Compensation and Reparation for Historic Injustice

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Abstract:

Similar to contemporary injustices, historic injustices may require contemporary restitution. What this restitution should consist of, and the conditions where such restitution is plausible are not immediately apparent. The thesis will address this opaqueness by clearly defining and distinguishing the two elements of restitution: compensation and reparation. This is a primarily descriptive task, and one that is not specific to historic injustice. Secondly, and with respect to historic injustices against individuals, I discuss the plausibility of contemporary claims for restitution. Restitution focuses on restoration of a loss, as well as reconciliation between parties whose relationship has been damaged; the discussion of compensation and reparation follows this distinction. The thesis will also illustrate the distinction between restitutioinal justice, and distributive justice. Those assessing claims for restitution must keep this distinction in mind as it would be a mistake to justify restitution by reference to contemporary inequality.

I will show that the Non-Identity Problem is a significant challenge to claims for either element of restitution. Two arguments designed to avoid the Non-Identity problem will be discussed in detail: the Family Lines argument put forward by Thompson,¹ and the New Injustice argument discussed by Boxill, Sher, and Cohen.² In particular, the New Injustice argument offers a potential solution by focusing on the flow-on harm failing to provide restitution can cause. The New Injustice argument suffers practically, however, as it is insufficiently action-guiding.

Concurrent with Scanlon’s account of blame, I suggest that establishing who is responsible, in both senses of the word, for injustice is vitally important for

¹ Thompson (2002).
² Boxill (2003), Sher (2005), and Cohen (2009).
establishing the credibility for claims for restitution for not just contemporary injustice, but historic injustice also. The role and meaning of apology and commiseration for historic events will also be discussed. Finally, I will consider what might be owed from historic perpetrator’s descendants to historic victim’s descendants, even if we cannot justify restitution.

I will show that restitution for historic injustice is implausible in cases where historic victims were individuals, but that there is value in commiseration for, and recognition of, these historic injustices. I make no conclusions about the likelihood of success of contemporary claims for restitution between transgenerational groups, such as nations. This restriction is largely for brevity.

Thanks must be given to Andrew Cohen, Janna Thompson, Stephen Winter, and particularly my supervisor Daniel Halliday, for their feedback and comments on parts of the thesis. I also thank my two anonymous examiners for their critical feedback and suggestions, particularly with respect to my consideration of theories of harm. Additionally, I thank those who attended, and gave feedback to, my presentation at the AAP conference in Wellington, December 2012, and my peers at the University of Melbourne for discussion, feedback, and encouragement.
Key Terms: Restitution, Compensation, Reparation, Reconciliation, Apology and Commiseration, Historic Injustice, the Non-Identity Problem, Blame, Responsibility.
Declaration:

This is to certify that:

I. The thesis comprises only my original work towards the masters except where indicated in the Preface, and

II. Due acknowledgement has been made in the text to all other material used, and

III. The thesis is less than 24200 words in length, exclusive of tables, maps, bibliographies and appendices.

Signed: ________________________________________
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1) The Problem of Historic Injustice

“[In New Zealand] in 1846, the British government instructed that all Māori landownership was to be registered; land deemed to be unused or surplus was to become Crown land. Governor George Grey reinstated the exclusive Crown right to purchase Māori land provided for in the Treaty of Waitangi. Crown agents developed some dubious practices to persuade Māori to sell, and they could offer whatever the government was prepared to pay, rather than a market rate. The government was the arbiter as well as the defendant when Māori complained.”

The implementation of this policy was unjust, and unjust for many reasons. It resulted in theft and coercive purchase of Māori land. It almost certainly reduced the welfare of Māori whose land was stolen or purchased. It discriminated against Māori as a group. That this policy was unjust is not dependent on how we diagnose it; it was unjust for all these reasons. We could say that the injustice is diagnostically overdetermined; that is, the policy can be diagnosed as wrong from libertarian, utilitarian, and egalitarian perspectives. It is also clearly an example of a historic injustice. We can and do accept these facts, but there are still the relevant questions: what can, and what should, be done about this historic injustice now? Contemporary people often feel much aggrieved over the way their ancestors were treated, and they often claim or demand restitution for historic injustices. Yet there is a strong intuition that it is not morally acceptable to grant restitution to someone who is not a victim. The conflict between these points is the problem which grounds this thesis.

Direct victims are the individuals against whom the injustice was committed at the time it was committed. Injustices are “historic” by virtue of occurring prior to

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3 Ministry for Culture and Heritage (2012). Discriminatory policies and practices were also implemented during colonisation of many “western” nations. The United States, Canada, and Australia for example.
the conception of any currently living person.\(^4\) Thus, contemporary individuals are not direct victims of historic injustice. This does not, however, automatically dismiss the plausibility of contemporary restitution for historic injustice and in many cases such claims are made. Sometimes these claims are on behalf of a group, and sometimes they are by, and for, individuals. For individual’s claims to represent genuinely outstanding debts of restitution, they must be identifying an issue with the above intuitions about who is owed restitution or disagreeing that they are not themselves victims. Either they are in fact victims of these historic injustices, or they are owed restitution despite not being a victim.

**Some solutions**

There have been many attempts to justify contemporary individuals’, and groups’, claims for restitution for historic injustice. Some arguments appeal to the concept of inheritance, and the simplest of the inheritance arguments is the Will argument.\(^5\) Proponents of the Will argument claim that you are a victim of an injustice when, because of that injustice, you have been denied an inheritance you would have otherwise received. The injustice has prevented a victim from exercising their rights of bequest which harms you as the intended beneficiary. If my land is stolen, and I would have bequeathed this to you, I am the direct victim of the theft. You are a secondary victim; the theft prevents me from passing it to you and this harms you. This is a relatively simple way of justifying restitution to contemporary individuals. When previous generations, and in particular the previous generation, suffered from removal of assets, which we can reasonably

\(^4\) A looser definition allows injustices to be defined as historic relative to particular individuals or groups, such that if it occurred before you were conceived the injustice is historic to you. This is a different definition of historic to that which Nozick (1974) employs. Justice is historical for Nozick simply when it refers to the past which in turn contrasts with “current time-slice” (p. 153) approaches.

\(^5\) I call it the Will argument, instead of the Inheritance argument, to distinguish it from other inheritance based arguments. For example, Boxill (2011) discusses the Will argument under the heading of the Inheritance argument.
assume would have been bequeathed to current individuals, those current individuals are victims, and are owed restitution.

A second inheritance argument is promoted by Thompson. Thompson claims that membership to the same family as a historic victim can be sufficient to justify contemporary individuals’ claims that they are harmed. Under the Family Lines argument you can be harmed by virtue of an unjust negative influence on your family line, which has prevented you from inheriting a culture, upbringing or material goods that you otherwise would have received. That you would have received these things is more than just expected, it is justified because of your position in your family line. The Family Lines argument does not rely on rights of bequest, rather on family rights and duties.

The Will argument is broader and narrower than the Family Lines argument. It is narrower in the sense that it is limited to estates and material inheritance: tangible goods, property, and money, that would have been distributed in someone’s will (thus the name), where an individual in a family may be harmed “intangibly”, such as by preventing the continuation of culture or language. Secondly, it is broader as it is not restricted to family members. The Will argument merely says that you are harmed when you are denied an inheritance you would have otherwise received. In the above example of the stolen land, “you” do not have to be my relative. You could be a friend or neighbour, a charity or a creditor. It is often argued that injustices can occur over many generations, and the Will and Family Lines arguments can account for this. Heirlooms are passed down through many generations of families, as are family businesses, religious beliefs, culture, and property. Consider the children of Aboriginal Australians who were forcibly removed from their parents and prevented from reconnecting with their family, culture, and history. These people have legitimate claims for restitution with respect to that stolen culture and denied family connections. More than this,

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6 Thompson (2002).
the children of these victims have also been denied the culture that their parents were unjustly denied. The parents have a legitimate claim this culture, and so do their children. The injustices committed against Aboriginal Australians, as families, are wrong for the descendants of those who were originally harmed, and this theoretically may be iterated over further generations for particular cases, if no restitution is granted.

The Will Argument invokes a version of the idea that legitimate ownership of land or goods cannot exist unless there was a legitimate transfer of the goods or land that yielded that ownership; the history of the item in question matters. If your ownership is illegitimate, then you cannot initiate a legitimate transfer to anyone else. Reliance on legitimate title to initiate a legitimate transfer is also an argument for the return of land to original “native” groups who, arguably, were the last legitimate owners of that land. Native groups in New Zealand, Australia, Canada, and elsewhere, have claim to large areas of land that was wrongfully appropriated during colonisation. This claim is quite a different type of claim from those of the preceding arguments. The Will and Family Lines arguments argue for contemporary restitution when historic individuals were wronged; historic injustices harm contemporary individuals because they deny them some form of inheritance. While many injustices against groups are historic in the sense that they predate all current individuals, they are contemporary because they happened in the history of a currently existing claimant group. Events that involve transgenerational groups are relevant to contemporary individuals in virtue of being members of that group. The group itself was the victim, that group has persisted, and that group remains the victim today. This is the Nations argument for restitution, as it most commonly refers to injustices that persist between nations, and in reference to Thompson’s discussion of nations.

7 Thompson (2007) argues for this point.
8 Transgenerational groups are groups which relevantly maintain their identity over many generations.
9 Thompson (2002).
On the arguments presented thus far, contemporary restitution for historic injustice looks quite plausible. We might ask “So what is the issue with restitution anyway?” I will turn to this issue in later chapters, but first a framework for restitution must be established, and key definitions of, and requirements for, restitution, compensation, and reparation. I will also set out the key distinction between restitution and redistribution and suggest a link between restitution and responsibility.

Some Definitions

Not all injustices will plausibly be candidates for contemporary restitution. Certain conditions need to be met before consideration of restitution will make sense. The basic conditions are as follows:

- There must have been an injustice, and
- Adequate restitution for the injustice must not have been made already.

These may seem like simple conditions, possibly just the concern of empirical research, but the fundamental importance of the basic conditions cannot be understated. Should either of the conditions fail to obtain, there can be no contemporary claim for restitution for that injustice.

Consider two neighbouring regions A and B, and two groups X and Y. Y moves into the area and settles on B. If X was settled only on A it would be hard to consider Y’s settlement on B an injustice against X. Imagine, however, that X had settled both A and B when Y settled B, without X’s consent, so that they now shared the area. If, in recognition of this, Y presented gifts to X, and these were mutually acceptable at the time as complete restitution for that unjust settlement, then the consideration of no prior restitution fails. Much of this discussion must take place within a framework of property rights. Historic injustices often involve property, such as my settlement example (and most, if not all, cases of colonisation), thus rights of acquisition and transfer of holdings
must necessarily be predetermined. For example, a Lockean proviso to not acquire so much that others are made worse off by that acquisition, may limit the claims that X may make against Y for settling in B (and other similar cases). This is likely to be particularly true if Y has nowhere else to go. If natural disaster and good fortune result in me suddenly being in possession of the only fresh water in the area, I cannot wield my previous sole possession to exclude you from that water, or charge you exorbitantly for its use.\textsuperscript{10} Theories of just property acquisition are for the most part likely to be tangential to discussions of restitution, as property related injustice most commonly concerns breaches in rights once property is already held. While some theory of just acquisition is needed, the theory we choose is unlikely to affect the diagnosis of a property-related action as just or unjust.\textsuperscript{11}

I do not claim that the basic conditions exhaust the set of necessary conditions for reasonable discussions about restitution; however, I would welcome any challenge which denies these claims and yet still supports restitution in a specific case. The person or group responsible for making a claim of restitution must be able to present the facts of the injustice to show that the conditions hold and their claim is therefore plausible. Arguing by shifting the burden of proof is not usually persuasive; however, shifting the burden of proof to those claiming restitution is contestant with the legal practice of presumption of innocence, so it is at least justifiable. Every claimed injustice, historic and contemporary, must be individually detailed to establish the plausibility of the claim.

\textsuperscript{10} Nozick (1974, pp. 178 - 182). This argument is further developed in Waldron (1992) and (2002) in discussing supersession of historic injustice (discussed at greater length in chapter 4).

\textsuperscript{11} The clear exception here is when theories of just acquisition are argued. Y may claim B was unoccupied and they were free to acquire it, where X might claim that B was not unoccupied according to their understanding of just acquisition, or, if it was unoccupied, that Y was not free to acquire it (for whatever reason).
The need to be clear in this way is apparent when we distinguish claims for *restitution* from claims for *redistribution*. The facts which legitimise acting on these claims are quite different. Calls for redistribution are based on a morally undesirable inequality between citizens in a society where everyone should, to some extent, be equal. If this morally undesirable inequality happens to coincide with a history of injustice in the disadvantaged group, it is easy to see how restitutioonal and distributive justice would be confused. In situations of contemporary inequality it is likely to be important to simply correct that inequality, referencing historic injustice only incidentally. When we are discussing what should be done about historic injustice, equality is of no consequence. Modern inequality is often a result of historic injustice, but the action to be taken to remedy this inequity is contemporary redistribution, rather than restitution. Restitution will be defined as follows:

**Restitution:** The transfer of resources, acknowledgement of rights, or performance of actions to alleviate the suffering and correct the unjust effects, one or more injustices have caused (in part or completely).

Restitution can be made when one’s rights, such as property rights, have been infringed upon, or when one’s wellbeing is adversely altered. This definition of restitution captures both rights and wellbeing aspects by appealing to the existence of at least one injustice, which in turn embraces both of these elements.

It is one of my primary goals that I develop an appropriate distinction between compensation and reparation, and not merely discuss the overarching idea of restitution. As defined above, restitution is too broad for most discussions. Compensation is a form of restitution, as is reparation. Compensation, however, will never be a form of reparation, and reparation never a form of compensation. Restitution implies that some sort of restoration by virtue of a victim’s loss is needed. Restitution focuses on harm that has been suffered, and the party who

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12 Commiseration will also be discussed in chapter 5.
has been harmed. This overarching term need not be “restitution”. Tsosie, for example, uses the heading of “reparative justice” for the concept of restitutinal justice, as per my account.\textsuperscript{13} However, as I define reparation distinctly, I do not follow Tsosie’s lead.

