects of justice are necessarily lessened.

Finally in this section, we may note that this approach does allow for the application of Simmons's response to the non-identity problem. As has been stated, Simmons denies that it is necessarily true that significant acts of injustice which affect individuals' interaction make a difference as to who it is that exists. His claim is that it is possible for the same offspring to be conceived in a counterfactual state where the act of injustice did not take place as in the real world; it is just highly unlikely. Thus, we could imagine situations where the same sperm ends up uniting with the same egg, meaning that the same person is conceived in both the real world and the possible world, which in turn allows for the assessment of loss and subsequent claims for compensation to be made in

relation to historic injustice. Sher has criticized this conclusion, arguing that, 'even if we substitute a criterion that *does* allow possible worlds that lack the original wrong but nevertheless contain the victims' current descendants, the relevance of such worlds to compensation will remain problematic if they are sufficiently remote from the actual world'.<sup>34</sup> Sher's concern here is with very serious acts of injustice which involve social upheaval and the relocation of persons, such as the slave trade or the Holocaust. If we imagine a world where these injustices did not take place, so as to construct a counterfactual for compensatory purposes, then it seems as if we will have to tell very improbable stories as to what could have happened in order to have the same parents conceiving the same children. Sher argues that there is no single obvious way to construct such counterfactuals, which means that it is hard to see why we should afford moral weight to whatever narrative we devise. Given that individuals will seemingly be due differing amounts of compensation depending on the precise counterfactual which is set up, Sher's concern is that whether people are owed compensation may be 'radically indeterminate'. It is not immediately clear how much weight to attach to this objection. Compensatory justice frequently has to deal with serious indeterminacy. Suppose a healthy young child suffers an accident which leaves her with a serious mental disability, which will prevent her ever gaining paid employment. How are we to compensate her for her loss of earnings, given that we have no idea what profession she would have followed? We obviously cannot know what is the correct counterfactual to employ, but we are nonetheless required by justice to make the best approximation we can. Regardless, we might note **(p.115)** here is that such worries typically do not apply to cases of the kind that we are examining. Given that our counterfactual includes a similar form of interaction to the real world, but holds that it should in fact have been just in character, it is much more straightforward to describe a counterfactual where the same parents conceive the same children. It is, of course, highly improbable that they would have conceived the exact same individuals in the counterfactual world as they did in the actual world, but, as the earlier argument maintained, we do not need to rely on probabilistic outcomes here.

In conclusion, in this section I have accepted the claim that, to assess harm following injustice, it is necessary to compare the current day with some kind of counterfactual. This is done by imagining a possible world where no injustice occurred. However, there are many such possible worlds, as there are many possible kinds of interaction between the victim and offender which do not involve injustice. One possible world is the world where the act of injustice simply did not take place, understood in terms of an absence of interaction between victim and offender, and a projection as to what would most likely have happened is made on the basis of probability. However, it has been shown that this approach can, in some cases, result in wildly unintuitive outcomes, both in terms of its use of probability and the way it characterizes the act of injustice.

Such counterfactual reasoning does not take account of actual actions which have been performed, and entitlements which have been generated. In cases where the victim and offender have had frequent interaction following the act of injustice, the best way to characterize the morally relevant counterfactual is by reference to a possible world where all the interaction between the relevant parties was just and consensual. If an act of injustice has truly not had lasting consequences, this possible world should now be very similar to the real world. But if injustice has had a significant causal effect on the subsequent interaction of the two parties, even though the victim has not reacted unreasonably to the injustice in question, we may well find that, relative to the morally relevant counterfactual, present day parties have either gained or lost as a result of historic injustice. Section 4.4 is concerned with this situation.

### 4.3 COUNTERFACTUALS AND RELATIONAL JUSTICE

This approach to the assessment of morally relevant counterfactuals can be used to cast some light on a dispute within the literature on international justice. As noted previously, in *Political Theory and International Relations* (p.116) Charles Beitz argued that, given (a) the character of Rawls's relational account of distributive justice, and (b) the empirical reality of the international economic order, Rawlsian principles of distributive justice should be applied not (as Rawls would have it) within particular societies, but across national boundaries to the world as a whole. Thus Beitz claimed that 'the membership of the original position should be global rather than national because national societies are not, in fact, self-sufficient; the system of global trade and investment, organized within a structure of international institutions and conventions, constitutes a scheme of social cooperation in Rawls's sense.'<sup>35</sup>

Beitz's conclusion here has been challenged by Brian Barry and Christopher Brown, who both argue that regardless of the extent of interdependence, interaction between states lacks the right character to make the global system the kind of scheme of social cooperation to which Rawls refers. As Brown argues,

...even making allowances for subsequent deepening of interdependence since the late 1970s when Beitz wrote, it remains the case that the present world system cannot plausibly be defined as a co-operative venture for *mutual advantage* which ... is the definition of society Rawls employs to get his schema under way. Possibly parts of the advanced industrial world could be seen in this way — the European Union for example — but it would be a particularly enthusiastic neo-liberal who argued that this applies across the board to all interactions between rich and poor. The alternative view that the rich are exploiting the poor makes it difficult to argue that the kind of reciprocity involved in Rawls's definition of a society can apply at the global level.<sup>36</sup>

Brian Barry argues in similar fashion:

Beitz's argument for extending the Rawlsian difference principle is in essence that the network of international trade is sufficiently extensive to draw all countries together in a single cooperative scheme. But it seems to be that trade, however multilateral, does not constitute a cooperative scheme of the relevant kind.<sup>37</sup>

Whether these criticisms are sufficient to undermine Beitz's account of cosmopolitanism in *Political Theory and International Relations* is an open question.<sup>38</sup> Caney argues that Beitz's own theory only requires that groups of people be 'interconnected in some way, even if that interconnection is not mutually beneficial or cooperative': thus Beitz writes, 'the requirements of justice apply to institutions and practices (whether or not they are genuinely cooperative) in which social activity produces relative or absolute benefits or burdens that would not exist if the social activity did not take place'.<sup>39</sup> Leaving this issue to one side, let us focus on the claim that principles of distributive justice apply if and only if interaction and interdependence has a particular **(p. 117)** cooperative character. This claim leads to a problematic conclusion when we consider unjust forms of international interaction, such as colonialism. It appears to be the case that if political communities are interdependent upon one another as a result of just interaction, then their interdependence constitutes mutually advantageous cooperation, and transnational principles of distributive justice apply to them. But insofar as their relations have been characterized by exploitation, that is, by injustice, no such entitlement to a fair share of the product of the societies is created. The outcome is that present day states owe less to other states because they treated them wrongly in the past than they would do had they acted in accordance with the principles of justice.

The insight which the foregoing account of compensatory justice provides is that the question to be asked is not whether international relations *are* characterized by mutually beneficial cooperation. Instead we should ask whether, given contemporary levels of development, historic interaction between nations *should* have been characterized by mutual cooperation. If the relevant counterfactual here is one whereby historic interaction was not in fact exploitative but was consensual, and if we hold that mutually beneficial cooperation is the condition which triggers duties of distributive justice, then it may well be that, historically, colonies were wronged by being excluded from the domestic sphere of distributive justice. So if, for example, one is an egalitarian at a domestic level, one would presumably have to conclude that an injustice was done to historic colonies when resources were not redistributed so that all individuals in both the colonial powers and the former colonies had an equal distribution of resources. If this is indeed the case, then modern day compensatory duties to non-nationals may be colossal.<sup>40</sup>

### 4.4 BENEFITING FROM INJUSTICE

We have established the morally relevant sense in which modern day parties might be said to be benefiting or suffering as a result of historic international injustice. It still remains to be shown, however, that anything follows from a recognition that this is indeed so in a given case. This section examines the question of whether agents can acquire moral obligations as a result of involuntarily benefiting from the unjust actions of others.<sup>41</sup> As such, it retains the current methodological assumption of treating modern day agents as innocent third parties in relation to historic injustice. I start by considering David Miller's article 'Distributing responsibilities'<sup>42</sup> which focuses on the distribution of duties of assistance, in cases where it is accepted that someone ought to provide assistance to those in need but where it is controversial **(p. 118)** upon whom the costs of assistance should fall. Miller proposes four morally relevant forms of connection with the victims of injustice which can give rise to moral obligations to assist; I propose that benefiting from events which led to the plight of those in desperate need, however involuntarily, constitutes an additional morally relevant form of connection. I proceed to argue that moral agents can possess compensatory obligations as a result of involuntarily benefiting from injustice even when the victims of injustice do not need to be lifted above some minimal threshold level of well-being.

#### 4.4.1 Benefit and Duties of Assistance

In 'Distributing responsibilities', David Miller seeks to address what he calls 'the problem of remedial responsibility', which he defines as follows:

To be remedially responsible for a bad situation means to have a special obligation to put the bad situation right, in other words to be picked out, either individually or along with others, as having a responsibility towards the deprived or suffering party that is not shared equally among all agents.<sup>43</sup>

As we have seen, Miller's account of just international interaction adopts further principles which both forbid exploitation and establish duties of assistance in terms of resource transfers. In *On Nationality* he outlines a theory of basic rights with correlative obligations regardless of nationality. These are principally conceived of as rights to forbearance, 'but may also include rights to provision, for example in cases where a natural shortage of resources means that people will starve or suffer bodily injury if others do not provide for them'.<sup>44</sup> As such, the kinds of 'bad situation' he has in mind are those where individuals or groups are below some minimal threshold of well-being, such as Iraqi children who are malnourished and lack access to proper medical care. In such cases, Miller supposes that it is not in question whether the situation requires a remedy, given that it is possible that a remedy could be given; the interesting question is who it is that should do the remedying (in the absence of an institutional mechanism for formally assigning responsibility). His aim is to find a principle, or set of

principles, for assigning this responsibility 'which carries moral weight, so that we can say that agents who fail to discharge their remedial responsibilities act wrongly and may properly be sanctioned.'<sup>45</sup> His methodology here makes explicit reference to our existing intuitive beliefs as to who it is that properly bears these responsibilities: his aim is to 'lay out principles for distributing responsibilities that we hope will command widespread agreement'.<sup>46</sup> He considers four different approaches that seemingly find support in the real world: based upon causal responsibility (**p.119**) for the occurrence of the condition, on moral responsibility for the occurrence of the condition, on capacity for remedying the condition, and on communal obligations to the affected party or parties. He concludes that no single approach can give a full account of who should remedy the situation in any given situation — using a single principle results in intuitively unpalatable outcomes. Instead, he argues for a 'connection theory', whereby any of the four relations listed above may establish a sufficiently strong link between parties to allocate remedial responsibility. Which principle is to be invoked in a given case will depend upon its particular characteristics, so that 'when connections have to be weighed against each other, we can do no more than appeal to our shared moral intuitions about which is the stronger.'<sup>47</sup> In this section I accept the idea of the connection theory, but argue for a fifth possible ground for the acquisition of remedial responsibility, specifically that of receiving benefits from the occurrence in question. My claim is that it is possible to think of cases where this form of connection seems intuitively to give rise to remedial responsibilities, even though other forms of connection, as listed by Miller, are also present.

Consider the following example. Four people, A, B, C, and D live on a remote island, each one possessing one-quarter of the land. All four are entirely self-sufficient, and their landholdings are separated by high fences. There is little or no contact between the four. The only crop which will grow on the island is the extremely versatile Polychrestos plant, whose root can be used to produce a wide variety of different dishes, as well as providing raw materials for clothing and other household essentials. The Polychrestos plant's root grows underground and is harvested each autumn, and must not be disturbed at any other part of the year. Although this means that the size of the crop will only be revealed at harvest time, the climate on the island is extremely constant, and the island's underground river distributes water evenly throughout the island's soil. Nonetheless, the Polychrestos plant is a high maintenance crop; and the size of the underground portion of the plant therefore is strictly correlated to the amount of care the overground portion of the plant receives. In order for each person to support herself, she must produce 200 kilos of root per year. A is a very hard-working, industrious type, whose agricultural efforts, from dawn to dusk each day, mean that she produces 700 kilos per annum, allowing her to eat very well and produce a wide range of leisure products. B, C, and D are rather laid-back in their approach to agriculture, and work just five hours a day to

produce the minimum 200 kilos a year. After a year of this, however, D, a rather unsavoury character, decides she does not want to work even five hours each day. Unknown to all the others, she diverts the underground river away from B and C's sections of land, so that her land receives all of their water, boosting, she hopes, her **(p.120)** own crop considerably. When harvest time comes, there are a number of surprises. A harvests her regulation 700 kilos. C's land has had no water, and consequently she has no crop. She is destitute, despite her efforts over the past year. It also emerges that D (no water engineer) has in fact diverted the water away from her own land as well as that of C, and B, far from having a failed crop, has been the beneficiary. To her surprise, she harvests 400 kilos. D is also destitute, and in rage and despair hangs herself with a rope fashioned from the last of the previous year's Polychrestos crop. This leaves the problem of C. Without her year's produce, C will die unless A and B provide her with the necessary 200 kilos. How should the remedial responsibilities be distributed? There appear to be no ties of community between the individuals, and neither is either causally or morally responsible for C's fate — that responsibility, in both senses, lies with D. This seems to leave us only with capacity — who is better placed to remedy C's situation? Either A or B could transfer the necessary 200 kilos to C, while retaining at least 200 kilos themselves, but evidently A's extra level of resources mean that her capacity is the greater. As such, on Miller's account, A has the greater connection to C and bears the remedial responsibility. Yet such a conclusion seems intuitively objectionable. Miller notes of the capacity approach that, 'its exclusive focus on the present necessarily blinds it to historical considerations'<sup>48</sup> — it does not consider how the resources which are to be redistributed came about. In this case, D's actions conferred benefits upon B. Should we not hold that B's improved position, which has come about as a direct result of C's worsened position, constitutes just the sort of 'morally relevant relation' between parties which might be considered when we ask who should bear remedial responsibilities?