I should also say something about Harm, which itself is not an uncontroversial moral concept. On a standard view harm is comparative. As Huseby indicates, comparative theories of harm claim of person P and (allegedly) harmful act X: “An act X harms a person P only if X causally makes P worse off than P would have been, had it not been for X”.\textsuperscript{14} This is not to say that an action cannot be both harmful and beneficial, different aspects of an act can affect the same agent in different ways. Consider Parfit’s reckless driver: The driver’s recklessness results in a crash, and an innocent person’s leg being amputated.\textsuperscript{15} The amputee is then not conscripted to the army, and does not get killed in a future battle. The driver’s recklessness seems to harm and benefit. Under a comparative theory of harm it is not as clear that losing one’s leg is harmful; Parfit’s case stipulates that if the person did not lose their leg in an accident, they would have been conscripted, and would have suffered a (presumably) early death. Comparatively, losing the leg is a better situation for the crash victim, although he would not know it. We could amalgamate these two factors, to determine the “net harm” of acts, but this is not necessary at this point. This is in part because “net harm” will be difficult to determine when one is “worse off” for being denied property rights; harm does not require reference to wellbeing. I will assume (whilst acknowledging the body of literature to the contrary) that the comparative view is correct. I will discuss harm in greater depth, and present non-comparative understandings of harm, in chapter 2.

\begin{footnotes}
\item Tsosie (2007).
\item Huseby (2010, p. 194), emphasis added. Overdetermination of harms may be disregarded for the purposes of this thesis.
\item Parfit (1984, p. 372).
\end{footnotes}
Compensation and Reparation

When developing a distinction between kinds of restitution, it is wise to think closely on what the aim of compensation and reparation are. Any distinction in aim will lead to a distinction in an accurate definition. The aim of compensation is restorative, whereas reparation’s goal is reconciliatory, and these aims together alleviate suffering and correct the unjust effects of injustice. Thus I propose the following definition for compensation:

Compensation: The transfer of goods or services, or the acknowledging of rights, to an injured party, for the purpose of correcting the loss the injury results in (in part or completely).

Compensation focuses entirely on the loss a victim suffers. Compensation is made to correct that loss. It is the tangible or intangible goods (including financial assets) transferred to, or services carried out for, a victim which makes up for their loss. Where an injustice includes the loss or denial of justified rights, compensation can consist of granting or acknowledging those rights. The scope of compensation is wide enough to cover many, although not all, of the costs that the victim otherwise would not have incurred. Compensation for time and effort may be made when a victim has been “put out” by injustice, but there is a limit to the value compensation can take. That is, the value of compensation cannot exceed the value of the losses suffered by the victim. This limitation is not captured by standard definitions of compensation that merely focus on restoring wellbeing or welfare losses. “Compensating a harmed person involves bringing him to the level of wellbeing he would have enjoyed had he not been harmed”.16 “Something fully compensates a person for a loss [iff] it makes him no worse off than he otherwise would have been”.17 “Compensation means making up for or counteracting some loss or lack of something useful or valuable”.18 On such interpretations of compensation no matter the non-material loss of wellbeing an

16 Boxill (2003, p. 67).
17 Sher (2005, p. 183).
18 Boxill (2011).
injustice causes, compensation can account for it. This follows as non-material losses, hurt feelings, loss of innocence, being disgruntled, and other such things, can impact on someone’s wellbeing.

While restitution for these negative effects is owed in many cases, the restitution owed is not aimed at restoring a loss, but on repairing a relationship. The form of restitution sought is reparation, and not compensation. Reparation will be defined as follows.

**Reparation:** The actions, or transfer of goods or services to an injured party, made for the purpose of repairing the relationship of the injured party and the injuring party (in part or completely).

Reparation focuses entirely on the relationship between perpetrator and victim. Reparation is made to repair the damage the injustice has done to that relationship. This view, without the rigor of a definition, is shared by Winter; “In contrast [to compensation], reparation calls attention to the relationship between offender and victim and asks what is required in terms of human relations”. What is required to provide compensation and to provide reparation most likely will be radically different.

There are two significant differences between compensation and reparation. Firstly, reparations require an injuring party, a perpetrator, where compensation does not, and secondly, the value of compensation is tied to, and limited by, the value of the loss a victim suffered, where the value of reparation is not similarly tied or limited. A third (minor) distinction is that compensation may rely heavily on property rights, whereas property rights are likely to only be tangential to reparation. Compensation can be justified by appealing to specific property rights

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19 Granting or establishing a victim’s rights is not a reparative act; justified rights should always be granted. Granting denied rights, or awarding new rights, is compensatory, rather than reparative.
that have been breached: the right to not have my car taken from me without my approval for example. Reparation, however, will not usually appeal to the content of any property right, but instead to the fact that one has the right to not have one’s property rights infringed upon.

Reparations aim at achieving reconciliation, which can only occur between relevantly related parties; those whose relationship is diminished or damaged. It may seem that one can engage in reconciliation between two other parties, however, the more accurate description in such cases is that you are engaged in facilitating the reconciliation of those other parties. Outside parties can facilitate reconciliation between others, but cannot actually reconcile them. Similarly, outside parties can facilitate the provision of reparations, but cannot themselves repair damaged relationships, or provide reparations themselves. Consider a case where a child breaks their neighbour’s window. The parent convinces their child to apologise to the neighbour. This act of convincing their child to apologise is not reparative, and does not itself repair the relationship between child and neighbour. The parent has, however, facilitated their reconciliation. Reparations can only be provided by the perpetrator of the injustice, to the victim of the injustice. This does not have to be the same party that provided compensation. The broken window case exemplifies this point as we would expect the replacement of the window to be made by the child’s parent, or perhaps one of the parties’ insurance companies, and not by the child.

The value of reparations is determined by what can reasonably be expected from the perpetrator to reconcile with the victim. This will be highly context specific, and may be minimal or considerable. Reparation may also be insufficient for

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21 Consider a councillor facilitating the reconciliation of a married couple; the councillor does not reconcile the couple, but acts to aide them in reconciling with each other.
22 However, if the child’s action simultaneously indicated something about the parent’s relationship with the neighbour, the parent and neighbour’s relationship may require repairing.
reconciliation; this does not imply that reparations are infinite, rather that something non-restitutional, such as punishment, is required if reconciliation is to be achieved. Unlike the value of compensation, which cannot exceed the value of the loss suffered, there is no specified limit on reparations. This is, in part, because it is hard to put a value on certain reparative actions. The most obvious examples of this are apology, acknowledgement of the injustice, and a willingness to offer compensation. We cannot deny that these have significant non-material value. Reparations and compensation do not by necessity accompany each other. This is one value in distinguishing them from each other. They are compatible, but there can be cases where one is owed but not the other.

Compensation does not need to be made by any particular party, even the original perpetrator, as it simply aims at restoring the victim. Reparations, however, always require a perpetrator because they aim at reconciliation. As Thompson says, “reconciliation makes sense only if there is a wrongdoer able and willing to engage in an act of reconciliation. Those who are not wrongdoers do not need to repair relations.” Without a wrongdoer, there can be no reconciliation, and no reparation. The requirement for reparation to be made will exist when both the injuring and injured parties exist, and there is mutual moral requirement for reconciliation. Further, both forms of restitution are distinct from punishment, which I do not want to discuss, other than to say it is neither compensation nor reparation, and that demanding restitution to punish the perpetrator is misguided.

Definitions of restitution, compensation and reparation are not consistent in the literature. Some even adopt the opposite definitions to those above. For Boxill, reparations deal with correcting what has happened in the past, while compensation looks to current problems and future outcomes. On my view

24 Boxill (1972).
compensation corrects the loss suffered in the past, while reparation seeks to achieve reconciliation now and into the future. Elsewhere, the distinction I am making is simply inadequately drawn out, or ignored. Cohen clearly illustrates this lack of distinction; “Transgressors owe their victims reparation as compensation for injury”\(^{25}\). On my account this statement makes no sense.

Elsewhere, the distinction I am making is partially adopted, or alluded to. Zutlevics, for example, correctly assigns apology to reparation, and not compensation.\(^ {26}\) Genuine apology must include, and attempt to express, at least some degree of feelings of sorrow and empathy. Compensation requires neither of these. Thompson offers two differing views on why reparation is required: the rights-based view, and the obligations-based view.\(^ {27}\) Thompson suggests that in one sense reparation is a legalistic discourse focused on restoration, and in another sense reparation is theological, focusing on reconciliation. The first sense clearly falls into what I call compensation, and the second more closely fits my understanding of reparation. Thompson’s theological sense of reparation is stronger than I wish to claim. The theological sense of reparation suggests that we can only say that reparation has been made once reconciliation is achieved. Reparation, on my account, simply aims at reconciliation, but does not guarantee it. “Reparation” in Thompson’s sense approximates “restitution” in mine. The lack of clarity and consistency in the literature has motivated this discussion.

### Restitution and Responsibility

We can also illustrate the distinction between compensation and reparation by reference to responsibility for harm. “Responsibility for harm” is vague, meaning one of two things. Miller discusses these two aspects of responsibility in some detail, and while my purpose is not quite the same as Miller’s, his discussion is

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\(^{27}\) Thompson (2002).
extremely relevant.²⁸ Miller proposes that in the presence of an undesirable circumstance, identification of who is “responsible” could either be identification of who is responsible for the circumstance occurring, or identification of who is responsible for correcting it. The first of these he calls outcome responsibility, and the second remedial responsibility. Outcome responsibility is correctly assigned when it is assigned to a party whose action, or inaction, was necessary for the outcome occurring. This does not imply the outcome responsible party has acted immorally; one does not need to act immorally to be responsible for a bad outcome. Miller uses the example of someone who takes all reasonable precautions when lighting a bonfire in their own yard, but by chance a stray spark causes damage to their neighbour’s property. There was no ill-intent, and all reasonable precautions were taken, but the damage occurred as a direct result of choosing to have the bonfire.

Outcome responsibility is not equivalent to causal responsibility. This is particularly clear when someone does not exercise their own agency, or has their agency undermined (where they have no other choice but to act in a particular way). Someone who is manipulated, or used, to poison a friend because a third party added arsenic to the tea, is causally responsible for their friends death (they served the tea), but they are not outcome responsible for it. When faced with armed thieves, a bank teller who opens the bank vault to save the lives of innocent bank customers is causally responsible for the loss of the money, but is not outcome responsible as they acted under duress. Their agency in choosing to release the money was high-jacked by the (credible) threats of the bank robbers. We may call on the Control Principle (CP), to distinguish casual responsibility from moral, and, to a lesser extent, outcome responsibility.

²⁸ Miller (2007).
(CP): “People cannot be morally assessed for what is not their fault, or for what
is due to factors beyond their control”.

The clear distinction between moral and causal responsibility is highlighted in
this principle. Those who are outcome responsible still had some control over the
outcome, even if we do not want to assign further moral responsibility and label
their actions as specifically “wrong”. (CP) does not hold for cases of mere causal
responsibility.

The second kind of responsibility Miller identifies is remedial responsibility. We
assign remedial responsibility to those who must correct a bad situation. This can
be assigned to a party for a number of reasons. Having benefitted from the
outcome, being part of a community with the victim, or simply being capable of
remedying the situation are reasons to assign an individual the responsibility to
remedy it. Being causally, outcome, or morally, responsible for a bad outcome,
are also reasons to assign remedial responsibility, but one does not need to be a
cause of the bad circumstance occurring to be responsible for rectifying it. Thus,
for capacity and benefit reasons, the US Government might be held remedially
responsible for correcting the harm caused by African American slavery, even if
we cannot, or do not, determine that they are causally, morally, or outcome
responsible for slavery. Miller’s list is not complete, but captures the majority of
reasons for identifying or assigning remedial responsibility (and particularly in
cases of historic injustice to which I will turn later). The most notable omission is
promise.

Determining the correct party and correct reason to assign remedial responsibility
to is not always straight forward. There is no clear “order” to the above six
reasons to standardly determine who should be assigned remedial responsibility.
Should the person who shoved the little girl in the river be required to jump in

29 (Williams & Nagel, 1976).
30 For simplicity I include contracting and covenanted with promising.
and save her from drowning or ought the lifeguard who happens to be walking by do it? Should the family living in poverty return the bread they stole from you, or should your millionaire neighbour give you some money to buy more bread? Should the drunk who damaged public property pay to have it repaired, or should the person who supplied them with alcohol bear this cost? Any way we might weigh these factors, the focus is to come to the aid of the victim in some way. Restoration because of loss is the focus of compensation, so we may often say that the party remedially responsible for an injustice is the party responsible for providing compensation to that injustice’s victims. Remedial responsibility and compensation are not completely synonymous as acting on remedial responsibility is not always best understood as compensation. For example, the lifeguard does not compensate the little girl he saves from the river when he saves her. In this situation, remedial responsibility is pre-emptive; the lifeguard’s action mitigates the “badness” of the current circumstance. However, when remedial responsibility is assigned to correct pre-existing bad circumstances, rather than prevent them from occurring or getting worse, the actions taken in fulfilling that remedial duty can be termed “compensation”.

As remedial responsibility is to compensation, outcome responsibility is to reparation. Where assigning remedial responsibility determines who should bear the burden of compensating a victim, identifying an outcome responsible party identifies who should bear the burden of providing reparation. It is clear that it is not always possible for remedially responsible parties to provide reparations; they may not have a damaged relationship with the victim. However, if one is outcome responsible, even if remedial responsibility is assigned elsewhere, one is reparatively liable. One implication of this is that if there is nobody who is outcome responsible, no reparations will be possible. Cases of natural disaster are case in point. More contentious cases are those where a party is causally, but not outcome, responsible. If I am bumped in a crowded bar and knock the drink out of your hand you might assign me remedial responsibility due to causal responsibility, and ask me to compensate you (“buy me another drink”). It is
unlikely that you would believe me outcome responsible, however, and thus require something else as reparation ("buy me two drinks!").

Here I have set out a framework for determining when compensation and reparation are viable. I have also positively defined both terms so as they can be understood practically and generously when considering if restitution is due. I will now turn to my main thesis: historic injustice. I will, for the moment, put aside reparations and consider the most serious problem concerning claims for compensation for historic injustice: the Non-Identity Problem. I will briefly survey the literature on non-comparative harm, argue that the main responses to the Non-Identity Problem fail, and discuss the practical implications this might have. In chapter three I will discuss the New Injustice argument. Chapter 4 I will reintroduce reparations and the responsibilities of descendants of perpetrators. Finally, chapter 5 will concern the role of apology and commiseration in reconciliation.

31 A similar example and point is raised in Nelkin (2013).
2) **The Non-Identity Problem**

For a theory of restitutional justice to be useful beyond the philosopher’s armchair, it must be action-guiding. It must not just identify a wrong, but also guide us to, or inform us of, a solution to it. Compensating for contemporary injustice is relatively easy. If you steal my car, compensation will likely include the replacement, or return, of my car. This compensation corrects the loss I suffered, and should leave me approximately as well off as before. The process for historic injustice is more complex. How do we determine a person’s counterfactual wellbeing when the injustice in question occurred before they were born? How would we determine an individual’s counterfactual allocation of property or even the groups with which they would associate? Significant counterfactual indeterminacy arises for cases of historic injustice where it does not in contemporary cases. This makes determination of what restitutional justice requires in historic cases, harder.

Counterfactual indeterminacy is the uncertainty regarding the range possible outcomes that arises when we wonder what would have happened if some other thing happened. There are two kinds of counterfactual indeterminacy, easily explainable in possible worlds terms. Firstly, counterfactual indeterminacy occurs when a person, object, or event, has no counterpart in the nearest, or perhaps any near, possible world. Secondly, counterfactual indeterminacy occurs when there is more than one equally close possible world in which non-identical counterparts do exist. Both of these lead to incoherence in claims for compensation for historic injustice, and the first is the concern of the Non-Identity Problem. However, whether a historic injustice is diagnosed as wrong from a libertarian, utilitarian or egalitarian perspective does not stop it potentially introducing counterfactual indeterminacy of either kind.

The Non-Identity problem was famously discussed in *Reasons and Persons*, where Parfit argues that contemporary choices and actions, non-trivially
determine the identities of future individuals.\textsuperscript{32} \textit{Same people} choices affect neither the number, nor the identities, of future individuals. \textit{Same number} choices affect the identities of future individuals, but not the number; some people who would have existed but for the choice are “replaced” by some other actual people. Finally, \textit{different number} choices affect both the identities of future people, and how many future people there are.\textsuperscript{33}

The Non-Identity problem requires the assumption of what Parfit calls the Time-Dependence Claim (TD):

\textbf{TD}: If any particular person had not been conceived when he was in fact conceived, it is \textit{in fact} true that he would never have existed.\textsuperscript{34}

The “problem” of the Non-Identity problem refers to the inability of future people to say they are in fact harmed by events that resulted in them being badly off. Temporally adjusting the argument, historic actions, regardless of how wrong or bad they were at the time, do not, in the morally relevant way, harm contemporary individuals, because without those historic actions those contemporary individuals would not, in fact, have been conceived at all. There is simply no matter of fact about how well off that person would have been, or what rights (including property rights) that individual would have had. Hanser breaks down the argument:\textsuperscript{35}

(1) The people [\textit{same number}] choices cause to be badly off, have lives worth living\textsuperscript{36}.

\textsuperscript{32} Parfit (1984), also Kavka (1982).
\textsuperscript{33} Also detailed in Parfit (1982a, p. 113).
\textsuperscript{34} Parfit (1984, p. 351), Parfit’s emphasis.
\textsuperscript{35} Hanser (1990, p. 52).
\textsuperscript{36} Historic injustices are not \textit{same person}. They are also unlikely to be \textit{same number}, however, for convenience this is usually assumed in the literature. This is why the clarification is included here. \textit{Different number} choices are more complicated, particularly when populations increase. Parfit’s “Repugnant Conclusion” (1984, pp. 381 - 390) is an example.
(2) If someone has a life worth living, having that life is not worse for him than having no life at all.

Therefore,

(3) The [same number] choices do not make these people worse off than they would have been had the choices not been made.

(4) A choice does not harm someone in the morally relevant sense unless it makes him worse off than he would have been had the choice not been made.\(^{37}\)

Therefore,

(5) In the morally relevant sense, these [same number] choices harm no one. Current individuals are not harmed by historic injustices, thus cannot claim compensation for them.

### A Word on Harm

The literature makes much of whether an injustice really occurred, and what it is for an action to be classified as harmful. For example, Parfit concludes in the 14 year-old mother example, that while she does not harm her child by not terminating the pregnancy and trying again later (resulting in a child who suffers in some way from having such a young mother), she does something wrong.\(^{38}\)

Similarly policies of resource depletion are wrong, even though the people who such a policy causes to be badly off would not exist but for the policy.\(^{39}\) The wrongness of these actions is (for Parfit) determined by non-person affecting rules, such as the “Same Number Quality Claim”, Q:

\[^{37}\text{Hanser takes this premise as false, which undermines Parfit’s argument. Arguably, Hanser is objecting to the utilitarian interpretation of being “worse off”, although (4) could extend, to libertarian or egalitarian interpretations of harm.}\]

\[^{38}\text{Parfit (1984, pp. 357 - 361).}\]

\[^{39}\text{Ibid. (pp. 371 - 372).}\]
Q: “If in either of two possible worlds the same number of people would ever live, it would be worse if those who live are worse off, or have a lower quality of life, than those who would have lived.”

As laid out in chapter 1, determination that an injustice occurred is a prerequisite to conversation about restitution. It is important to establish that an act was wrong, and why, but that does not necessarily require that it was wrong to anyone. We can conclude that the 14 year old mother does wrong and thus she, or her guardians, should be punished, but that the child is not owed compensation for the difficulties they suffer having such a young mother. The importance of determining wrongdoing is significant, and as a rule Q is plausible, but this is at best tangential to my thesis; establishing that historic actions or events were wrong is necessary, but not sufficient, for contemporary restitution. Of greater significance are claims that one can be harmed by a condition for your own existence, as this suggests that contemporary individuals may be victims of action that occurred before they were conceived, and that they rely on for their own existence.

On non-comparative harm accounts, individuals can be harmed by conditions for their own existence, as an individual can be said to be harmed simply in virtue of the condition they find themselves in. This is non-comparative in that it requires no comparison to how things might have been. An individual may claim victim status by virtue of the fact that they suffer a specific harm (regardless of any benefits they may also receive), or because they suffer specific

40 Ibid. (p. 360).
41 Winter (2007) has such a view, but refers to an individual’s interests instead of their condition.
42 A good account of, and a persuasive rebuttal to, this and similar non-comparative views is given in McMahan (1988). There is a wide literature discussing and defending non-comparative accounts of harm, and particularly in procreative choice cases, including: Hanser (1990), Roberts (1995) and (2007), Carter (2001) and (2002), Harman (2004), Wasserman (2005), Boonin (2008), Benatar (2008), Roberts and Wasserman (2009), Huseby (2010).
breaches to their rights, such as the right to a “normal” life. Harms occur when there is a failure to reach a particular threshold of wellbeing. Typically these arguments are used to identify wrongdoing in procreative actions; a procreative act may directly cause an individual exist who unavoidably suffers.\textsuperscript{43} According to the \textit{harm-based} account, that “an agent is morally accountable for someone’s suffering a harm, by virtue of having performed a certain action, seems a perfectly intelligible “person-affecting” explanation why his action is objectionable”.\textsuperscript{44}

Accounts such as the harm-based account here focus on the victim; they argue that the suffering of the person justifies claims that the act that caused that suffering was wrong. People born with one arm, with a particular disease, perhaps even those who are conceived to act as a suitable organ donor for a family member, suffer low, or restricted, wellbeing, and can be said to be harmed by the acts that caused them to exist. These individuals do not meet specific thresholds, so are harmed. Defendants of non-comparative accounts, such as the harm-based account, need to respond to two intuitions.\textsuperscript{45} Firstly, they must respond to the intuition that one is not harmed if one could not have existed otherwise. Of course this is exactly the intention of the threshold accounts, but proponents’ arguments must be strong enough to overcome the intuition that actions yielding a particular condition are only harming once identity has been determined. One may be in a bad situation, and may require support according to distributive justice, but suffering does not equate to being harmed. Secondly, they must respond to the “net harm” concern; to what extent is someone wronged by an action that leaves them better off “on the balance of things”.

\textsuperscript{43} For example, the actions of the secretly ambitious lab technician in Roberts (1995, pp. 310 - 311).
\textsuperscript{44} Hanser (1990, p. 59), McMahan (1988) refers to this as the “Harm Based” account.
\textsuperscript{45} See McMahan (1988) for several excellent examples.
The debate between accounts of harm is significantly deeper than I am able to present here. While comparative accounts of harm appeal to me intuitively, let us admit for the sake of the argument, that in procreative cases, and cases where our actions affect the further future, such as Parfit’s risky policy, non-comparative accounts of harm do not suffer the Non-Identity problem. Let us assume that they do identify people who have been harmed by existence-inducing acts. Even given these assumptions, contemporary claimant’s claims for compensation are not furthered. The success these views have in procreative and further future cases, will not systematically carry over to claims for restitution for historic injustice. The ethical concerns we have about historical injustice are multidimensional, while those concerning procreative cases are focused on the wellbeing of harmed individuals. As mentioned previously, historic events and actions can be diagnosed as injustices for libertarian, utilitarian, and egalitarian reasons. We are assuming that procreative accounts illustrate how historic actions yielding bad conditions are harmful, but claims for compensation for historic injustice usually do not refer to contemporary individuals’ condition. Instead they refer to that which was historically taken or denied, and ask that it be returned or granted as compensation. Parfit’s cases, and others in the literature inspired by Parfit, concern the distribution and level of wellbeing. The morally relevant facts within Parfit’s and Parfit-esque examples are facts concerning wellbeing. Where identity is dependent on non-utilitarian wrongdoing, the non-comparative accounts of harm are not applicable. In such situations all thresholds have been met. As historic injustice may often be diagnosed for non-utilitarian reasons, these solutions are insufficient for justifying compensation to contemporary individuals in general. Compensation does not require any particular condition on the part of the claimant.

Separate arguments adopt a comparative account of harm and suggest that it is harmful to be caused to exist with a life not worth living. The commentator in A

\[46\] (Parfit, Reasons and Persons, 1984)
cause of action for “wrongful life” makes such a suggestion.\textsuperscript{47} When an actual person who suffers a life that is not worth living would not exist counterfactually, this non-existence is better for them. However, it seems clear and apparent that any kind of existence is at least not worse than non-existence. This is not to say that there is no life not worth living, but rather that one cannot compare the life not worth living to non-existence. One cannot refer in any way to the wellbeing of a non-extant individual, so cannot make any judgements regarding a non-extant individual relative to an actually extant individual. This is completely compatible with the Non-Identity problem, as the Non-Identity problem does not require any reference to well-being. With this in mind, we may proceed.

\textbf{Counterfactual Existence Problems}

There are two distinct arguments to support the claim that one does not have a counterpart in the closest rectified world (the closest possible world to our own without the injustice in question as part of its history). The first argues from probability; the chance of a person having a counterpart in a rectified world is negligibly small. The second argues impossibility, that it is impossible for you to have a counterpart in the rectified world. This second argument, gives a much stronger result than the first. Like Sher, I do not consider the strong argument particularly credible, thus I will focus on the weaker argument only.\textsuperscript{48}

The weaker argument says that given the very high variability in the exact spermatozoon that fertilises an egg at conception, any change to the conditions of conception will almost certainly change the identity of the child conceived. We rely on the identity of our parents for our own identity, but we also rely on the circumstances they find themselves in during, and prior to, the moment of our conception. But we cannot ignore the slight chance the exact same genetic

\textsuperscript{47} (A Cause of Action for "Wrongful Life": A Suggested Analysis, 1970 - 1971)

\textsuperscript{48} Sher (2005) details the strong argument in some depth.
material will come together in a different situation. Parfit acknowledges this in clarifying the time-dependence claim:

**TD2:** If any particular person had not been conceived within a month of the time when he was in fact conceived, he would in fact never have existed.\(^{49}\)

This acknowledges that beyond a reasonable doubt the specific egg and spermatozoon from which you developed would not have come together had your parents *instead* conceived a month, or more, before or after you were in fact conceived. TD is likely to hold, but TD2 still has significant implications so can most likely be used. There may be some few possible worlds where you have a counterpart and the injustice that affected your parents did not occur. This “few” is incredibly small, and is also inversely related to the seriousness of the injustice; the greater the impact the injustice had on one or both of your parents, the less likely it is that you have a counterpart in a rectified world. The weaker, although not weak, non-identity argument is fairly simple in what it claims. We cannot discuss how well off you would be in the absence of a historic injustice because you are overwhelmingly likely to be dependent on that injustice for your existence.

But what can we say about that person’s wellbeing in the case where they do exist? To know that compensation is due, we need to know that something has been taken or denied that would be present in the absence of the injustice. But can we know this? Surely not. The counterfactual level of wellbeing, rights, and assets distribution in a possible world is not just what we want them to be. Even if we can avoid the Non-Identity problem, we face the second kind of counterfactual indeterminacy. Consider the possible world where my ancestor did not have the family house taken from him, and left it instead to my grandparents. Waldron puts the point I want to make well. “How [would they] have exercised their freedom if they had a real choice[?] Would they have held

\(^{49}\) Parfit (1984, p. 352)
on to the land and passed it on to their children and grandchildren? Or would
they have sold it… in response to the first honest offer they were given? And, if
they had, then what would the purchaser have done with it? Sold it again? Passed
it on to his children? Lost it in a poker game?”50 The Non-Identity problem
stymies all claims by individuals to compensation for historic injustice because
there is sufficient indeterminacy to undermine the legitimacy and determination
of such claims.

Accounting for counterfactual indeterminacy is a significant task for any
proponent of compensation for historic injustice. In what follows I limit myself
to historic injustices committed against individuals. This is not to deny that
transgenerational groups have suffered historic injustices, or their significance.
However, there are a myriad of concerns facing claims these groups might make
now with respect to those historic injustices. These are questions that claims for
restitution for historic injustices against individuals do not have to consider. Thus
for brevity, I limit the discussion of compensation to cases where historic victims
were individuals only. This limitation is also for completeness; undoubtedly there
exist cases where historic individuals, rather than groups (transgenerational or
otherwise), were victims. That these cases do not present themselves so
frequently, or publically, as claims by transgenerational groups does not render
them philosophically insignificant. Finally, for reasons of priority I discuss
injustices committed against individuals. Many, if not all, of the considerations
we must make for historic individual’s cases are will also be relevant for claims
by transgenerational groups. An account concerning historic individual victims
will shed some light on, and provide the groundwork for, transgenerational cases.

50 Waldron (2002, p. 144)
The Family Lines Argument

Not all attempted solutions to the Non-Identity problem require utilitarian presuppositions. Thompson’s attempt, the Family Lines argument, is an example. According to the Family Lines argument, individuals can be harmed by virtue of their membership to a family line. To prevent families from transferring resources, culture, or knowledge to future generations of their family is an injustice which harms the family member whoever they turn out to be. Even if individuals are dependent on the harm to exist, the injustice is against the family line, and it is in virtue of this that they can justify failing to identify a counterpart as a reference for compensation. Family lines are comprised of roles, and relationships between those roles. For ease of expression, I will refer to the individual in a possible world which fills the same role in your family as your “role-counterpart”. One is harmed by historic injustices against your family line when your role-counterpart is better off than you are. Thompson does not discuss the Family Lines argument in as much detail as it deserves, as she is primarily concerned with establishing that families and family lines are bearers of rights to establish that a family line can be harmed. She shows that because injustices can be committed against a family line, current people who depend on the injustice for their existence still have a claim. Thompson’s discussion does not explore the implications of what this means.

It is true that families are a kind of transgenerational group, but it is vital to distinguish them from other kinds of transgenerational groups. If we fail to do this the resulting argument will likely be a Nations style argument, rather than one arguing that contemporary individuals are harmed. Harming a family line is wrong by virtue of the natural and permanent relationships members of the family have with each other. These permanent and natural relationships do not exist in other transgenerational groups. Familial harms, such as those committed

\[51\] Thompson (2002)
against aboriginal families in Australia, as mentioned previously, prevent family relationships from functioning. Wrongs against family lines are not wrong in the same way that injustices against a nation are wrong. They are wrong due to which individuals are affected, and their relationships; the loss of identity children suffer, the isolation from relatives, and the loss of connection to the family’s past. Additionally, injustices against family lines infringe on family members rights of inheritance from, and duties to bequeath to, other family members. These rights and duties do not naturally exist in most other groups. Because of this it is correct to think about what each family-member is owed (due to filling a role within the harmed family line), rather than what the family-group is owed.