Thus, one could formulate the following claim in relation to remedial responsibilities:

*If the events which cause agent C to fall below the morally relevant threshold confer benefits upon agent B, then the fact of the receipt of these benefits, however involuntary, establishes a morally relevant connection between C and B, which may give rise to remedial obligations on the part of B.*

It is key that the claim only states that receipt of benefits *may* give rise to remedial obligations. As with Miller's four other forms of morally relevant connection, in cases where more than one party is relevantly connected to the suffering agent we must use our moral intuitions to determine either which party bears the primary responsibility, or how the costs should be shared

amongst different parties. My claim in this section is simply that benefiting constitutes a fifth form of morally relevant connection to go alongside Miller's existing four, which may give rise to remedial responsibilities in certain circumstances.<sup>49</sup> This improves the existing typology in two ways. The first is that it responds directly to the problems that Miller cites with **(p.121)** the capacity problem, in that it identifies a class of resources which may be available for remedying a situation — those which have arisen elsewhere as a result of that situation — which do not have a problematic history, in that it is hard to link them to their present owners by any kind of desert claim. But furthermore, there are independent moral reasons for supposing that some such resources should be redistributed. It is not so much that they represent a class of neutral resources which can be safely redistributed, as that, insofar as they represent the 'fruits of injustice', they may be seen as distortions within the overall scheme of distribution. This can be seen by examining Miller's account of when it is that different relations amongst the four he identifies become relevant in determining remedial responsibility. It is not always the case that this allocation of responsibility should turn on, for example, the extent to which different parties can effectively remedy the situation, and the costs they will bear in doing so. Thus in some cases there are 'independent moral reasons' for assigning remedial responsibility to a particular agent, and this applies most obviously when A is morally responsible for P's injury, when there may be two such reasons. These essentially stem from the idea of rectificatory (or corrective) justice. The first of these is that:

Where A has unjustly benefited from the injury he has inflicted on P — he has stolen something of P's or exploited him, for example — then if A is made to compensate P by returning what he has taken or in some way undoing the damage he has inflicted, then this will help to cancel out A's unjust gain, and so restore justice between them.<sup>50</sup>

Second, even if A has not benefited from his actions, he has wronged P, and owes P compensation. Our concern here is with the first of these reasons. We need not think that the only circumstances where a party enjoys an 'unjust gain' are those whereby she gains as a result of acting unjustly. In a legal context, for example, the category of 'unjust enrichment by subtraction' within the law of restitution is principally concerned with those circumstances whereby injustice in distribution arises despite the absence of wrongdoing; in the case, for example, of a mistaken payment.<sup>51</sup> It is possible to see the changes in distribution that emerge as a result of injustice as (to use Nickel's term) 'distortions' in the overall scheme of distribution, even if the party who has benefited has acted legitimately and has not committed any wrongdoing. Such cases may be seen as falling squarely within the preserve of corrective justice, defined by Nickel as, 'the matter of people having those things that they deserve and are entitled to, or otherwise ought to have.' He further claims that compensation serves justice by preventing and undoing actions that would prevent people from having those



things'.<sup>52</sup> Such an approach claims that compensation serves an Aristotelian conception of justice as the maintenance of an equilibrium of goods between members of society.<sup>53</sup> If corrective justice is **(p.122)** seen in this way, then, as Coleman writes, 'rectification ... is a matter of justice when it is necessary to protect a distribution of holdings (or entitlements) from distortions which arise from unjust enrichments and wrongful losses. The principle of corrective justice requires the annulments of both wrongful gains and losses.'<sup>54</sup> The claim here, then, is that insofar as a third party directly benefits from unjust action and the victim suffers, a distortion in the fair scheme of distribution is created. Insofar as pinning remedial obligations on benefiting third parties seeks to correct this distortion, it appears that we have independent moral reasons for the allocation of responsibilities.

One further complication must be noted at this point. So far, reference has been made to benefits which have been *conferred* on B. The aim here is to identify the extent to which B's improvement, which has the occurrence of the act of injustice as a necessary component, may be seen as an automatic effect of the act of injustice. In the Polychrestos case above, the improvement in B's position was precisely of this kind; she can have no claim to her extra 200 kilos based on anything approximating desert. But the situation is more complicated when a third party benefits from an injustice, in that her position is better following the injustice than it would have been had the injustice not occurred, but part of the reason for this difference stems from her own actions. For example, suppose that, in the preceding example, B could tell that her Polychrestos plants were becoming healthier and growing faster. She wrongly supposes this to be a result of her own efforts, and is inspired by her progress to redouble her efforts, with the consequence that she produces 600 kilos of produce. Now, if we measure the degree of her benefit by simply comparing the current situation with the counterfactual situation where the unjust diversion of the river did not occur, we would conclude that B has benefited to the tune of 400 kilos, and this is the relevant amount which would be available for redistribution. Yet this seems unfair. The problem is again that of specifying the morally relevant counterfactual. As in Section 4.2, this is not done by crudely comparing what has happened with what would have happened and subtracting the one from the other, but rather looks at the extent to which the actions of the parties who have benefited from injustice have created new entitlements for themselves. It is the automatic effects of the act of injustice which ground remedial responsibility.

#### 4.4.2 Benefit and the Effects of Injustice

It has been argued that the receipt of benefits — however involuntary — stemming from an act of injustice can confer remedial obligations upon a moral agent. The arguments put forward so far, however, apply only to a particular **(p. 123)** kind of remedial responsibility, namely responsibility for fulfilling duties of assistance. In such cases, it is a given that assistance should be given by someone, given an acceptance of the relevant further principle of just

international interaction; the question is who it should be. But such 'bad situations' are not the only ones which may be thought to be in potential need of remedy. What of 'bad situations' where one party is wronged and harmed by another, but not so badly harmed as to fall below a minimal level of welfare sufficient to bring duties of assistance into play? Might a third party which benefits from the injustice in such cases potentially acquire compensatory obligations? In speaking of 'victims of injustice' here, I mean to refer to people who have been both wronged and harmed by the actions of another agent or agents. The 'bad situation' here is not defined in terms of some independently derived minimal level of welfare, an absolute criterion, but in relation to the morally relevant counterfactual as outlined in Section 4.2. If we assume that the harm suffered is not sufficient to bring the victim below our welfare threshold, then why should we believe that anyone not responsible for causing the harm should have obligations to remedy it?

The question is whether, within an account of distributive justice which is generally happy to allow individuals to suffer losses without requiring that others pay compensation to make up for their losses, such as international libertarianism the fact that an innocent third party has benefited from another's wrongdoing gives us a good reason to shift some or all of the victim's losses to the third party. It is my belief that we lack a coherent set of principles to answer this question. For example, having just cited a common law principle, it is interesting to see how different branches of legal theory cope with the problem. Mention has already been made of the concept of unjust enrichment under the law of restitution, according to which, it is maintained, the law protects one person from being unjustly enriched at another's expense. This seems clearly applicable to the present case, and yet the extent to which claims may be made under this general principle are (broadly speaking) limited to cases where one party has either freely accepted a particular benefit or has possession of or legal title to a particular item of property or sum of money to which another party has a strong moral entitlement. For reasons which will be discussed later, moves to claim that an agent might acquire obligations through the involuntary receipt of a benefit in kind are severely restricted. In the area of criminal law, a different approach is often taken to the subject of possessing stolen goods. If I have been given or have bought for a cheap price an item of stolen property in good faith, I may reasonably be said to have benefited from an act of injustice. The question of what should happen next varies for different kinds of property, and in different legal jurisdictions. In some cases, the beneficiary has to return the item, receiving no compensation even if she has **(p.124)** purchased it in good faith. Clearly, this might leave the (one-time) beneficiary of an injustice paying the greatest price for the injustice, and being worse off than she was prior to the injustice. In other cases it is the victim who is held liable for these costs, and the beneficiary keeps the property in question.<sup>55</sup>