A family has a structure where members within the family are genetically related to each other in a specific way. Those members have specific roles dependant on their position within the family. There are (at least) two distinct tiers of roles. First-tier roles are generational, and may be expressed hierarchically; such as parent, oldest child, and grandparent. Second-tier roles are gendered; such as father, oldest daughter, and grandmother. Both of these tiers are important in cases of historic injustice. The oldest child might have traditional rights to the family home, but the oldest daughter might have traditional rights to their mother’s jewellery. Second tier roles of children are sensitive to counterfactual indeterminacy. If we suppose that there is an equal chance a particular first tier role will be occupied by a son or daughter, it is counterfactually indeterminate whether your role-counterpart will be of the same gender as you. We do not require role-counterparts to be counterparts, in fact it is most likely that they will not be, so there is no guarantee they will be particularly similar to you in any physical way. A claim for second tier reasons will be weaker than those for first tier reasons because of this, thus I will mostly disregard them in what follows. The focus on families as transgenerational groups misses what it is that makes an

52 As indicated in Thompson (2002)
injustice against a family particularly wrong: that they unjustly impact on first tier relationships between family roles.

According to the Family Lines argument a family member is harmed by a historic injustice when that injustice has prevented family roles from interacting in justified, or required, ways. Instead of saying that I am harmed because “I would have been better off”, I claim to be harmed because “my role-counterpart in the rectified world is better off than I actually am”. Compensation is determined by reference to an individual’s role-counterpart. This, I think, is where Thompson would object. Thompson can respond against the role-counterpart view by saying that the counterfactual is irrelevant. The facts are that you are actually a member of a family which has suffered a historic injustice, and it is simply this that entitles you to compensation. In this way we can avoid non-identity issues, and victims of family injustices can claim for the inheritance they would have received. However, following this approach I do not see how we could determine the value of compensation current individuals would be owed; a non-comparative notion of harm would have to be adopted.53

The significance of family Roles is not explained clearly Thompson. She alludes to individuals filling roles within a family with numerous references to “positions” within the family. However, there are also numerous references to “membership” to a family, which makes the argument appear more like a Nations argument. These are even explicitly combined in places, such as “…we find it reasonable to assume that individuals have a reparative entitlement simply by virtue of their membership or position in a family”.54 The Family Lines argument is quite distinct from the Nations argument. It is not by virtue of belonging to a family that someone is due compensation, it is by virtue of their place, and filling a specific role, in the family line instead.

53 And as has been established such views are not without their problems.
54 Thompson (2002, p. 125), (emphasis added)
I do not see how the shift from identifying individual counterparts to identifying role-counterparts fixes the Non-Identity problem. There are two worries. The first is a standard counterfactual indeterminacy problem; there is simply no fact of the matter about how a family line would have left its land and possessions to future generations. Thompson indicates that we can rely on tradition, such as the eldest daughter receiving the family jewels, to determine contemporary harms. However, traditions are flexible, transient, and dependent on family circumstances. It is not clear how this is accounted for, particularly in cases where the injustice occurred many generations ago such as slavery in America. This objection may not pose too great a problem when claims are for non-material inheritance such as access to culture. The greater concern, however, is the non-identity of roles, which in turn has two aspects. The first relates to gendered second tier roles which, as mentioned, are highly vulnerable to indeterminacy. The second relates to the size of families, and the existence of any role-counterpart.55

If it is the case that poorer families are, on average, larger (in other words, have more members and thus more roles) than wealthier families, and that suffering an injustice makes a family poorer than it otherwise would have been, then injustices against families will, on average, cause the size of that family to increase. Had the historic injustice not occurred, members of the family would have had fewer children. Thus, in the absence of an injustice you may not have any role-counterpart. The Non-Identity problem is reintroduced. It is not just the case that you would not exist in the rectified world, but that your role would not. Once again we have no point of reference for calculating compensation. Historic injustices are not always same number. In many cases we would expect them to be different number. An injustice that increases the population is of concern

55 Winter (2007, p. 20) raises similar concerns.
when determining to what extent that population is harmed.\textsuperscript{56} The same can be said of injustices that (presumably indirectly) increase the size of a family.

I have not found the role-counterpart objection anywhere in the literature. The lack of separation of the Family Lines argument from the Nations argument, and the focus on establishing that a family line can be harmed, has led to this objection not being clear previously. Once we explain why an individual is harmed due to filling a family role, which in turn is harmed, the objection becomes apparent. This objection will be most significant in cases of earlier historic injustices. If the historic injustice in question was inflicted on your parents, it is quite likely that you would still have a role-counterpart, and can claim victim status. Thompson uses the Family Lines argument in an attempt to defeat the issues surrounding non-identity, but the composition and conditionality of the family line itself is conspicuously absent from her discussion. “The fact that presently existing African Americans would not have been born if their ancestors had not been enslaved is no barrier to their claiming reparation for slavery as members of family lines. For their claim rests not on their being the particular individuals they are, but on membership of a family line to which an injustice was done.”\textsuperscript{57} As African American slavery and the implementation of racist Jim Crow laws happened many generations ago, we cannot use the Family Lines argument to claim compensation for them.

The Family Lines argument does not provide a comprehensive and compelling solution to the Non-Identity problem, insofar as it only succeeds when we are confident that family structure (including size), and traditions, are unchanged by injustice. This is likely to only hold for very recent historic injustices, such as those committed against the previous generation. Either it does not respect the significance of families and treats them as just another kind of transgenerational

\textsuperscript{56} This is similar to the Parfit’s Repugnant Conclusion, see Parfit (1984, pp. 381 - 390).
\textsuperscript{57} Thompson (2002, p. 139)
group capable of being a victim, or it does not solve the Non-Identity problem by focusing on family roles. I shall next consider whether the New Injustice argument will fare any better.
3) **The New Injustice argument**

Thus far, the Non-Identity problem has stymied every argument for contemporary individuals’ claims for restitution for historic injustice. The New Injustice argument aims to justify restitution by pointing out a different injustice which harms contemporary people. It is perhaps most easily explained by example. Consider an injustice for which no compensation is made. At some time after the injustice was committed, the victim has a child. As a result of the continued failure to compensate the parents after the child is born, the child is harmed. The child is harmed because they are brought into, and raised in, unjustly constrained circumstances. Their parents are owed compensation, and the child has claim to some of that compensation. Even if all parties involved live lives worth living, and are objectively well off, the failure to compensate the parents harms to the child, as it unjustly restricts their wellbeing. This process can theoretically be iterated over multiple generations. Grandchildren of the original victim are also due some compensation if their parents, the children of the original victims were not compensated (for the harm that they suffered because of the failure to repay their parents) before the grandchild was born, and so on. Once a child is conceived, we can show that the child suffers a New Injustice injustice iff:

A) their parents are still owed compensation from an injustice (any injustice) that they suffer; and,

B) the child actually receives a level of wellbeing below that which they would have been entitled to, had their parents been compensated, post-conception.

I will refer to the new injustices illustrated by the New Injustice argument simply as New Injustices henceforth, in lieu of New Injustice injustices.

Consider a fictional family: Alex is owed compensation because her father Joe was never compensated for the injustice he suffered. Joe suffered an injustice because his mother, Jamie, was never compensated for the injustice she suffered,
who in turn suffered an injustice because her mother, Michelle, was never compensated for injustice she suffered. Michelle suffered an injustice because her parents had their land stolen and this injustice, we can call it the “original injustice”, was never rectified in any way.\footnote{That Michelle’s parents had their \textit{property} stolen is not particularly relevant. Instead what is relevant is that they suffered from some uncompensated injustice X, and X just happens to be “had their land stolen”.} The failure to compensate Michelle’s parents unjustly constrained Michelle’s wellbeing. There is a causal relationship that runs back as far as the original injustice, but the injustice that is suffered by each generation is \textit{only} dependant on a continuing failure to compensate their parent or parents. It is worth stressing that according to the New Injustice argument Alex is not harmed by the injustice that any of her ancestors suffered; instead, the continued failure to compensate Joe brings about a new and distinct injustice which harms her.

The New Injustice argument still requires the identification of a counterpart. When we appeal to a counterfactual to determine the harm suffered by a child, we are appealing to the \textit{very specific} possible world where the parents were fully compensated between the child’s conception and birth. Only in this possible world would the physical identity of the child be maintained, whilst not suffering a life where their parents suffer from an uncompensated injustice. Yet in appealing to this counterfactual, there is no fact of the matter how much better off your counterpart is for not having suffered an injustice. There exists a plurality of equally close possible worlds in which the relevant individual’s counterpart is better-off. The difficulty of determining the value of compensation is acknowledged in the literature. Due to this, Cohen focuses on the scope and conditions under which a New Injustice might legitimately occur, whilst Sher and Boxill focus on establishing the plausibility of the New Injustice argument as a possible source of contemporary harm.\footnote{Sher (2005), Boxill (2003), and Cohen (2009)} The New Injustice argument faces a serious problem if it can indicate a potential injustice, but not
the extent to which it is an injustice and the extent to which compensation is owed.

### A Failure to be Sufficiently Action-Guiding

In the above example, the seizure of Michelle’s parents’ land is an entirely different kind of injustice to that which Alex suffers. The return of land to Alex, or her ancestors, does not compensate Alex for her constrained childhood. It might make Alex better off, her wellbeing will almost certainly be higher after being given the land, but this is tangential to the harm she suffered as a child. Incorrect compensation can induce the victim to forget any debts due, but compensation should not be attempted with a broad stroke, so that only hopefully accurate compensation is made. For example imagine that, for the sake of simplicity, we gave everyone who suffered from a New Injustice a new Lamborghini. Would we not be incentivising them to forget any New Injustice they suffered, rather than compensating them for it? With nothing else available, financial compensation is the only option for compensation for New Injustices. But just how much financial compensation is required to compensate for New Injustice argument harms? The New Injustice argument is insufficiently action-guiding because there are many equally plausible answers to this question, including “none”. I will consider several factors that might cause the value of New Injustice argument claims to fall over successive generations. Firstly, however, I will briefly answer two intuitions that suggest the value should actually rise over time.

An injuring party becomes more liable the more generations they harm. Presuming no special ethical duty to individuals with whom you are co-existent, injuring one different person in ten generations is just as immoral as injuring ten individuals within one generation. From this, it seems as though current generations are owed more from the party who has repeatedly failed to compensate both them and their ancestors. This intuition is misguided. The harm
one suffers from a New Injustice does not increase in this way. Instead, this argument identifies a new avenue for contemporary individuals to seek compensation for inheritance they were (possibly) unjustly denied. The perpetrator can become more liable as more generations pass, but saying that each subsequent generation is owed more for the failure to compensate their parents is arguing that a deceased person’s debt should be paid to their heir.

The harm each generation suffers may rise, however, if the continued failure to compensate subsequent generations compounds the problems that subsequent generations face. Failure to compensate each generation can entrench the reduced wellbeing each individual suffers. The current generation is owed more because recovery under their own will and efforts is more difficult than it was for their ancestors. The extent to which entrenchment increases the value of compensation owed is not clear. Further, the claim could quite reasonably be made that any entrenchment is a distinct injustice to the New Injustice we are considering. This is drawn out by considering who is liable. The State is likely responsible for unjust entrenchment, while another parties may be responsible for New Injustices. When institutions change such that they are no longer conducive to social class entrenchment, the entrenchment argument becomes weaker whilst the New Injustice argument is unchallenged.

**Mitigating Factors**

Each subsequent generation’s claim to be harmed may diminish, as the proportion of their ancestors who suffered uncompensated injustices falls. From the above example, Alex is likely to have a significantly smaller claim than Michelle did, because while Michelle’s injustice was directly related to those who suffered the original injustice, Alex’s New Injustice has been “diluted” by three generations of individuals who did not unjustly suffer. The New Injustice Jamie suffered is smaller than that Michelle suffered because Jamie’s father, Bob, did not suffer from any uncompensated injustice. Bob does not bring unjust limitations to his relationship with Michelle and their combined ability to raise
Jamie. For each generation the *unjust* constraint is smaller for the child than it is for the adult when only one of the child’s parents is owed compensation. Alex’s claim is not as large as her ancestors’ claims because a larger portion of her family history is just.

A child has rights to some portion of the assets that each of their parent’s control. It is for this reason that we can see why a child has a greater claim if both of their parents are victims of uncompensated injustices. A child does not have a single large claim when both of their parents are victims; they have two distinct claims, one for each parent. A child thus has a claim with respect to any compensation *each* parent is owed. This, at most, will only change our interpretation of Michelle’s claim, however, Jamie’s claim will be roughly halved when compared to Michelle’s claim because while Michelle’s father did suffer unjustly, Jamie’s father did not. When we iterate over multiple generations, we can see how each generation’s claim is smaller than that of the previous generation.

But what if more than one of your ancestors suffered from an uncompensated injustice? Consider the history of injustice against African Americans in the USA, and let us (very unrealistically) make three assumptions for illustrative simplicity. Let’s assume that:

1. All contemporary and historic African Americans are the descendants of slaves or were slaves themselves.
2. That all African Americans are only the descendants of other African Americans.
3. No compensation has ever been made to any African American for slavery or the New Injustice’s which followed from failing to originally compensate for slavery.

Under these conditions, contemporary African American individuals have a strong case for being compensated under the New Injustice argument. Every African American, contemporary and historic, has suffered a constrained childhood because not just one, but both parents suffering from uncompensated
injustices. There has been no opportunity for the injustice suffered by subsequent
generations to “dilute”, so current individuals’ claims are just as strong as that of
their ancestors.

Another concern is the determination whether or not a parent *does in fact suffer*
from failing to receive compensation once their child is conceived and to what
extent. The New Injustice argument grounds compensation to children because
the continued failure to compensate their parents is an injustice to them. When
parents have no claim to compensation, the child has no claim either; this is the
case for the majority of people, as most people, most of the time, do not suffer
from uncompensated injustices. Let us suppose that in the overwhelming
majority of cases having children improves both parents’ wellbeing.\(^60\) Without
the injustice for which they have yet to receive compensation, they would not
receive *this* benefit, as without the injustice *this* child would never have existed.
Proponents of the New Injustice argument face a challenge; must compensation,
both to parents and children, be smaller when a parent benefits from the injustice
they continue to suffer?