Given the variable legal treatment of the issue, we must look to its theoretical underpinning. The most common way that moral agents are said to acquire compensatory obligations is through what is sometimes called 'the fault principle'. In broad terms, this is the idea that those who are responsible for injuring other parties bear a moral responsibility to compensate the victims of their actions, precisely because it is their fault that the injuries in question occurred. Once it is established what would compensate the injured party, the guilty party has a moral obligation to so act, insofar as they are able to do so. Evidently, this is the understanding of moral responsibility discussed by Miller in the previous section, and, as before, it seems clear that this should generally be the primary response to acts of injustice and is in most cases the ideal response. What of circumstances, however, where the parties who were actually responsible for the act of injustice do not or cannot fulfil their obligations? For some writers this is the end of the matter, and any suggestion of the acquisition of compensatory obligations without fault is simply unacceptable. Thus O'Neill writes:

... some laissez faire liberals are dubious about rights to compensation except where the individuals who inflicted wrong are identifiable and obliged to compensate for the injuries they inflicted. On such views rights to compensation are symmetrical with rights to punish, in that they are absent when there is no wrongdoer, or no identifiable wrongdoer. Just compensation presupposes an injuring as well as an injured party.<sup>56</sup>

As it stands, such a position is too strong, as it rules out the possibility that non-offenders may acquire compensatory obligations through prior agreements that one party will cover another's losses in the event of them suffering particular harms. This may be either as a result of a contractual arrangement, as in the case of buying insurance, or simply as a result of a promise or commitment, such as when a government sets up an agency to compensate victims of crime for their injuries. Such schemes are not normally seen as justifiable if they actually allow the offender to escape responsibility, but rather act as a safety net to compensate victims should they not receive their due from the offender. Thus, for example, car insurance should not protect one from a conviction for dangerous driving, nor from subsequent claims for damages, but covers one for accidental harm one causes and for any harms one may suffer through accident or the fault of others. This is simply a case of a special obligation, of the same nature as a promise. As such, the obligation is essentially voluntaristic.

**(p.125)** The issue becomes controversial, then, when it is claimed compensatory obligations can be acquired involuntarily. The question of the involuntary receipt of benefits has been explicitly invoked in the context of discussions of the normative justifications of reverse discrimination as a compensatory response to injustice. A frequently cited example comes from the writing of Judith Jarvis Thomson. She concedes that practices of reverse

discrimination in hiring impose costs upon the (say) white males who are affected by them, but she argues that this is not necessarily unjust:

...of course choosing this way of making amends means that the costs are imposed on the young male applicants who are turned away. And so it should be noticed that it is not entirely inappropriate that those applicants should pay the costs. No doubt few, if any, have, themselves, individually, done any wrongs to blacks and women. But they have profited from the wrongs the community did. Many may actually have been direct beneficiaries of policies which excluded or downgraded blacks and women — perhaps in school admissions, perhaps elsewhere; and even those who did not directly benefit in this way had, at any rate, the advantage in the competition which comes of confidence in one's full membership, and of one's rights being recognized as a matter of course.<sup>57</sup>

The principle at stake seems to be that, by benefiting from an act of injustice, one can acquire obligations towards the victims of that injustice. This is not an uncontroversial conclusion, and it has been strongly criticized by Robert Fullinwider. Fullinwider claims that the passage cited above reflects a particular moral principle, 'he who benefits from a wrong must help pay for the wrong'.<sup>58</sup> Fullinwider claims that this is 'surely suspect as an acceptable moral principle', suggesting that only 'he who wrongs another shall pay for the wrong' is justifiable as a principle of compensatory justice.<sup>59</sup> To illustrate his case he uses the following example:

While I am away on vacation, my neighbour contracts with a construction company to repair his driveway. He instructs the workers to come to his address, where they will find a note describing the driveway to be repaired. An enemy of my neighbor, aware, somehow, of this arrangement, substitutes for my neighbor's instructions a note describing *my* driveway. The construction crew, having been paid in advance, shows up on the appointed day while my neighbor is at work, finds the letter, and faithfully following the instructions paves my driveway.<sup>60</sup>

It is clear that in this case the neighbour is a victim of his enemy's unjust act, and has a valid claim against him. But what is to be done in the absence of the enemy? Fullinwider rejects the conclusion, which he believes follows from the principle of compensatory justice he attributes to Thomson, that I am obliged to pay my neighbour for his driveway, contending that to do so would constitute an act of moral supererogation; a laudable act certainly, but not one (**p.126**) which is required by a moral obligation. The key point for Fullinwider is that the receipt of the benefit in this case is *involuntary*. Perhaps the situation is different with regard to those who willingly accept benefits stemming from injustice: 'If I knowingly and voluntarily benefit from wrongs done to others, though I do not commit the wrong myself, then perhaps it is true to say that I am less than

innocent of these wrongs, and perhaps it is morally fitting that I bear some of the costs of compensation.’<sup>61</sup> But those who involuntarily receive benefits bear no compensatory obligations.

This takes us to the heart of the issue. Is Fullinwider right about the involuntary receipt of benefits? It seems to me that he is not, and that the power of his example derives from a confusion over how extensive compensatory obligations stemming from injustice should be.

So let us return to the driveway. The crucial question here seems to stem from my attitude towards my newly resurfaced driveway. Let us suppose that the driveway cost my neighbour £500. I have not, however, benefited financially, as the resurfacing has added no value to my property.<sup>62</sup> But let us also assume that I have indeed derived overall benefit from the experience, in that I prefer my new driveway to my old one. This is not to say, of course, that I would necessarily have been willing to pay £500 to have it resurfaced. Let us suppose that, had the driveway resurfer knocked on my door the day before and offered to resurface my driveway for £500, I would have refused.<sup>63</sup> Asking me to pay £500 in this circumstance does seem unfair, since to do so would leave me worse off than I would be had the whole experience not taken place. I would, in truth, have become the victim of the piece. But this is not the only alternative open to us. Imagine that the driveway resurfer had in fact offered to do my driveway for £200. This is considerably below the going rate, and I may well have leapt at the opportunity. If this was indeed the case, and I am correspondingly (at least) £200 better off on the basis of my own evaluation, then is it unreasonable to say that I should pay £200 to my neighbour? After all, I am still benefiting from the whole transaction; to use economic terminology, I am on a higher utility curve than before. We may well think that I do not (necessarily) owe my neighbour £500, but it does not necessarily follow from this that I owe him nothing at all. Certainly I am innocent of wrongdoing towards him at this point. But might it not be that our moral relationship, the balance between the two of us, will be altered if I materially benefit from my neighbour's unrectified experience of injustice without making any effort to offset his losses?

Fullinwider's example seems initially powerful due to its 'all or nothing' character. One can have compensatory obligations to X, however, without having an obligation to compensate X fully. Thomson's point in relation to affirmative action, if it is to succeed, must be that the situation of white (p.127) males even after policies of affirmative action have been put into place is better than it would have been had past and recent injustice not occurred; they derive a net benefit from their social position even when such policies have been enacted. Clearly, the principle 'he who benefits from a wrong shall pay for the wrong', which Fullinwider initially attributes to Thomson, is a nonsense, given that the benefit one receives from the wrong might be marginal, whereas the cost of paying for it might be monumental. So the compensatory obligations of the

beneficiaries of injustice can be limited to paying compensation up to the point where they are no longer beneficiaries of the injustice in question. Nor is it necessarily the case that a beneficiary need pay anything at all, given that other parties (most notably, the agent responsible for the act in question) may have prior obligations which fully compensate the victims, leaving no work for the beneficiary to do.<sup>64</sup> Insofar as the receipt of benefits does give rise to a principle, it can only be as demanding as, 'she who benefits from a wrong may have obligations to (help to) pay for the wrong, insofar as doing so does not leave her worse off than had the wrong not occurred'. Interestingly, this follows closely a parallel argument within the literature on political obligation over the extent to which the involuntary receipt of benefits provided by the state can ground obligations to obey the law. Jonathan Wolff, for example, disputes the extent to which this can be the case on the basis that, for some people, the benefits the state provides are not worth the price the state extracts: i.e. acceptance of political obligations. Thus he writes concerning the fairness account of political obligation:

... a revised account does not appeal to the idea that the mere receipt of benefits is sufficient to create obligations ... Rather obligations are generated for an individual only if an individual receives a *net* benefit according to his or her subjective scale of valuation.<sup>65</sup>

It is my contention that compensatory obligations can be generated in a similar fashion. Moral agents can have obligations to compensate victims of injustice if they are benefiting and the victims are suffering from the automatic effects of the act of injustice in question. It is crucial to the argument that the losses and benefits in question arise from injustice, which is to say wrongdoing by other agents.<sup>66</sup> The individual's duty not to benefit from another's suffering when that suffering is a result of injustice stems from one's moral condemnation of the unjust act itself. In consequence, a duty to disgorge (in compensation) the benefits one gains as a result of injustice follows from one's duty not to so benefit. My claim is that taking our nature as moral agents seriously requires not only that we be willing not to commit acts of injustice ourselves, but that we hold a genuine aversion to injustice and its **(p.128)** lasting effects. We make a conceptual error if we condemn a given action as unjust, but are not willing to reverse or mitigate its effects on the grounds that it has benefited us. The refusal undermines the condemnation. The belief that certain acts are wrong and should not be performed on account of their harmful consequences commits one to endorse the application of rectificatory justice to seek to undo the effects of injustice, insofar as doing so does not render oneself a victim, by lowering oneself below the morally relevant counterfactual. Being a moral agent means being committed to the idea that justice should prevail over injustice. Losses which others suffer as a result of the unjust actions of other persons cannot be dismissed as arbitrary or simply unfortunate: they create distortions within the scheme of fair distribution. If no one else is willing or able to make up

these losses, then the duty falls to those who are benefiting from the distortions in question.<sup>67</sup>

It is useful here to consider Janna Thompson's work on the nature of apologies for historic wrongs. Thompson's query is what it means to say that one is 'sorry' that a particular event occurred. She identifies what she calls, 'the apology paradox': if we owe our existence to a given act of injustice, and if we are happy that we are alive, how can we meaningfully say that we regret the act of injustice that brought our very existence about? And if we do not regret the act of injustice, how can we apologize for it? Thompson argues that we need to reinterpret what we are actually doing when we apologize for historic injustice:

Many people feel uncomfortable or even apologetic about benefiting from an injustice even when they had no responsibility for it. They are sorry that the good things they now possess came to them because of a past injustice. They do not regret that they have these things, but that they came to have them in the way they did. An apology could be interpreted as an expression of this kind of regret. So interpreted it is not, strictly speaking, an apology *for* the deeds of our ancestors or an expression of regret that they happened. Rather, it is an apology *concerning* deeds of the past, and the regret expressed is that we owe our existence and other things we enjoy to the injustices of our ancestors. Our preference is for a possible world in which our existence did not depend on these deeds.<sup>68</sup>

The claim here is not that we should regret our own existence, insofar as it stems from historic injustice, but that we should regret the fact that our existence is a result of unjust rather than just actions. We would prefer a world where both we existed and where our ancestors had not acted unjustly. But if we accept (as I think we should) all that Thompson says, are we not obliged in fact to do rather more than simply regret the fact that the world is as it is, and issue an apology in recognition of this fact? If we actually wish that we were in a different kind of world, and think that such a world would be more just than **(p. 129)** our current world, surely it follows that we should seek to make our world more similar to the counterfactual world in question? Thompson specifically refers to 'our existence and other things we enjoy'. But while we obviously cannot alter the fact that we have come into existence, we do have control over those 'things we enjoy' which are transferable resources. Suppose that, through the intervention of an unknown enemy, the estate of A's parents is left to B in their will rather than to A, as A's parents had intended. A would surely be entitled to feel aggrieved if B expressed her sorrow at what had taken place, and expressed the wish that they lived in a counterfactual world where the event had never happened, while still retaining the estate. My point is not just that B's expressed sentiments seem empty; it is that they are incompatible with her subsequent actions. If our moral condemnation of injustice, our regret that injustice has occurred, is to be taken seriously, it must be matched by action to

remedy the effects of injustice, insofar as they persist as the automatic effects of injustice. We are right to feel guilty at benefiting from others' misfortune, precisely because this suggests that we have not fulfilled our compensatory obligations.

One final point in this section. In 'Superseding historic injustice', Jeremy Waldron refers to what he calls the 'contagion of injustice'.<sup>69</sup> The interdependence of different parties, both domestically and internationally, and their involvement in, for example, market transactions makes it likely that many people may, to an extent, have benefited as a result of a given act of injustice. It follows from the preceding argument that such people may collectively possess a duty to put the situation right, insofar as doing so does not leave them worse off than if the injustice had not occurred. So it might well be argued, for example, that the West as a whole has benefited from the injustices of the colonial period, and so even those countries which did not directly act as colonial powers may have compensatory duties in the current day. When considered at a domestic level, the likelihood that many and diverse innocent third parties may have benefited from a given act of injustice may in some cases make the fulfillment of the ensuing duties onerous, and at times practically impossible. This might well be thought to provide an argument for an automatic, government-sponsored scheme for compensation for the victims of crime. But this notwithstanding, we might nonetheless think that some duties may appear more pressing to some beneficiaries of injustice than to others. This relates to the earlier claim that recognizing one's duties amounts to a condemnation of the previous act of injustice, and a kind of determination that injustice should not prevail. It seems to me that the parties who should feel this most strongly are those people who were intended to benefit from the act of injustice. Consider, yet again, the example of the driveway. Suppose that the purpose of the evil note leaver was not only to harm my neighbour, **(p.130)** but also to benefit me specifically. Insofar as I have in fact benefited from his actions, he has achieved his aim and injustice, as it were, has triumphed. This is true not only in the sense that a distortion in the fair scheme of distribution remains, but also in the sense that what has resulted is the precise unfair distribution which the perpetrator of injustice intended. This has relevance in an intergenerational context, in that it is often a principal aim of those who seek to gain unfair advantage to improve the prospects of their descendants, and relevance in an international context, as frequently the motivation for international wrongdoing is to benefit one's nation, understood as a historic community which exists through time. There is, then, a sense in which it might not be wholly accurate to see some innocent persons or groups as genuinely third parties in relation to injustice. Their position is more involved or implicated than this. It is not a necessary condition of having these duties that it was intended that we benefit from the act of injustice, but it may be that we can see our moral duties more clearly when this is indeed the case.