Because a child yields welfare benefits for parents, there is indeterminacy
whether a parent’s counterpart has more or less wellbeing than in the possible
world rectified before the conception of their child. Counterfactually, parents will
have relatively less wellbeing as they do not have *this* child in that possible
world. We can weaken this argument, suggesting that the parent may have higher
wellbeing in a rectified world, but that if they do, it is likely to be a fairly
moderate increase at best. In other words having a child reduces, but does not
eliminate, the compensation owed to a parent because having the child is of value
to the parent. Under the New Injustice argument, the compensation a child is

\(^60\) One might argue that raising a better-off child would be better for the parent, but this
is not certain, and even when their child suffers a disability, parents usually “come to
love their actual child and thus find it difficult to wish that their child had never
existsed”, McMahan (1988, p. 217)
owed is directly related to the compensation their parent is owed. Thus having a child reduces the value of the parent’s claim to compensation, and the child’s claim will correspondingly be diminished or cancelled (relative to if we did not take this objection into consideration).

This objection overlooks the fact that harms and injustices may both benefit and harm, whilst still being injustices. Being stabbed whilst walking home, resulting in an otherwise-fatal tumour being found and removed, is such a case. In this situation we are still able to accuse the stabber of wrongdoing. Analogously, we might be benefitted by a failure to be compensated that led to having a particular child, but still be able to claim that the failure to be compensated continues to be an unmitigated wrong after the child is conceived. Further, proponents of the New Injustice argument may argue that had one been appropriately compensated, one would most likely have gone on to have a (different) child. The welfare benefits this (different) child grants to your counterpart is roughly equal to the value of your child to you. The comparison of possible and actual worlds should therefore not take into consideration the benefit a parent receives qua parenthood. The strength of these rebuttals is not clear, both on their own merits, and due to family size indeterminacy. The intuition persists that having a child is good for the parent, and without the persisting injustice, they would not have received that good. Proponents must adequately address this challenge, either by explaining it away, or explaining in action-guiding terms how it affects compensation.

Sher suggests another problem. In many cases, the failure to compensate one’s parents does not only financially or materially harm them. The injustice, and failure to provide restitution for the injustice, can permanently worsen someone’s

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61 We may say that the stabber did the right thing in this case, though his actions are still blameworthy (as he did not know the tumour was there); no restitution is owed because the “victim” is benefited and not harmed, but reconciliation and punishment are still required. Both parties were simply lucky. For a discussion of moral luck see Williams and Nagel (1976)

62 Sher (2005, pp. 198 - 200)
character. Damage to a parent’s character may result in the mistreatment of their child, resulting in that child having a relatively low level of wellbeing. On the face of it, this appears to be an instance of a child suffering due to their parent’s failure to receive compensation. The problem is that the mistreatment the child suffers is unrelated to the continued failure to compensate. That is, if compensation was made between the child’s conception and birth, it is unlikely to correct the parent’s temperament and thus their treatment of their child. Should restitution be made in a timely enough fashion so as to avoid irreparable damage to the character of the parent, the parents actions following being compensated would result in a different child (if any) being eventually conceived. The failure to compensate a prospective parent results in the actual child unavoidably suffering from their parent’s adjusted temperaments.

Sher has the intuition that in many of these cases the child will be owed restitution, despite the New Injustice argument not being able to justify it. We should, however, resist this intuition. If the child has been wronged by being mistreated at the hands of their parents, say through socially unacceptable abuse, or less tangible harms such as having an alcoholic parent, the moral responsibility for injustice that falls on the parent, or perhaps the state. Ultimately the Non-Identity problem trumps the child’s claim to harm because of their parent’s bad character, even when that character was dependent on suffering an injustice and the continued failure to compensate. This does not eliminate all claims relying on the New Injustice argument. It may, however, mitigate the harm the child can claim to suffer because of the continued failure to compensate their parent. Their standard New Injustice argument claim survives, dependant on the value of compensation the parent is still owed. If our intuition is counter to this, we are likely confused about why we feel that child is harmed. Changes in the personality of the parent may require redistributive support be paid to the parent or child, as well as restitution according to the New Injustice argument.
**Distributive Justice**

We need to be careful when applying the New Injustice argument that we do not stray from arguing for restitutinal justice to arguing for distributive justice. Children may be harmed due to being raised in *unjustly* constrained circumstances, but that is not stipulating objectively constrained circumstances. The child is raised in constrained circumstances relative to what their counterpart in the rectified world receives.\(^{63}\)

Assume that the theft of the Michelle’s parent’s land threw them into a great depression, and their social and financial circumstances suffered. For whatever reason, Jamie, Joe and Michelle never managed to escape this below average lifestyle through no fault of their own, and Alex was thus raised in a less affluent area, with lower quality education, healthcare, and government services. According to the New Injustice argument what compensation is Alex owed? Consider the following case. The perpetrator responsible for the theft of Michelle’s parents’ land also happened to steal a neighbouring block of land, belonging to Jeremy’s parents. Due to similar circumstances Jeremy was brought up in a constrained environment. Unlike Michelle, however, Jeremy happened to succeed in life, in such a way that his son Gary, grandson Jerry, and great-granddaughter Sophie grew up in above average social and financial situations. Despite their success, no member of Jeremy’s family were given compensation for the injustice of the stolen land, or the subsequent New Injustices that (supposedly) resulted from being raised in relatively constrained circumstances.

Does Sophie suffer a New Injustice as Alex does? The New Injustice argument would suggest that she does, and at least to the same degree (although perhaps not extent) as Alex. However, given that Sophie is brought up in an affluent family it is hard to support that she really has suffered any hardship at all. Our

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\(^{63}\) That child may also suffer from personality-adjusted parents, but that doesn’t matter for the New Injustice argument.
intuitions support the notion that Alex is owed something and Sophie is not, but this is not supported by the New Injustice argument; so long as the child’s wellbeing is unjustly diminished they have a legitimate claim for compensation. We can support our intuitions, but only by adjusting our justification for supporting Alex. Alex is owed “compensation” because she has been born into a socially/financially constrained family, and she has suffered an unjustly constrained childhood, either objectively or relative to socially accepted standards. Sophie, on the other hand, is not owed “compensation” because despite being constrained in some way by the continued failure to compensate her ancestors, she has been born into a relatively affluent family.

If this is the explanation for our intuitions, then we are failing to call upon a New Injustice argument for supporting compensation at all, and instead are appealing to distributive justice; the argument for supporting Alex is an argument for correcting contemporary inequality, not for compensating historic injustice. Our justification appeals to equality and not restitution. The New Injustice argument allows us to argue for compensation to Sophie, and that may be fine. If, on the other hand we do not believe that Sophie suffers a New Injustice, the New Injustice argument must be discarded or modified.

A Defence of the New Injustice argument

The reduction of the New Injustice argument to an argument to correct contemporary inequity can be avoided by explaining more carefully what it is to have one’s wellbeing unjustly diminished. As Cohen notes, any reasonable explanation for what a child is entitled to, and what a parent has a duty to do, will extend beyond the assurance of the child’s mere survival. He suggests that there is some range of wellbeing which a child is entitled to, W, and a child is harmed when they fail to obtain at least the minimum of this range. To keep a parent

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64 Cohen (2009)
from providing \( W \) to their child is to commit an injustice against that child. Each point of wellbeing within \( W \) is equal with respect to the child’s right to claim it, and equal with respect to the parents duty to provide it. The minimum of \( W \) will exceed mere survival, and the maximum will be a function of the parents’ ability to support their child. A child’s right to support from their parents will not extend to impinging on their parent’s survival. Constraints on parents’ ability to provide for their child will constrain the maximum value of \( W \) and illustrates that a maximum must exist. A child may have a right to a minimum level of support from their parents in relation to their ability to provide, and perhaps even a share in a luxurious life style if their parents are capable of providing this. The specific level of wellbeing a child has is \( W^i \). The parent thus fulfils their duty when \( W^i \) is within \( W \), for any \( W \).

We can stipulate that there is a level of wellbeing, \( M \), such that if a child’s wellbeing does not meet \( M \), then the child is objectively harmed. The child is harmed because \( M \) represents the minimum morally acceptable standard of life for any child.\(^{65}\) \( M \) is important for practical normative social decisions, such as welfare payments to struggling parents. The minimum of \( W \) will always be constrained by \( M \).\(^{66}\)

\( W \) is likely to be affected by a continued failure to be compensated for injustices one’s parents suffer. It is likely that if a parent was justly compensated, counterfactual \( W \) would be higher than actual \( W \). Call the just range of wellbeing the child is owed, \( W_J \), and the range of wellbeing a child has a right to in the presence of injustice, \( W_U \). If \( W_U \) and \( W_J \) are particularly narrow ranges or if the value of compensation owed to the parent is particularly large the minimum of

\(^{65}\) \( M \) is likely to be indexed to the circumstances of the society in which a child lives, but is likely to be greater than assuring mere survival in all but the most drastic circumstances. Sen’s (1983) discussion of relative and absolute poverty is relevant here.

\(^{66}\) This is what a child has right to, so even if parents are incapable of ensuring their child achieves wellbeing at least equal to \( M \), that child still has a right to achieve \( W^i \) no less than \( M \).
W_J may exceed the maximum of W_U. It is only in this circumstance that the failure to provide compensation to the parent is a new and distinct injustice to the child.\textsuperscript{67} Assume that a parent always provides “well” for their child, such that W_i is always within W_U in the actual world. The failure to compensate the parent causes the child to receive a level of wellbeing W_i that is less than the minimum of W_J.

W_U and W_J may of course overlap. In this scenario, the failure to compensate the parent is not a New Injustice to the child. Without compensation, the parent has the ability to provide a level of wellbeing that would be acceptable in the absence of injustice. Even if the child is receiving a level of wellbeing that is below the minimum of W_J in the world without compensation, the reason for this level of wellbeing rests with the parents’ decisions. The child has no right to choose what level of wellbeing within W_U they receive; every level of W_i within W_U is equally just from the child’s point of view. Because any W_i within W_U is precisely as just as some points within W_J, the lack of compensation does not harm the child; the child could be receiving a level of wellbeing within W_J without W_i exceeding W_U. The greater the compensation parents are owed, the more likely it is that children suffer New Injustices. This result should be welcomed by proponents of the New Injustice argument.

When W_i exceeds the maximum of W, that child is being “spoiled”, relative to their parents’ duties to provide. Cohen claims that spoiled children cannot claim to be harmed by the failure to compensate their parents.\textsuperscript{68} The welfare-threshold framework for the New Injustice argument shows that this is not strictly the case. The child can still be harmed, even if they receive wellbeing W_S, where W_S is greater than the maximum of W_U, because it is possible that the minimum level

\textsuperscript{67} This also identifies the conditions under which a parent does wrong to their child, despite the injustice. If a child fails to have a level of wellbeing equal to or greater than the minimum of W_U, then they have a claim against their parent for better support.

\textsuperscript{68} Cohen (2009)
of \( \text{W}_j \) still exceeds \( \text{W}^s \). If \( \text{W}^s \) exceeds the minimum of \( \text{W}_j \), there is no injustice to the child from the failure to compensate the parent; the child’s counterpart may not insist on a level of wellbeing higher than the child actually receives.

These conditions apply regardless of the affluence, or lack thereof, of the child in question’s parents. Yet the intuition that in conditions of affluence a child’s claim lapses can be motivated. This is done in two ways. Firstly, as \( \text{W} \) is indexed to the capability of a parent to provide for their child, the ability to provide better for your child the will cause \( \text{W} \) to expand.\(^{69}\) The probability that \( \text{W}_j \) and \( \text{W}_U \) will not overlap, will be reduced the greater the range \( \text{W}_U \) originally takes. If Sophie has claim to \( \text{W}_U \), but this is a large range, the compensation owed to her parents would have to be very significant for the minimum of \( \text{W}_j \) to exceed \( \text{W}_U \). Thus our intuitions that Sophie probably is not owed anything are justified. The other option is to stipulate that the maximum of any range of \( \text{W} \) is limited to some level: \( \text{W}_{\text{Max}} \). Determining \( \text{W}_{\text{Max}} \) is beyond the scope of this thesis, but could be relatively modest, particularly if the affluent have other moral demands on their assets.\(^ {70}\) The children of millionaires may be able to claim a comfortable childhood, but cannot demand a luxurious lifestyle, where \( \text{W}^i > \text{W}_{\text{Max}} \). As the affluence of a parent increases, the greater the likelihood that \( \text{W}_{\text{Max}} \) will limit the maximum \( \text{W} \). In fact, if the maximum of \( \text{W}_U \) is \( \text{W}_{\text{Max}} \) any improvement in the ability of the parent to provide for their child will not affect the level of wellbeing the child can claim.\(^ {71}\)

The New Injustice argument can account for intuitions we have that the affluent are not harmed by failures to compensate their parents. It also provides us with a general framework for calculating compensation under the New Injustice argument, which thus far was missing. At a minimum, this still requires a

\(^{69}\) It seems likely that the minimum of \( \text{W} \) will increase more slowly than the maximum.\(^ {70}\) Singer (1972), for example, might argue that \( \text{W}_{\text{Max}} \) is low because of the demands on those with the ability to prevent the suffering of the worst off in the world.\(^ {71}\) Other than increasing the minimum amount of wellbeing that child can justly claim.
supporting ethical framework to argue for what the range of W might be. A further concern is raised as we attempt to iterate the New Injustice argument over multiple generations: does the minimum of $W_J$ exceed the maximum of $W_U$ for previous generations, and if so, by how much? Without this information the New Injustice argument remains insufficiently action-guiding.

This concludes my discussion of compensation for historic injustice. I feel that the problems raised by the Non-Identity problem considered here and in the previous chapter, and the insufficiency of the New Injustice argument, lead to the conclusion that claims by *individuals* for compensation for historic injustice cannot be substantiated. No contemporary individual is a victim of, nor harmed by, historic injustice.

However, even you do not agree thus far, there is a further problem for claims for contemporary compensation for historic injustice. Who should bear the burden of compensation for historic injustice? As Miller quite rightly claims, “even if we are able to overcome the several difficulties noted above, and establish that claimant groups have a justified demand for compensation of some kind, it is still necessary to investigate whether other groups, or institutions, have a responsibility to meet such a demand.”

While Miller is referring to slightly different difficulties, and has a slightly different definition of compensation, this is precisely the sentiment I wish to express. An analysis of a particular injustice, even if it comes out in favour of a compensation claim, does not mean that compensation can or should be made. There may simply be no individual or group that is remedially responsible for the injustice. Now, we may be able to simply assign remedial responsibility so that victims get what they are owed; perhaps this is one function of the state. But we need to be mindful whether in doing this our justification for the transfer changes from granting just restitution to fulfilling the requirements of distributive justice. If we have not strayed into

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72 Miller (2007, p. 138)
justifying redistribution by reference to inequality, and are in fact arguing for restitution, we have one more major question to ask: if we assign a contemporary party remedial responsibility for historic injustice, does that party, some other party, or no party at all, have the ability or responsibility to provide reparations?
4) **Concerning Reparations**

Thus far I have disregarded considerations of reparations, both for simplicity, and because the crux of many arguments in the literature is compensation. Reparations are the aspect of restitution that aims at restoring relationships damaged by injustice. This is often not captured in the use of the word “reparation”. Even Winter’s interest-setback argument for “reparations”, argues for compensation, despite the fact that his definitions of compensation and reparation closely align with mine.\(^{73}\) Because of the very specific distinction I am drawing here, it is worth considering why claims for compensation and claims for reparation might be differently affected by the Non-Identity problem and counterfactual indeterminacy. Similar to the discussion of compensation, the discussion of reparations here only considers individual perpetrators. It is not a great concern for the discussion of reparation whether the original victim was an individual or a transgenerational group. Who the victim is will not affect the discussion of reparations, which focuses on historic individual perpetrators and their descendants. The restriction to individual perpetrators is motivated by the same motivations for restriction the above discussion of compensation to individual victims and their descendants: brevity, completeness, and priority.\(^{74}\)

There are certainly cases of historic injustice that were perpetrated by individuals which may generate contemporary claims for reparation. Such transgressors could include ruling dictators, democratic leaders acting beyond their mandate, soldiers, as well as ordinary citizens. In some cases, it might be possible to shift the blame to a transgenerational group, but an account for cases where this cannot happen should be made.

\(^{73}\) Winter (2007)  
\(^{74}\) There is an extensive literature concerning group responsibility, and group rights more broadly. See Jones (2008) for a good overview of group rights. Authors on collective responsibility include, but are in no way limited to, Miller (2007), Abdel-Nour (2003), and Feinberg (1968).
Consider again African American slavery. In many respects the government of the USA, a transgenerational group, could be considered guilty of slavery. However, whilst the legislative environment legitimised slavery, it was *individuals* who actually practiced slavery and owned slaves. Are particular contemporary individuals, separately from, although perhaps as well as, the United States government, reparatively responsible for the historic injustice of slavery? What, if anything, is owed by way of a material or non-material transfer, from the descendants of historic perpetrators? First, I must present an explanation of what it is for an individual to be reparatively responsible at all.

**The Blameworthy Individual**

When individuals suffer a contemporary injustice, it is common to demand something in addition to compensation as restitution; compensation is often insufficient for complete restitution. Taft’s widow case is a good example.\(^{75}\) The widow of a patient who died due to medical malpractice was dissatisfied with the doctors who had been responsible for her husband’s death. This was despite agreeing to an out of court settlement for their malpractice. The widow's unhappiness was not related to the settlement, but because despite settling the doctors responsible never apologised for their actions. The widow had been compensated for her loss, but the lack of an apology prevented reconciliation; reparations were needed.

Reparations can only sensibly be talked about when there is both an injured and outcome responsible party that exists at the time the reparations are sought. Descendants of original victims and perpetrators are not *prima facie* excluded from filling these roles. The requirements for reparation appear just as stringent, if not more so, than that for compensation. There must be an injured party to receive the reparations, but there also must be a *responsible* party to make them.

\(^{75}\) Taft (2000)
I am using *responsible* here in the sense of outcome responsibility; remedial responsibility is insufficient to imply a reparative duty. We do not expect any sort of reconciliation with a party who is *only* remedially responsible. Responsibility, for the purposes of reparation, must be a kind of causal responsibility, but one that reveals something about the actor. Mere causal responsibility is insufficient. Scanlon puts forward a theory of blame and blameworthiness that useful here.\(^\text{76}\) For Scanlon, assessing someone as being blameworthy is determining that “their conduct shows something about them that indicates… impairment of their relations with others, an impairment that makes it appropriate for others to have attitudes towards them different from those that constitute the default moral relationship.”\(^\text{77}\) To actually blame someone would be to personally hold this adjusted attitude towards the individual.

We can see the difference between causal and outcome responsibility in this new light. If a reflection off one’s wristwatch dazzles a nearby workman so they fall off a ladder, one is causally responsible for the workman’s injury. Yet we do not want to blame the watch-wearer for the workman falling. Nothing about the watch-wearer’s actions or attitudes suggests they are blameworthy (except maybe under extraordinary conditions). On the other hand, consider Miller’s case of damaging your neighbour’s house. While one took all reasonable precautions, you are outcome responsible, and blameworthy for damaging your neighbour’s property. Your actions, assessing the risks and the way you built and monitored your fire, still indicate a willingness to take some amount of risk, given the damage you could cause. You are outcome responsible and blameworthy where the watch-wearer is not. Mere causal responsibility is insufficient for blameworthiness; outcome, or moral, responsibility is required.

\(^\text{76}\) Scanlon (2008)

\(^\text{77}\) Ibid. (p. 141). “Default” here is likely to be equivalent to “prior”. Conduct indicating adjustment of relationship with others can result in appropriate attitude *changes* even where the moral relationship between the relevant parties never was neutral.
It might seem to be the case that blameworthiness is synonymous with guilt. But this is not strictly the case. In the broadest terms, guilt may be attributed to an actor simply in respect of a negative attitude or event they are relevantly related to. One might say that I am guilty of writing this thesis, and you guilty of reading it, if these things are considered bad. On such an interpretation, one can be guilty of situations where one is merely causally responsibly. But it is not the case that two people are equally guilty when they purchase stolen goods, if one knows that they were stolen, while the other does not. We want to say that the former purchaser is more guilty; we blame them where we do not blame the purchaser in the latter case. It is more accurate, when considering who can be called on to provide reparations, to determine “blameworthiness” instead of “guilt”. Guilt and blameworthiness can, on tight interpretations of guilt be synonymous.\textsuperscript{78} But because of the vagueness associated with guilt I will avoid the term for clarity, henceforth using blameworthiness instead. In the absence of a blameworthy, outcome responsible, party, reconciliation does not make sense, and neither will reparation. So, can current generations stand in the right blameworthy relationship to a historic wrongdoing to justify reparations?

**Contemporary Blameworthiness**

It seems wrong to say that someone is harmed by something that was a necessary condition for their existence.\textsuperscript{79} Does it not also seem just as wrong to say that someone is blameworthy for an event which they rely on for their existence? No individual is outcome responsible for any action or event that predates their own

\textsuperscript{78} “… We might blame the collapse of a building on faulty construction, or the car crash on faulty brakes, but these things are not blameworthy because they aren’t moral agents.”, Oshana (1997)

\textsuperscript{79} That is, if the comparative accounts of harm I adopted in chapter 2 are correct.
existence.\textsuperscript{80} To be blameworthy for an action, the action must indicate an impairment of the actor’s relations with others. Historic actions, however, are taken by neither party involved in contemporary claims. In this sense they are taken by third parties, and the actions of third parties cannot necessitate any impairment of one’s relationship with others. This is not to say that x’s actions cannot affect y’s relationship with z. For example, a parent’s actions could result in their children become estranged from each other, say by one child being spoiled and the other neglected. Yet it is highly unlikely that we would claim that the spoiled child was blameworthy for being spoiled. Similarly, my grandparents’ actions against your grandparents might lead to circumstances where we are now estranged. But that does not mean I am blameworthy of my grandparent’s actions. I am certainly not outcome or morally responsible for them. As no contemporary individual is capable of being blameworthy for any historic injustice, discussions of reparations must immediately halt.

However, perhaps we could revive the plausibility of contemporary individuals being blameworthy for historic injustice if blameworthiness could transfer from the original blameworthy party to another party instead. If x’s blameworthiness can transfer to y such that y becomes blameworthy for x’s actions, current individuals may be able to be blameworthy for historic injustice. We seem to see this in contemporary cases. Consider the broken window case mentioned in Chapter 1. We would quite reasonably blame the parent if they failed to correct the injustice their child committed. Where we do not expect the child to correct the injustice, we do expect that of their parent and the failure to do this perpetuates the injustice.\textsuperscript{81} Transferral of blameworthiness in this situation is dubious; it is unlikely that we truly transfer blame from the child who broke the

\textsuperscript{80} Blameworthiness may be more restrictive than this, requiring some level of ability to exercise the control principle. It seems right so say that sufficiently young, and unborn, children are incapable of blameworthiness despite existing.

\textsuperscript{81} Either there remains a hole in the neighbour’s window, or the neighbour is (unjustly) forced to remedy the situation themselves.
window to the parent. Either the parent is blameworthy for some action other than breaking the window, such as failing to repair the window, or we realise that the child never was truly blameworthy in the first place and that the parent always was. The second of these seems closest to transferral of blameworthiness, but even if this is properly construed as transferring blameworthiness, it will not be helpful for assigning blameworthiness to contemporary individuals for historic injustice. We would never adjust our attitudes such that we no longer wish to negatively assess the original perpetrator, but instead wish to negatively assess (that is to say blame) their descendants.

We may, of course, blame current generations for something other than the original injustice. Imagine a block of land that was historically wrongfully acquired, and has remained in the family of the original perpetrator. Current individuals may automatically be blameworthy for the perpetuation of the historic injustice. We might think that, similar to nations, a family may commit an injustice, and so as long as the family persists, it remains blameworthy. Members of the family may therefore be blamed, not as individuals, but as members of the family. There are two problems with this. Firstly, it is not clear that families are capable of committing injustices, and capable of being blamed. However, even if they are this discussion would rest within a discussion of blameworthiness of transgenerational groups, which is not the concern of this thesis. The discussion of whether the actions of an individual, acting as an individual, can imply blameworthiness of a group relates to group blame too, and thus must be had another day. Secondly, we could suggest that injustices committed by individuals confer blameworthiness on the roles within families, which could yield contemporary blameworthiness, but it is not clear whether roles can themselves be capable of blame. An individual might be blameworthy in virtue of a role they fill, but this is blameworthiness of the individual, not
blameworthiness attached to the role.\textsuperscript{82} To blame contemporary individuals for injustices related to historic injustice, they must have acted with respect to historic injustice in a blameworthy manner. Does inheriting once wrongfully acquired assets, like land, count as a blameworthy act that relates to historic injustice? It certainly is related to historic injustice, and most likely in the right way, as opposed to merely being co-incidentally related. However, while inheritance may be a controversial as an institution, within that institution someone cannot be blamed for owning land that was once wrongfully acquired, if they inherited it legitimately.\textsuperscript{83}

There is an exception. When a party acquires land they know the previous owner had no right to transfer, the new owner is blameworthy of perpetuating the injustice. They are blameworthy in a way that unwitting perpetuators of historic injustice are not. This is the historic equivalent of the stolen goods example above. Imagine that I do not approve of my parents’ actions when they steal your land, and have implored them to return it. If they leave the land to me and I do not return it, I am blameworthy of not only being a hypocrite, but of acceptance, and possession, of land I know was not my parents’ to give. My acceptance of the inheritance is indicative of an impairment of my relationships with others, and this impairment results in a legitimate case for reconciliation between me and the land’s last just owner (or perhaps their descendants). I do not see how such a claim could be defeated by non-identity worries; an individual who relies on the injustice for their own existence can be blameworthy for the \textit{continuation} of the injustice in these situations.

Proponents of reparations for historic injustice face a problem; a current owner can discontinue the blameworthiness of a chain of blameworthy owners by

\textsuperscript{82} I would not be blamed for marrying without my family’s consent, but for the fact that I fill the role of eldest son. Yet it is the individual, me, who is blamed and is blameworthy, and not the role I fill within the family line.

\textsuperscript{83} Haslett (1986).
simply keeping the next recipient ignorant of the chequered history of the asset in question. Assume the point where an asset is blamelessly inherited is time $t_2$. All owners after $t_2$ must also be blameless. Victims may still have a compensatory claim against the owners from $t_2$ on, but as these owners have innocently and in good faith acquired the assets in question, nothing about their acquisition or ownership is blameworthy. We may suggest that owners should ensure the legitimacy of their acquisitions. If this is the case then the potential acquirer at $t_2$ is blameworthy because they failed to ensure what they were acquiring was the $t_1$ owner’s to transfer. This argument weakens over time; we do not expect a potential buyer to ensure the legitimacy of the entire history of a good before they purchase it, and we do not judge the failure to do this as blameworthy. Further, if it came to be that later, say at $t_4$, the current (innocent) owner was made aware of the historic illegitimacy of their inheritance, up to $t_1$, it does not follow that they are blameworthy of current illegitimate ownership, simply because their current ownership is not illegitimate. The innocence of their acquisition means that others cannot justify adjusted relationships towards them.\textsuperscript{84}

The problem I mention is a form of moral hazard. There is an incentive for individuals, and parents in particular, to withhold information from their wills’ beneficiaries. There may even be a deontological moral duty to hide this information from beneficiaries if you have a duty to prioritise your family’s wellbeing. This is different to a moral hazard that Waldron identifies.\textsuperscript{85} Waldron’s moral hazard appears when current circumstances, and reliance on current usage of land and other goods, are of moral significance. Historically unjust allocations of goods can become justified over time when historic injustice is “superseded” by contemporary circumstance.\textsuperscript{86} The moral hazard is that

\textsuperscript{84} They may, however, owe something else to victims’ descendants, as will be discussed in the next chapter.
\textsuperscript{85} Waldron (2002)
\textsuperscript{86} Ibid.
supersession of historic injustice incentivises unjust actions. If you, or your descendants, can take, and retain, X for long enough, circumstances will eventually change such that X will legitimately have become yours (theirs). This can incentivise you to unjustly take X in the first place. It seems to me just a fact that the moral hazards that Waldron and I have identified simply do exist. I see no reason why punitive institutions, policies, and laws, cannot be put in place to disincentivise these behaviours, however, where such situations already occur, contemporary owners of historically unjustly appropriated goods will be insulated from reparative claims. These owners are not blameworthy.

This does not render historic injustice irrelevant or insignificant. Consider cases like Waldron’s where current ownership of historically purloined land is legitimate due to supersession of historic injustice. We cannot deny that the historic injustice still did happen; it is part of the history and circumstance of current individuals, even if they do not have to do anything about it, in normal circumstances. It is part of the history of that land. The current owner should be mindful of this, as some actions, even if permissible, may be blameworthy due to the history of injustice. Actions affecting a change in ownership, or change in use, of land may be blameworthy. Legitimate owners can make legitimate transfers, and often will do so for their own benefit. However, if the current owner of land which has a history of injustice were to simply get rid of that land, say by wilful neglect, purposeful destruction, or gift, the descendants of historic victims may have cause for complaint. “If you didn’t want it, you should have given it back to us”, they might say, and this is a legitimate claim. Similarly, particular uses of land may be objectionable, or more objectionable, because of the history of injustice associated with that land. Converting a once-sacred lake into a water-skiing resort could be objectionable to descendants of victims because of the history and use of the lake before it was wrongfully appropriated. A history of injustice concerning material assets suggests limitations on some

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87 Ibid.
aspects of ownership of those assets. Individuals whose actions disregard this history are blameworthy for disregarding it. I do not want to commit to a theory of permissibility in such situations. It is plausible for these actions to be permissible, yet blameworthy. It is also plausible for them to be impermissible, in which case blameworthiness seems clearer. Even this, however, does not suggest that current individuals are blameworthy for historic injustice.