### 4.4.3 From Theory to Practice — Problems of Measuring Benefit

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It has been claimed that insofar as moral agents have benefited from the wrongdoing of others, they may have obligations to compensate the victims of this wrongdoing. Thus far, the calculation of what constitutes a benefit has been presented as either uncontroversial, as in the Polychrestos case, or as being subjective in that it depends upon the extent to which the putative beneficiaries believe that they have themselves benefited, as in the driveway case. That calculations of advantage will often turn upon the subjective preferences of those concerned does undoubtedly have complications for the application of the theory. It suggests that it would be very difficult to ground legal rights to compensation in a variety of such cases, as is demonstrated by existing laws on unjust enrichment. Seeking restitution in a legal context simply because another has been unjustly enriched at one's expense is difficult in the absence of free acceptance of the benefit in question, because of the problem of subjective devaluation. This is an argument based upon the premiss, 'that benefits in kind have value to a particular individual only so far as he chooses to give them value. What matters is his choice.' So what constitutes a benefit is up to the individual and is an inherently subjective manner: 'Some people like their poodles permed. Others abhor permed poodles.'<sup>70</sup> Only in the case where one party actually receives money can it be taken for granted that she has benefited, since its nature as a medium of exchange is taken to mean that is beneficial by definition: 'Where the defendant received money, it will be impossible on **(p.131)** all ordinary facts for him to argue that he was not enriched. For money is the very measure of enrichment.'<sup>71</sup> To refer to the previous example; one could not hold the owner of the new driveway legally liable for the costs to his neighbour, because there is no way for an external agent to determine the degree of benefit the owner has received. There is nothing inherently unreasonable about his claiming that he has received no benefit from the experience whatsoever, and in fact preferred the driveway as it was. Even if it is the case that the resurfacing has unambiguously added to the value of his property, he still has to live with his unfavoured driveway until such a time as he sells his house, and it is quite conceivable that this experience might make him worse off overall, even if he eventually receives a higher price for his property. So it may be that, even if one accepts the moral force that attaches itself to benefiting from injustice, there is no way that rights stemming from such obligations can, in many cases, be written into the law, since defendants would simply have to claim that they did not consider themselves to have received benefit to avoid legal obligations. Two things follow from this. First, and most obviously, the topic becomes more a matter of moral than legal obligation, unsuitable for codification into positive law. Benefiting from historical injustice may not present a sound way to ground claims against an unwilling putative beneficiary due to the problem of subjective devaluation. But there is no problem with claiming that moral agents must honestly ask themselves to what extent they have themselves benefited from injustice, and assess their moral obligations accordingly. This is not, of course, to say that the question is not a matter of public policy, but simply that it becomes

a moral and a political question, of what ought to be done in policy terms, rather than of what one has to do in order to fulfill one's legal obligations. When the beneficiaries are not individuals, with particular likes and dislikes, but collective entities such as peoples or corporations, it may in any case be easier to make an objective assessment of well-being, and hence of advantage and disadvantage, by reference to material considerations. Such entities will have to debate and decide upon the actions they think it is right to pursue given their circumstances.<sup>72</sup> Given the weakness of international law, and the extent to which it reflects the interests of powerful states, this is the only way the compensatory element of the rectificatory project is likely to get off the ground in any case.

Second, it might be that a discourse of 'rights to compensation' on the parts of victims is simply misplaced in this context, and we should instead be moving towards a duty-based model, where initiatives of compensatory justice gain momentum not from the political protests of victims, but from critical reflection by benefiting moral agents as to the provenance of their advantages. It was precisely this duty-based approach to the rectificatory project that was endorsed in Chapter 1. It was noted that Onora O'Neill argues that, 'Only **(p.132)** the weak and powerless have reason to make the perspective of reciprocity and rights their primary concern.'<sup>73</sup> Insofar as those who have benefited from injustice are not the weak and powerless, the duty-based approach is surely the way they should approach the rectificatory project.

One final point arises. Throughout this chapter, I have sought to depict the involuntary beneficiaries of injustice as innocent third parties, even if their advantage was the motive of the wrongdoer. This is the correct way to address the problem in a purely theoretical sense. Throughout, the beneficiaries of injustice have been presented as if they have only just received the benefits in question. A and B, we might imagine, are considering C's plight as they survey their freshly harvested Polychrestos crop. The surprised owner of the repaired driveway has just come home from work and is trying to work out what to do next. In such cases, the beneficiaries in question truly are innocent third parties. But, if it is accepted that they at this point have rectificatory obligations to others, then they are innocent only insofar as they act reasonably promptly to fulfill the said obligations. A third party which benefits from injustice but does nothing to repair the plight of the victim, when it is clear that no other party is likely to act, is not an innocent bystander; she is acting unjustly in relation to the victim and so becomes a wrongdoer herself. Fullinwider states the principle succinctly in outlining the case against his own position:

Possession of illicit benefits undermines one's claim to 'innocence'. The wrongful possession serves the same function as personal fault, it makes one liable to pay appropriate compensation.<sup>74</sup>

This argument is of great significance when it comes to considering real world compensation claims, precisely because they typically respond to acts of injustice which have already occurred, sometimes some distance in the past, and for which no one has paid compensation. In such cases, the argument is not simply that an innocent third party has moral obligations towards victims still feeling the effects of the act of injustice. It further holds that the third parties are themselves guilty of compounding the act of injustice by withholding due compensation, which is to say that they have acted unjustly to the victim and so may owe them compensation over and above that which would have been required had they acted correctly initially. This suggests an alternative vision of historical injustice; instead of seeing it as something which fades with time, perhaps we should see its continued non-rectification as a perpetuation of the injustice itself, locking successive generations into compensatory obligations which, in their turn, are not met. This possibility will be discussed in Chapter 6, when the methodological assumption of innocence is relaxed. At the very least, it suggests an urgent need to consider the source of our **(p.133)** present-day advantages — and to consider at what expense to others they were procured.

### Notes:

(1.) See Jules L. Coleman, 'Justice and the argument for no-fault', *Social Theory and Practice* 3 (1974), 161–80 at p. 161.

(2.) Peter Cane, *Atiyah's Accidents, Compensation and the Law* (London: Butterworths, 1993), p. 355.

(3.) Bernard Boxhill argues that community membership is sufficient to ground obligations of compensation to victims on the part of the community as a whole. Such a commitment is, he maintains, implicit in the community's social contract; so he writes, 'The case for rights of compensation depends ... on the fact that the individuals involved are members of a single community, the very existence of which should imply a tacit agreement on the part of the whole to bear the costs of compensation', Boxhill, 'The Morality of Reparation', in Gross (ed.), *Reverse Discrimination* (Buffalo: Prometheus, 1977), 270–8 at p. 272.

(4.) Elizabeth Anderson, 'What is the point of equality?', *Ethics* 109 (1999) 287–337 at p. 288.

(5.) See Thomas Pogge, ' "Assisting" the global poor', in Deen K. Chatterjee (ed.), *The Ethics of Assistance: Morality and the Distant Needy* (Cambridge: Cambridge University Press, 2004), 260–88 at p. 265.

(6.) The issue of apology for wrongdoing is conceptually distinct. We would normally think that two parties who have wronged each other to equal degree should each apologize for their actions.

(7.) Ellen Frankel Paul, 'Set-asides, reparations, and compensatory justice', *NOMOS XXXIII: Compensatory Justice*, 97-139 at p. 119. One may take issue with Paul's rather sweeping claims concerning contemporary Africa, and, indeed, the United States.

(8.) Goodin, 'Compensation and redistribution', p. 145.

(9.) James W. Nickel, 'Preferential policies in hiring and admissions: a jurisprudential approach', in Barry Gross (ed.), *Reverse Discrimination* (Buffalo: Prometheus, 1977), 324-47 at p. 327.

(10.) Nozick, *Anarchy, State, and Utopia*, p. 57. Nozick goes on to qualify this by noting that Y should compensate X for how much worse off Y's action would have made a reasonably prudently acting X.

(11.) Derek Parfit, *Reasons and Persons* (Oxford: Clarendon Press, 1984), pp. 351-5.