There are many possible blameworthy actions that contemporary people may take with respect to a legacy of historic injustice, and restitution including reparation, may be made for these. Reparations for historic injustices committed by individuals are not plausible. Reparation requires a party which is outcome responsible, or blameworthy for the injustice in question. Descendants of perpetrators and owners of historically purloined goods are neither of these. This is not a way of side-stepping the problem, nor is it a way of justifying what might appear to be insufficient compensation. It is entirely legitimate for restitution to be limited to compensation in the absence of an outcome responsible party. It may seem as though one aspect of reparations remains plausible: apology.
5) **Apology, Commiseration, and Sincerity**

Thus far I have argued that, in the context of historic injustices committed against individuals by individuals, contemporary restitution is not applicable. Compensation is unsuitable due to concerns over the legitimacy of contemporary individuals’ claims to be victims of the historic injustice. Reparation was ruled out for similar reasons, and because current individuals cannot be held outcome, or morally, responsible for historic injustice; blameworthiness for historic injustices cannot be transferred to contemporary generations. It remains a question, however, whether anything might be due when the descendants of historic perpetrator’s meet the descendants of historic victim’s. This chapter will examine what might be morally required in such situations, and specifically whether an apology can be demanded by victims or their descendants.

**Failing to Apologise and the Apology Paradox**

Historic perpetrators and their victims often have contemporary descendants. In this “age of apology” we might expect that when these people meet, the descendants of the former should apologise to descendants of the latter. Reconciliation may be required, particularly if there is inequality between these two contemporary groups, and reconciling typically includes an apology for the wrong deed. It follows that a contemporary apology for the historic injustice should be made. However, in the absence of blameworthiness, what does an apology mean? An attempted apology will simply fail to be an apology if one is not in the correct position to be able to apologise, even when the expresser sincerely intends to apologise. For example, Pettigrove points out that if one misdirects an apology, it will fail on the grounds that an apology should be directed to the one who suffered the harm. Another instance of failing to successfully apologise occurs when one is not in the right relationship to the

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88 Gibney (2008)
89 Pettigrove (2003).
wrong for which you are attempting to apologise. I support the strong claim that if current individuals are not outcome or morally responsible for injustices, including historic injustices, and they attempt to apologise for them anyway, then those apologies will *always* fail to be apologies. They fail because the “apologiser” is not blameworthy of the wrongdoing for which they are attempting to apologise. They are instead some other kind of linguistic event.

In fact, contemporary apologies for historic injustice may be paradoxical\(^90\). Consider the following argument:

1. Being sorry entails regret.
2. Regretting something means we wish it had not happened.
3. Therefore, regretting our ancestors’ actions means that we wish those actions had not happened.
4. It is highly likely that the composition of humanity would be significantly different in identity and number, had historic events not occurred. (The Non-Identity problem)
5. We always prefer existence than to non-existence.
6. Apologising for historic injustices implies that we regret events upon which we depend for our existence.
7. Therefore, we cannot apologise for historic injustices.
8. Therefore, we ought not to attempt to apologise for historic injustices.\(^91\)

Sincerely apologising for historic injustice would not only entail that we sincerely regret our own existence, which is counter to our own nature, but that we also regret the existence of whom we are apologising to. It would be

\(^{90}\) Self-defeating may be a more appropriate term to paradoxical, but I will follow the literature and refer to the problem as a paradox.

\(^{91}\) This argument is adapted from Thompson (2000), and to a lesser extent Levy (2002). The most significant modification is a strengthening of point 7. Here I replace the claim that apologies for historic injustice cannot be *sincere* with the stronger claim that we *cannot apologise* for historic injustices, as an insincere apology fails to be an apology at all.
unfortunate indeed if the only sincere apology we could make implied a preference for non-existence of the victim.

Thompson proposes a revisionary solution to justify our apologising practices. The apology we make is an apology *concerning* the injustice, rather than an apology *for* the injustice. Levy objects to Thompson’s view for being unduly revisionary. Levy’s view is that our statements are inherently temporally indexed. We might win the lotto and be pleased about it, but still consider that buying the ticket was irrational *at the time* that we bought it because we would not rationally choose an expected loss, which buying the lotto ticket yielded. It is not incoherent to say that it was irrational to buy the lotto ticket *at the time* we bought it, even after we realised it was a winning ticket. Likewise, we can regret that *at the time* an injustice occurred, whilst being grateful that it did. We don’t want to revise what we mean when we apologise, we just have to understand the context of the apology as temporally indexed. It seems to me, however, that both approaches are overly revisionary. They revise what it is to apologise to defend our apologising practices. No such revision is necessary. Instead of changing what it means to apologise, for “reasons of economy” it is best to insist that all apologies for historic injustice simply fail to be apologies at all. This requires no change in what it means to apologise, our behaviour, or temporal indexing of our apologies, merely a change of our attitudes regarding that behaviour.

Realising that we are not apologising does not reduce in any way the importance of our expressions, nor does it imply that we need change our linguistic habits. We must simply not confuse what it is to apologise with what it is to *commiserate*. The motivation for both Thompson and Levy’s responses to the apology paradox was to avoid the impossibility of sincerity. Without adjusting what it is to apologise, saying “sorry” for historic injustices can only coherently be understood as a non-restitutional commiseration. But what is a commiseration, how does it differ from an apology, and what follows from this? Can a commiseration in the right circumstances be morally required, and if so does
commiseration require material transfer to descendants of perpetrators when they commiserate with descendants of victims for their ancestors actions?

Reconciliation via Commiseration

When assigning responsibility to compensate, we can utilise Miller’s approach. Miller identifies four types of responsibility which relate to injustice: moral responsibility, outcome responsibility, causal responsibility, and benefit. Remedial responsibility is assigned for the other two reasons, community and capacity, when there is a victim in need of support only. We can separate Miller’s six reasons into three categories. In category (A) we have moral and outcome responsibility, in category (B) causal responsibility and benefit, and in (C) community and capacity. Identifying a contemporary remedially responsible party for a category (A) reasons, identifies a reparatively liable party. On the other hand, when remedial responsibility is assigned for category (C) reasons, reparations are of no concern.

Assigning remedial responsibility for category (B) reasons does not identify any party with reparative duties. Despite this, in such cases there often seems a legitimate cause for reconciliation between the victim, and the remedially responsible party. Consider causal responsibility. In Miller’s bar case, one unwittingly knocks over a fellow patron’s drink, but in a way that yields neither moral nor outcome responsibility; despite not being blameworthy, reconciliation should still occur. This is highlighted when one considers the circumstance where no reconciliation is attempted and the acrimony that is likely to follow. Cases of benefit can also require reconciliatory action. One party has benefited at the expense of another, even if that benefit was innocent, unintended, or random. In such cases, it is quite understandable for the relationship between the victim

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92 Miller (2007, pp. 100-104)
93 Promise would also fit into category C.
and the beneficiary to be damaged, even if this damage is caused by resentment of inequality.

We often call upon restitutional justice not only to correct the losses a victim has suffered, but also to erase unjust enrichment that has resulted from the injustice. This is a motivation for choosing to assign remedial responsibility for benefit reasons over other reasons to assign remedial responsibility. The most obvious instances of contemporary benefit are the current holders of historically wrongfully acquired assets. I will, for brevity, consider cases where inheritance is the only method of transfer between original perpetrators, and current owners. Do inheritors of once wrongfully acquired assets owe an apology to the descendants of historic victims? The simple answer is no; they do not stand in the right relation to the injustice for this apology to be sincere. But, as previously established, what can be given is a sincere commiseration.

While no clear linguistic distinction exists between apology and commiseration, very roughly this is the difference between being sorry for your behaviour, an apology, and being sorry that a misfortune has befallen someone, a commiseration. An utterance of “I’m sorry”, is on its own, ambiguous between an apology and a commiseration, genuine or otherwise. It does not (usually) express an apology in cases such as “I’m sorry that your father is ill”, yet does in cases like “I’m sorry I knocked over your pint in a fit of temper”. In the intermediary (category (B)) case “I’m sorry I knocked over your pint [through no fault of my own]” it is less clear what linguistic act “sorry” plays. Even where replacement of the spilt pint is assigned to me for casual responsibility reasons, it is not clear that my “I’m sorry” is an apology. Given the lack of blameworthiness it is plausibly more appropriate that my “sorry” is commiserating for the loss of your drink, and not because I stood in a causal relation to your loss. Cunningham acknowledges that apology may only be appropriate in situations where the

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94 Cunningham (1999, p. 287), makes a similar point.
apologiser is responsible, but failure to distinguish kinds of responsibility leaves his account incomplete. Importantly, however, Cunningham correctly identifies that acts of reconciliation do not have to be restitutional in nature. “Apology is most convincing on the grounds that it has the potential to improve relations between groups if the apology… is sincere and is acceptable to the recipient. Reparations, in money or goods may follow from this; but in practice reparation has occurred independently from apology.”^95 An equivalent statement is true of commiseration.

This account certainly should not be taken to mean that one should deny the meaning of historic injustice to contemporary parties. Denial of, or a failure to acknowledge, historic injustices may itself be blameworthy. On both interpretations a sincere utterance of “I’m sorry” indicates understanding for the facts of the injustice and the extent of harm which resulted. However, unlike an apology, a commiseration is not indicative of wrongdoing. A feature of apology is that it reduces the person or group making it. When I apologise I indicate that I was wrong, I made a mistake, or I failed in some way. An apology admits blameworthiness where a commiseration does not. A commiseration may be understood counterfactually; “if I was in the position of those who had committed the injustice I would be deeply ashamed at my actions”, or “had I the opportunity to commit the injustice or not, I would not have”. But again, neither of these admits fault or blameworthiness. A commiseration can, however, function as an aide to reconciliation, particularly when an apology is not appropriate. It is for this reason that properly distinguishing between the functions and applicability of commiseration and apology is so important. Two questions remain; can a sincere commiseration be morally obligatory, and does provision of a commiseration ground an obligation to offer a material transfer?

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^95 Cunningham (p. 291).
The Problem of Sincerity.

There are circumstances where a commiseration, if sincere, is sufficient for reconciliation. In such situations, reconciliation can be achieved without any material transfer. This alone answers our second question; when reconciliation is the goal, a commiseration does not ground a moral obligation to provide material transfer, as material transfer is not necessary for reconciliation. The problem is while both parties may yearn to reconcile, reconciliation is not unconditional; it is dependent on the perceived sincerity of each party. Sincerity is subjective, and thus is difficult to reliably communicate. The recipient of a commiseration may doubt the sincerity behind the commiseration, and in many cases quite reasonably so. It follows that we can be faced with the bizarre situation where a commiserator commiserates and is sincere, and the recipient genuinely wants to reconcile, but no reconciliation is achieved. We might appeal to assertion rules such as (B) “assert only what you believe”, or the stronger rule (K) “assert only what you know”. While these may prove a contradiction in the beliefs of a person showing that they cannot believe p, and thus they have expressed p insincerely, normative rules such as (B) and (K) only lend force to negatively assessing those who assert insincerely. Adherence to these rules does not provide evidence that an expression is sincere without drawing on knowledge about the asserter, such as they are generally a trustworthy and sincere asserter. Often, and particularly in acrimonious situations, this knowledge is absent. The problem of sincerity is a problem of asymmetric information; the commiserator knows their own sincerity (or insincerity), but the recipient does not, stymying reconciliation.

In economic theory, problems of asymmetric information are often overcome by way of a signal. Similarly, in non-economic asymmetric information cases a signal is often used. One buys flowers to apologise for forgetting your

96 (B) and (K) are discussed in Pagin (2012).
97 The Apology Paradox is an example.
anniversary, wears formal attire to a funeral, and travels to be at a family member’s graduation. These tokens seem to show sincerity because they indicate sacrifices that insincere expressers are unlikely to choose to incur. When someone who always and only wears formal attire turns up to a funeral wearing a suit, this indicates very little. It does indicate something when someone who almost never wears a suit attends that same funeral similarly dressed. Tokens seem to show sincerity when incurring their cost is unnecessary, or unusual. These tokens are less personally costly to sincere expressers. Thus, as tokens can be indicative of sincerity, the argument can be made that when descendants of perpetrators of injustice provide their ancestors’ victims’ descendants with a commiseration they should also provide them with a non-restitutional token to indicate their sincerity.

However, there is nothing inconsistent in sincerely apologising whilst failing, or even refusing, to provide a further sign of this sincerity. The fact that signals are oft given does not mean that when commiserating for historic injustice a signal must also be provided. This may be due to the differences we confront in historic versus contemporary cases, differences between apology and commiseration, or the non-obligatory nature of signals in general. It is also possible that what we take to be a signal of sincerity may in fact be signalling something quite different, or not be indicative of anything significant at all. The question remains which party, if either, is blameworthy for a failure to reconcile in such situations. It must also be kept in mind that, when answering this question, expressing sincere commiseration is desirable. It would be highly unfortunate for expressions of sincerity to be universally accompanied by unwanted burdens on the sincere party, resulting in non-obligatory expressions being discouraged.

This of course does not give reason in itself enough to dismiss all claims that gestures or gifts indicate sincerity. It is simply a fact that there is a cost to indicating sincerity. This cost is borne by one or both of the relevant parties. The expresser can incur an immaterial cost, such as effort, or a material cost to
indicate their sincerity. The recipient can incur an immaterial cost of accepting
the expression as sincere and overcoming mistrust. Given that reconciliation is at
least a desirable outcome, we need to know who should bear this cost and why in
practice the burden of proof is often placed unquestioningly on the expresser.

Three Problems with Cost Determination
There are three objections one can make to the practice of assigning full cost to a
sincere expresser. Firstly, the cost should not be borne by outside parties, that is,
the cost of communicating sincerity should not be borne by a party who is neither
the expresser, nor recipient, of the sincere expression. Whilst a contemporary
commiserator is an “outside party” with respect to historic injustice, they are an
involved party for the purpose of the commiseration. This argument may hold
sway in cases where groups attempt to commiserate, but seems irrelevant in cases
of individual commiseration. Secondly, it is not clear why mistrust by the victim
should lead to extra costs borne by another party. It is equally reasonable to
assume that all of the cost goes to the victim, who must overcome their distrust,
as it is to put the entire burden of cost on the commiserator. It might be argued
that the cost to the commiserator is low when sincere, so it is on that basis the
commiserator should bear the cost. If they are insincere, they bear an extra cost,
but this is an acceptable price to pay for their deception. However, an analogous
argument can be made for the cost to be borne by an opportunistic victim; we do
not want to reward opportunism, and the cost of accepting a commiseration is
low when one does not doubt the sincerity of the expresser’s expression at face
value. The problem of ascertaining sincerity reappears if we wish to assign cost
based on sincerity.

Another option would be to split the costs in some way, but how this cost should
be split is just as arbitrary as assigning cost to one or other party. In fact,
determining where this burden should lie when commiserating for historic
injustice is likely to be more arbitrary than in cases of contemporary injustice. In
cases of contemporary suffering or misfortune, for which a commiseration is
often given, it is usually quite clear who has suffered, why, and how. These facts are at best opaque in cases of contemporary individuals commiserating for historic injustice. Consider a seemingly simple case of commiseration: you commiserate with a widow at her husband’s funeral. As an indication of sincerity you don a formal suit. Why does the cost of commiseration, as low as it seems to be, get attributed to you, as opposed to the widow, who could overcome the fact that you could have turned up in something far more casual and comfortable? One explanation is that the reason for the commiseration is immediate and clear; her husband just died. We can say that the commiserator in the funeral case is obligated to assume the cost of convincing the widow of their sincerity because the cost is low, and the widow is clearly suffering. It is an exercise in compassion that we do not haggle with the widow to determine who assumes the cost of sincerity. This explanation is missing in cases of commiseration for historic injustice. The injury felt by descendants of victims may seem real, and significant, but it is much harder to determine this than in the case of the funeral. Even commiserating with an individual for their suffering due to contemporary relative inequality is relatively simpler than commiserating with that same individual for the same suffering, but for historic injustice reasons.

The third objection concerns the determination of what gift would be either necessary or sufficient as proof of sincerity in any particular case. The kind and magnitude of signal needed to reveal one’s sincerity will be related to the ability of the victim to overcome their distrust. In some cases a victim will be predisposed towards trustworthiness; the required “proof-of-sincerity gift” would be small. In other cases a victim will be untrustworthy and belief in your sincerity would be difficult, or impossible. Distinguishing victims who are (reasonably) deeply mistrusting from the opportunists is a difficult matter. It is also surprising to think that the cost borne by a blameless party could be determined by a party other than themselves. Yet this may result if suspicious victims demand a significant token as indication of sincerity.
It is certainly a problem if failing to provide a *sufficient* signal is mistaken for insincerity. When commiserating for historic injustice there is no norm for what a signal of sincerity should be, where for many common contemporary examples there are. We know what to do and how to show sincerity of love on Valentine’s Day; we have experienced it before, there are traditions to which we can adhere, and each instance is likely to be similar to the others. Failing to adhere to these traditions is commonly seen as blameworthy. Commiseration for historic injustice suffers on both of these counts; it is not common to commiserate for historic injustice and because of the individuality of each historic injustice, one is unlikely to be able to look to other such commiserations for guidance regarding what to do to indicate one’s sincerity. Failing to provide a signal of sincerity is not automatically blameworthy and neither is providing a signal that is perceived to be insufficient.

**Why Signal?**

Why then is it common practice for an expresser to indicate their sincerity in a material or immaterial way? Natural mistrust towards those who have done wrong can legitimise placing the cost of sincerity on those who apologise, but this does not explain cases, such as commiseration, where the sincere expresser has done no wrong. There are several explanations for such practices, only one of which references sincerity. In fact, in many circumstances it seems wrong to describe such “signalling” behaviour as signalling anything at all.

The practice of wearing formal attire to a funeral could be based in tradition. Compliance with tradition or expectation does not indicate the sincerity of any commiseration one might tacitly be making with funeral attendance and attire. This is particularly likely where sincerity does not factor into traditions’ origins. Traditions can be started for many reasons, and if a particular tradition is in fact grounded in an attempt to indicate sincerity, one could say that adherence to that tradition is in itself an indication of sincerity. It is quite likely, however, that the majority of traditions originated due to a social, religious, or practical practices
and circumstances. When all job applicants wear suits to interviews, the wearing of a suit indicates nothing about the quality of the applicant. When very few people wear suits to an interview, however, it can indicate that you a quality potential employee; people who do not expect to gain or keep a job would not invest an expensive suit. The expectation of wearing a suit undermines the signalling value it would otherwise have. Pessimistically, adherence may be a subconscious act; it is simply less costly to adhere than not to, which again signals nothing. Wearing formal attire to a funeral, or not wearing white to a wedding are such cases. Another explanation can be made with reference to respect. Respecting a worthy adversary, yet being glad, or not upset, that they are gone might be such an example. In many cases there will be significant crossover between respect and sincerity, and this brief account is not meant to suggest otherwise.

In other instances of commiseration, the practice of expressing sincerity via cost can be explained via consumerism. Materialistic behaviour may simply be a convenient vehicle for showing our sincere expressions. When I am sorry for something I did, I buy flowers, and I buy flowers only because I wish to express something sincerely, in this case, apology. The influence of society guides me to demonstrate my sincerity in particular ways. An account would be incomplete, however, if we did not recognise the opaqueness that surrounds such consumerist behaviour. Receiving flowers or a box of chocolates may be nice, but shows little about the sincerity behind such low-cost gifts when that is what one would do regardless of sincerity. Ultimately, these examples illustrate behaviour which is generally accepted to be good, yet each shows how bearing a burden may not constitute a signal of sincerity. If attempting to represent sincerity via a costly signal is not assured to be representative of actual sincerity, how can it be morally required?

Of course, none of this precludes an honest desire to express oneself in a tangible way. There is certainly nothing illegitimate about wanting to signal subjective
emotions through undertaking special effort, or material sacrifice. It is far from my intention to indicate any sort of wrongness about these practices. Rather, my claim is that they may be merely supererogatory, from the perspective of representing sincerity.⁹⁸ The force of the argument here is that in such situations where common practice is for the burden of proof to be borne by the expresser, honest or otherwise, that is all it is: common practice. There is no significant moral reason why those who are expressing commiseration need bear non-communicative costs, those costs of sincerely expressing, except by appealing to broader concepts such as adherence to tradition. This is brought out further in cases of historic injustice where no such tradition or common practice exists. Further, in cases of commiseration, as distinct from cases of apology, there are no reasons, *prima facie*, which affect where the burden should lie.

There are, in particular, two factors that must be excluded from implying insincerity of a particular commiseration. Firstly, one must separate accusations of liability for restitution. In particular, whether or not a commiserating party believes that they owe restitution is irrelevant to the sincerity they can feel regarding a historic injustice. Conversely, accepting a commiseration does not preclude a demand for an honest apology. Consider Taft’s widow case.⁹⁹ The doctors in this case could have offered a sincere commiseration, “We are sorry for your loss”. The widow can accept this as sincere, whilst not reducing her frustration over a lack of an apology. Secondly, and more importantly, one must exclude a refusal to provide proof of sincerity from considerations of that sincerity. This is ultimately what I have been arguing for in this chapter, and it is here where I believe some may object. Why would one refuse to offer proof of one’s sincerity if one was in fact sincere? Surely such a refusal is indication that your commiseration lacks the right emotional content. This is not the case. It is quite reasonable for a party to not believe that they owe anything extra as proof

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⁹⁸ They may or may not have further values in themselves.
⁹⁹ Taft (2000)
of sincerity. Any gift to attempt to show sincerity is not morally required, and if it were, it would run the risk of its meaning being confused with other matters, like tradition and respect. Ultimately, I feel it is best to adopt a principal of charity with respect to commiseration, if not apology too. One should treat a commiseration as sincere at face value unless there are good relevant reasons to think otherwise.

Finally, if what is required for reconciliation is not restitution of either kind, but acknowledgment of the wrong that was done, this can be achieved simply by commiserating. One usually does not simply commiserate in a vacuum, but commiserates with someone, for something. It is the “something” here that is often of greatest concern to victims and their descendants. A full analysis of historic injustice may determine that contemporary parties are not victims and cannot claim commiseration. But such empirical analysis will most likely also reveal the nature and extent of any historic harm which will more fully inform those wishing to commiserate.\(^{100}\) Whether via an apology, a commiseration, or some other linguistic function, it is important to acknowledge that the historic injustice did occur. If this is the case, the question of sincerity of the emotion behind the acknowledgement may be moot.

Consider Kevin Rudd’s apology to the aboriginal people of Australia, particularly for the injustices of removing children from their families and culture.\(^{101}\) Let us, for the sake of argument, assume that in fact John Howard, the previous Prime Minister, was correct in claiming that it was not appropriate for this generation to accept guilt for actions which they could not control.\(^{102}\) The apology by Kevin Rudd, though inappropriate, would still have value in formally acknowledging the wrongness of historic injustices.

\[^{100}\) It may also support prioritising descendants of victims amongst those parties seeking support. See Thompson (2002, pp. 143 - 145)
\[^{101}\) Rudd (2008)
\[^{102}\) Howard (1997)
“Although the content of an apology is oriented toward the past, the whole purpose of the act lies in its future consequences.”¹⁰³ As Joyce notes of apology, I note of commiseration. Reconciliation is the goal we aim for, so that interactions now and in the future can take place between parties with, at least, a neutral relationship. Lingering doubts concerning blameworthiness and unsatisfied claims for restitution can halt this progress. It is for this reason that this discussion is worthwhile. It is for this reason that an understanding about what can and cannot be required of contemporary individuals, in light of the presence of a history of injustice, is valuable.

¹⁰³ Joyce (1999, p. 171)
A Practical Conclusion

This thesis has examined some of the moral concerns contemporary societies face when presented with cases of historic injustice; that is, injustice that happened prior to any currently living person being born. Restitution for historic injustice to contemporary individuals is not appropriate. Compensation claims will fail on the grounds that contemporary individuals are not harmed by historic injustices. In fact, had those historic injustices not occurred, the individuals claiming compensation would not exist. Claims for reparation fail because contemporary individuals are unable to be held outcome responsible or blameworthy for historic injustices.

The thesis has made five distinct points. Firstly, that we must appropriately distinguish between the two main aspects of restitution, compensation and reparation, as the justification for each of these, and what is required when filling claims for them, can be quite distinct. Secondly, I have argued that one must not confuse contemporary inequality or suffering with a need for restitution, even where contemporary inequality or suffering is causally related to historic injustice. Correcting inequalities and suffering can be entirely justified with reference to distributive justice and equality, and need not reference historic injustice at all. Claims for restitution dependent on contemporary inequality are misguided (although the action they seek may not be). Thirdly, I have presented the Non-Identity problem as the strongest objection to claims for historic injustice put forward by individuals. I also presented two arguments against the Non-Identity problem: the Family Lines argument, and the New Injustice argument. The Family Lines argument failed to avoid the Non-Identity problem without becoming a generic Nations-style argument. The New Injustice argument, whilst plausible, is too abstract to provide any guidance for compensation, particularly over multiple generations. Because contemporary individuals rely on historic injustice for their existence, they cannot claim to be worse off because of it. Fourthly, I argued that apologies for historic injustice are
not plausible because contemporary individuals cannot be considered blameworthy for historic injustice. Finally, and despite contemporary individuals’ inability to apologise, there is significant value to offering commiseration for historic injustice as a way of facilitating reconciliation. This may entail material transfer as part of the commiseration, but such transfers are not morally required.

What are the practical implications of the theoretical discussion I have made here? Clearly and distinctly differentiating compensation from reparation allows for more accurate accounting of historic injustice. Making this distinction also highlights the importance of defining who the claimant and the accused perpetrator are, and doing so with respect to the injustice. Contemporary parties can only be identified as victims or perpetrators because of a relevant connection with historic injustice. One should determine explicitly, not implicitly, for what reason the accused is remedially responsible, if they are at all, to determine whether the act of fulfilling remedial duties could constitute reparation. This is particularly important when remedial responsibility is assigned for causal responsibility and benefit reasons, as it would be wrong to confuse these with outcome or moral responsibility.

It is highly unlikely that we will be able to apply a particular rule across all historic injustices; we must take each historic scenario independently to determine what can be done now to ensure that relevant contemporary parties are able to interact more positively now and in the future. In this way we reduce overarching claims for restitution to claims relating to specific instances. If we conclude that particular African Americans can legitimately claim restitution, we cannot extrapolate that all African Americans are owed restitution. If it is determined that one Iwi in New Zealand was harmed by breaches of the Treaty of Waitangi, it does not automatically follow that other Iwi were similarly harmed, even by similar breaches. Comparison to similar historic cases might be
useful to speed up practical deliberations, but ultimately every claim for restitution for historic injustice must be weighed only on its own merits.

Non-identity concerns must be taken seriously when we consider why contemporary parties believe themselves to be harmed. It may not be clear whether a historic injustice was against an individual, a family, or some other transgenerational group. If compensation or reparation is logically excluded, then those who consider themselves victims must be willing to accept this, just as those who are perpetrators must accept their liability when a debt is owed.

I have had to set some material aside in writing this thesis. The thesis focuses primarily on one subset of historic injustices; those committed against individuals, by individuals. While each of the broad concepts I have discussed here are worthy of their own thesis, the most significant area for extension is a discussion of historic injustices committed by transgenerational groups, and particularly those against other transgenerational groups. The analysis I have presented here, particularly in the general discussion of blameworthiness, responsibility, restitution, apology and commiseration can be used to frame a discussion of what contemporary transgenerational groups owe to each other. On the face of it, the plausibility of restitution in such cases looks a lot more promising; while the injustice is historic relative to contemporary individuals, it is not historic relative to the group that suffered it. This claim, however, is not without its challenges. Can groups be blameworthy? Does blameworthiness remain when membership of the group partially or completely changes? What about dissenting minorities? Do democratic nations relevantly stay the same across multiple elections? These questions, and others, must be answered to provide a complete account of what can and should be done about historic injustice.

There is also much more to be said on the nature of harm, as alluded to in chapter 2. There is a significant body of literature that seeks to show that the Non-
Identity problem is not a problem, as an act that can be causally necessary for a person’s existence and harmful. Of necessity my discussion of threshold accounts of harm has been brief, and further argument is needed to defend my conclusion that these accounts are flawed. Barring this, extension of threshold accounts is required to illustrate how current individuals can claim restitution for injustices their ancestors suffered, if one wants to use these arguments to argue for restitution for historic injustice. It is of further interest what exactly “the life not worth living” entails, although this is likely to be less esoteric than Socrates famously claimed.104 This is of particular interest when the life not worth living is worth living for the person whose life it is.

Failing a positive result for the claimant, an investigation into the historic injustice is worthwhile to establish and acknowledge the facts surrounding what happened historically. Inquiry can be valuable in coming to terms with differences in views and opinions about what actually happened and can assist in the reconciliatory process. Many have acknowledged the benefit of discussion, and acknowledging that the historic injustice did in fact occur.105 The value of this is enhanced when we consider that this discussion should lead to better contemporary understanding of the historic injustice. Discussion of historic injustice should be encouraged, and while objections must be taken seriously, so must the claim itself. Regardless of the result of a claim for restitution, appropriate treatment of these claims will naturally lead to uncovering of facts, and mutual acknowledgment of what really happened. At the very least, this should be welcomed.

104 “… for the unexamined life is not worth living” Plato, Apology (p. 38a.)
Works Cited


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