(12.) Stephen Kershnar points out that this only poses a problem insofar as we assume that it is, in fact, a good thing to come into existence. He implies that, although there might be exceptions in terms of extreme disabilities, this is normally the case, given that, for example, many of the descendants of slaves are 'flourishing'. Kershnar, 'Are the descendants of slaves owed compensation for slavery?', *Journal of Applied Philosophy* 16 (1999), 95-101.

(13.) This is a solution which is suggested, to some extent, by James Fishkin in 'Justice between generations', in John W. Chapman (ed.), *Nomos XXXIII: Compensatory Justice*, 85-96. His putative model is complicated by the fact that he is considering compensation for slavery within the United States. The relevant group to be compensated, therefore, is modern day African Americans, understood as the descendants of slaves brought to America from Africa. Fishkin suggests that it is precisely because of the lingering effects of slavery that there is such a recognizable group within the United States of today. Difficult questions as to the identification of the set of descendants to be identified and the distribution of compensation within this set would, of course, have to be addressed. One might think, however, that the case is more straightforward in an international context (or, at least, in some international contexts) where communities are more readily identifiable and separable.

(14.) In particularly strong cases of group loyalty, it might be possible for individuals plausibly to maintain that they would prefer not to have existed if the alternative would be the avoidance of some particular harm to the group; which is to say their own personal identity is less important than their membership of the group. This seems theoretically possible, but is unlikely to be widespread in practice.

(15.) It rejects, for example, the account given by George Sher of the 'branching criterion' of personal identity across possible worlds. See 'Transgenerational compensation' (*Philosophy and Public Affairs*, 35 (2005) 181–200, at p. 187). One might note that Sher's account here gives rise to even more counterintuitive outcomes than the probabilistic account, as discussed later in this section, since it holds that no individual can be compensated for an event which occurred prior to the point where she began to exist as a person, even if this event had no effect on which sperm unites with which egg, since there is no possible world where it is both true that she exists and the event did not take place (p. 186). Sher's argument in this article rejects his earlier position in Sher, 'Ancient wrongs and modern rights', *Philosophy and Public Affairs* 10 (1980), 3–17. In what follows, I defend the broad thrust of Sher's earlier position against some of his later criticisms.

(16.) Kershnar, 'Are the descendants of slaves owed compensation for slavery?', pp. 97–9 [my emphasis].

(17.) Simmons, 'Historical rights and fair shares', p. 178n.

(18.) Joel Feinberg, 'Wrongful life and the counterfactual element in harming', in *Freedom and Fulfillment: Philosophical Essays* (Princeton: Chichester, 1992), 3–36 at pp. 3–4. Feinberg is using 'interests' here in a similar way to that employed by Nozick previously in terms of indifference curves. Thus he writes, 'despite the diversity of component interests in any person's interest-network, and their different degrees of importance to one's overall good, our concepts seem to commit us to the view that interests can be summed up or integrated into one emergent personal interest' (pp. 4–5).

(19.) Feinberg, 'Wrongful life and the counterfactual element in harming', p. 8.

(20.) Feinberg, 'Wrongful life and the counterfactual element in harming', p. 11.

(21.) Kershnar, pp. 95–6.

(22.) James Woodward, 'The non-identity problem', *Ethics* 96 (1986), 804–31 at p. 809.

(23.) Fabre, *Justice in a Changing World*, p. 143.

(24.) Of course, this claim is controversial, as it may be argued, for example, that the presence of such companies prevents the development of indigenous industries, whose profits would be retained by national members, which would work to the advantage of the national community in the long run. Or it might be more generally argued that, although the individual workers are better off in material terms, this is not true of their overall interests.

(25.) See M.A. Roberts, 'The non-identity fallacy: harm, probability and another look at Parfit's depletion example', *Utilitas* 19 (2007), 267–311 at pp. 277– 84.

(26.) Of course, what we understand by a 'fair wage', i.e. a non-exploitative wage, is deeply controversial. Our view on this will be determined by our stance on the nature of exploitation, as discussed in Chapter 3.

(27.) These objections mirror similar points made by Waldron, who notes that some of the events in counterfactual states 'are exercises of human choice rather than the inexorable working out of natural laws' ('Superseding historic injustice', p. 9). It should be stressed that the claim here is not that no compensation is owed; the question rather concerns how much compensation is to be paid. Clearly the student is entitled to some compensation.

(28.) Sher, 'Ancient wrongs and modern rights', p. 12.

(29.) This may not be obvious if one assumes that the compensation is being paid by the same agent who was responsible for the kidnapping in the first place. But imagine instead that we are asking what degree of compensation A should receive from a general compensation fund, paid collectively by society as a whole to victims of injustice.

(30.) Sher, 'Ancient wrongs and modern rights', p. 13.

(31.) Simmons, 'Historical rights and fair shares', p. 171n. Sher acknowledges this point at the end of his article when he suggests that ancient wrongs to Native Americans and African Americans may be atypical in that they have made it very hard for the descendants of the (originally) injured parties to acquire alternative entitlements.

(32.) Waldron, 'Superseding historic injustice', p. 6.

(33.) This is not to say that the opposite cannot occur, in that political injustice can create politicized identities and empower agency within wronged. groups. The point is that one cannot assume that harms will not be long lasting.

(34.) Sher, 'Transgenerational compensation', p. 187.

(35.) Charles Beitz, 'Cosmopolitan ideals and national sentiment', p. 595. In this article Beitz revises his earlier position, claiming that he need not show that international society actually does have this character, but merely that it is feasible that an international society could do so.

(36.) Brown, *Sovereignty, Rights and Justice: International Political Theory Today*, p. 173.

(37.) Barry, 'Humanity and justice in global perspective', p. 531.

(38.) As stated previously, Beitz's later work relies on a non-relational, rather than a relational, account of distributive justice. Beitz, 'Cosmopolitan ideals and national sentiment', p. 595.

(39.) Caney, *Justice Beyond Borders*, p. 110; Beitz, *Political Theory and International Relations*, p. 131.

(40.) This claim has been articulated in terms of a particular account of the circumstances of justice, based on mutually advantageous cooperation, but other international libertarians, who give different accounts of when different individuals are governed by the same principles of distributive justice, may also be vulnerable to this critique. So, for example, accounts which are based on the coercive power of the state must look at the extent to which, historically, members of other political communities were forcibly coerced, and determine whether the character of this historical interaction was sufficient, at that point in time, to give rise to distributive duties to non-nationals which were unfulfilled.

(41.) I use 'involuntary' here, and throughout, to indicate that the benefits in question are not voluntarily acquired or accepted, in that they are conferred upon those who receive the benefits without an exercise of the will on the part of the beneficiaries.

(42.) David Miller, 'Distributing responsibilities', *Journal of Political Philosophy* 9 (2001), 453–71.

(43.) Miller, 'Distributing responsibilities', p. 454.

(44.) Miller, *On Nationality*, p. 74.

(45.) Miller, 'Distributing responsibilities', p. 454.

(46.) Miller, 'Distributing responsibilities', p. 454.

(47.) Miller, 'Distributing responsibilities', p. 469.

(48.) Miller, 'Distributing responsibilities', p. 461.

(49.) This is now accepted by Miller — see *National Responsibility and Global Justice*, pp. 102–3.

(50.) Miller, 'Distributing responsibilities', p. 470.

(51.) See Andrew Burrows, *The Law of Restitution* (London: Butterworths, 1993), pp. 16–23.

(52.) James W. Nickel, 'Justice in compensation', *William and Mary Law Review* 18 (1976), 379–88 at p. 382.

(53.) For discussion of this in a legal context, see Lon L. Fuller and William R. Purdue Jr., 'The reliance interest in contract damages', *Yale Law Journal* 46 (1936), pp. 52–96. See also Ellen Frankel Paul's discussion in 'Set-asides, reparations and compensatory justice', pp. 98–104.

(54.) Jules L. Coleman, *Markets, Morals and the Law* (Cambridge: Cambridge University Press, 1988), p. 185.

(55.) Saul Levmore, 'Variety and uniformity in the treatment of the good-faith purchaser', *Journal of Legal Studies* 16 (1987) pp. 43–65. Levmore attributes the wide variety of practice he identifies in the treatment of good-faith purchasers of stolen goods to the existence of uncertainty or reasonable disagreement about the behavioural effects of alternative legal rules: 'some reasonable people might favor the innocent owner, some might prefer the innocent purchaser, and others might split between the two on the basis of time passed, place of purchase, or both' (p. 57).

(56.) Onora O'Neill, 'Rights to compensation', *Social Philosophy and Policy* 5 (1987), 72–87 at p. 77.

(57.) Thomson, 'Preferential hiring', p. 152. This position, insofar as it relates to the benefit acquired by a group rather than by individuals, obviously raises important questions as to the distribution of compensatory burdens within the benefiting group, which Thomson only addresses fleetingly. For criticism, see Hardy E. Jones, 'On the justifiability of reverse discrimination' in Gross (ed.) *Reverse Discrimination*, pp. 348–57. Others have questioned the extent to which all white males do in fact benefit from their racial identity. For defence of the proposition, see Charles R. Lawrence III and Mari J. Matsuda, *We Won't Go Back: Making the Case for Affirmative Action* (Boston: Houghton Mifflin Company, 1997). For opposition, see Gertrude Ezorsky, *Racism and Justice: The Case for Affirmative Action* (Ithaca: Cornell University Press, 1991), pp. 83–4.

(58.) This is the version of the principle given in Fullinwider's 1980 book, *The Reverse Discrimination Controversy* (Totowa, New Jersey: Rowman & Littlefield, 1980). It replaces the more commonly cited 'he who benefits from a wrong shall pay for the wrong' from his 1975 article, 'Preferential hiring and compensation', *Social Theory and Practice* 3 (1975), pp. 307–20.

(59.) Fullinwider, 'Preferential hiring and compensation' in Steven M. Cahn, *The Affirmative Action Debate* (New York: Routledge, 2002), 68–78 at p. 75.

(60.) Fullinwider, 'Preferential hiring and compensation', pp. 75–6.

(61.) Fullinwider, 'Preferential hiring and compensation', p. 76. This point mirrors the legal doctrine of free acceptance. See Birks, *An Introduction to the Law of Restitution* (Oxford: Clarendon Press, 1989), p. 265.



(62.) Perhaps I rent my house on a long-term lease. Or perhaps the re-surfacing has been cosmetic rather than structural. I am grateful to Hillel Steiner for helping to clarify this point.

(63.) Fullinwider assumes this to be the case: 'Presumably I valued other things more dearly than having my own driveway repaired; otherwise I would have done it myself', *The Reverse Discrimination Controversy*, p. 39.

(64.) Generally, it seems to me that we should see the obligations of offender to victim as conceptually prior to any compensatory obligations other parties might have. O'Neill argues that only when compensation is forthcoming from offender to victim can restitution, in the sense of the restoration of the moral relationship between the parties, occur. As such, compensation is always a second-best response to an incidence of injustice. Thus, there is a temptation to introduce lexical priority here, and hold that third parties only acquire compensatory obligations when offenders cannot or will not fulfill their own obligations. However, some may prefer to extend Miller's 'connection theory' into this area, and maintain that this is only a presumptive priority. It is quite possible to think of circumstances where relatively minor wrongs could have massive consequences, in that one party could lose and a third party could gain huge amounts, but where the offender makes no material gain at all, or even an overall loss (should, for example, her plans go awry). It is not necessarily clear that the offender should foot all of this bill, even if she is able to, when such an obvious distortion has entered into the distributive scheme. Nonetheless, even Fullinwider's revised formula, 'he who benefits from a wrong must help pay for a wrong' is far too strong here, as in many cases of wrongdoing when a third party benefits, the entire burden of compensation will fall on the wrongdoer.

(65.) Jonathan Wolff, 'Political obligation, fairness and independence', *Ratio* 8 (1995), 87-99 at p. 96. This point can be used in the context of Nozick's famous account of the community public address system, whereby it is claimed that one has an obligation to contribute a day's labour to the system on the grounds that one has benefited from it, even though one voted against its institution. See *Anarchy, State, and Utopia*, pp. 93-5. The burden becomes less onerous if the proviso that one receives *net* benefit is included, which is to say that one has benefited even after doing one's day of service. Nozick's initial example has such force because we imagine the possibility of an individual who has indeed benefited from the system, but not to the extent that he would receive a net benefit from having listened to the system and provided a day's labour.

(66.) Nothing in this argument, therefore, should necessarily be taken as providing support for the idea that one can acquire obligations to others simply by benefiting from their actions. The key idea in this Section is that one is benefiting *from injustice* specifically; as such, my argument does not, for example, depend upon the version of the fair play account of political obligation

which is based on the involuntary receipt of benefits. For an account of such a view, see George Klosko, *The Principle of Fairness and Political Obligation* (Lanham: Rowman & Littlefield, 1992); for criticism, which I need not reject, see Daniel McDermott, 'Fair-play obligations' *Political Studies* 52 (2004), 216–32.

(67.) A complementary argument to this can be found in Axel Gosseries's account of 'moral free-riding', in Gosseries, 'Historical emissions and free-riding', *Ethical Perspectives* 11 (2004), 38–62.

(68.) Janna Thompson, 'The apology paradox', *The Philosophical Quarterly* 50 (2000), 470–5 at p. 475.

(69.) Waldron, 'Superseding historic injustice', p. 11.

(70.) Birks, *The Foundations of Unjust Enrichment* (Wellington: Victoria University Press, 2002), p. 95.

(71.) Birks, *The Law of Restitution*, p. 109.

(72.) It should be noted here that the fact that the extent to which an agent benefits from a given action will, to a large extent, depend upon the subjective preferences of the agent does not necessarily mean that an agent cannot be mistaken concerning the degree of benefit which they have in fact received. Suppose it is the case both that (a) I prefer, in aesthetic terms, my old driveway to my present driveway, and that (b) the new driveway adds considerably to the value of my house. If I am not aware of (b), then it may be that I have in fact gained a net benefit from the act of injustice, but mistakenly believe that I have not. (Of course, it is still possible that even though I am ignorant of (b), my dislike of my new driveway is so great that I am not compensated by the increase in my property's value, and so have not benefited overall.) In such a case, I do possess compensatory obligations to my neighbour, even though I am not aware of it. Whether or not I am culpable here, in moral terms, depends on whether we think I am negligent in failing to be aware of the true nature of the lasting effects of injustice. Evidently, in keeping with the spirit of the rectificatory project, I do believe that moral agents face a duty actively to scrutinize the nature and provenance of their place in the world.

(73.) O'Neill, 'Rights to compensation', p. 84

(74.) Fullinwider, *The Reverse Discrimination Controversy*, p. 37.

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