

*Inheriting rights to reparation: compensatory justice and the passage of time*<sup>1</sup>

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ABSTRACT: This article addresses the question of whether present day individuals can inherit rights to compensation from their ancestors. It argues that contemporary writing on compensatory justice in general, and on the inheritability of rights to compensation in particular, has mischaracterized what is at stake in contexts where those responsible for wrongdoing continually refuse to make reparation for their unjust actions, and has subsequently misunderstood how later generations can advance claims rooted in the past mistreatment of their forebears. In particular, a full consideration of the wrongful character of non-rectification needs to take account of the multiplicity of temporal points at which compensation could have been, but was not, paid, each with potentially significant consequences for the victims of injustice. This has relevance for what is owed to those who have been wrongfully denied compensation for wrongs that caused them direct harm, and can be extended to others, such as their direct heirs, who are likewise affected by non-rectification. This opens the door to the endorsement of potentially extensive contemporary claims on behalf of the heirs of victims of wrongdoing.

KEYWORDS: Compensation, compensatory justice, reparations, corrective justice, inheritance, historic injustice.

## 1. COMPENSATION AND INHERITANCE

This article advances a new justification for the claim that the descendants of the victims of past wrongdoing can inherit rights to compensation, even when it appears that they themselves have not suffered from the original act of injustice. This is a controversial idea. Such a claim, it may be thought, misunderstands the point of compensation, which is intended to make up for a

loss suffered by a particular individual. This means that a claim to compensation is personal: it is a right that the individual possesses to have a loss she has suffered repaired, rather than a property right in an object that can be bequeathed to another. A descendant of a victim of injustice might be able to make a claim if she herself has been harmed by an act of injustice, but that is different from saying she can inherit another's rights to compensation. Since the publication of Jeremy Waldron's 1992 paper "Superseding Historic Injustice", writers on the rectification of past wrongdoing have typically sought to separate two seemingly distinct ways of justifying contemporary obligations which do not attribute moral responsibility for wrongdoing to present day agents (see Waldron, 1992; Boxill, 2003; Butt, 2009). Though terminological usage varies, these can be described as involving compensation on the one hand, and restitution on the other. The first appeals specifically to counterfactual reasoning and asks two questions: are some currently living persons better off, and some worse off, than they would be in a counterfactual world where historic injustice did not take place? If so, is this sufficient reason to oblige some individuals to transfer some or all of their resources to make this world more like the counterfactual world where injustice did not occur? (Butt, 2009: chapter 4; Butt, 2012). Answering either question in the affirmative is likely to be contentious once any significant passage of time has passed, and so those seeking to advocate contemporary reparative obligations have sometimes sought to justify their arguments in a less controversial way, by maintaining, without direct reference to counterfactual calculations of harm and benefit, that some present day parties are in possession of property that properly belongs to others, and so should be returned (see Simmons, 1995; Butt, 2009: Chapter 5). The key idea here is that of inheritance: the claim is that there are present day individuals or groups who have inherited entitlements to the property in question, meaning that this property should be handed over to them. Though such an approach manages to sidestep at least some problems of counterfactual calculation, it seemingly narrows the range of cases of historic injustice which can be remedied to those where there is an extant material dimension of misappropriated and wrongly retained property. Janna Thompson expresses this idea as follows:

...an approach to reparation that appeals to inheritance... puts limits on what kinds of injustice can be the subject of claims. Claims have to be confined to demands for restoration of, or compensation for, expropriated possessions. Descendants can claim nothing in reparation for the murder, torture, abduction or maltreatment of their forebears, for the disrespect shown to them as persons, however large these injustices may loom in their thoughts about the past. (Thompson, 2002: 108).

On this understanding of our relation to the past, when an individual dies, her specific entitlement to compensation dies with her. The situation might be different in cases of wrongful exploitation, such as the slave trade or other forms of colonial domination, where the victims of injustice have actively been involved in productive labour of a kind which might plausibly be thought to give rise to property entitlements which can be bequeathed or inherited, even if these entitlements were not respected at the time (see Kershnar, 1999; Ypi, Goodin, and Barry, 2009). But the argument is harder to make when we look instead at particular non-material harms suffered by victims of injustice. Do such harms give rise to bequeathable entitlements in the same kind of way? Even if we were to accept that such entitlements were indeed generated historically, are there good reasons to think that they rest on a sufficiently robust form of property rights to persist many years later, even though they have not been in the possession of the present day parties who may be said to have inherited them? Various writers on this subject have sided with Waldron in concluding that the inheritance account can provide only a limited degree of support for contemporary claims to reparations, accepting that the passage of time means that, in many cases, the historic injustice in question has been superseded, and the rights of heirs fade away (Waldron, 1992: 15-20).

Recent writing on historic injustice, however, has suggested a way in which the harm and inheritance accounts might be brought together: the descendants of injustice might indeed themselves be the victims of an injustice, but not necessarily of the original act of injustice

which harmed their ancestors. The argument, instead, focuses on the subsequent failure by those responsible for historic wrongdoing to pay compensation to their victims. Might it be that these descendants would be appreciably better off in the present if compensation had indeed been paid in a timely manner? Concentrating on the fact that a failure to pay compensation itself constitutes an act of injustice seemingly gives us a way out of some of the problems posed by the first argument relating to harm caused by the original act of injustice itself (Boxill, 2003; Sher, 2005; Butt, 2006; Cohen, 2008). One commonly articulated issue in this context, for example, is the non-identity problem, which observes that the original act of injustice is likely to have had a significant effect on the identity of the modern day descendants, who would not exist had it not taken place (Parfit, 1984: 351-355). The existence of a given individual seems to hang on their having been conceived at a particular time, when a specific spermatozoon came into contact with a specific egg. Events which make significant differences to the progress of individual lives almost certainly mean that the children they subsequently conceive will have a different personal identity to those they would have conceived had the event not taken place. If a current day individual owes her very existence to a historic injustice, some ask, how can it be claimed that she been harmed by the event in question and is owed compensation? However, if, we hold that compensation should have been paid after the conception of descendants, then the non-identity problem does not appear to have such force.<sup>2</sup> Imagine a situation where a couple are the victims of injustice in a way that significantly affects their material welfare. They subsequently conceive a child, and then seek compensation for the wrongful harm they have suffered. This compensation is unjustly withheld. It now appears that there is a further individual who has had their interests wrongfully set back by an unjust action. If compensation had been paid when it should have been, that child may have grown up in an affluent, rather than an impoverished, environment. In particular, it is quite possible that the child would have inherited some or all of the compensation payment from her parents at the time of their death. Such an argument has the potential to demonstrate how a new generation can be pulled into the reparative reckoning. It does seem, however, that in making such an argument, we are in the field of complex counterfactual speculation. Who knows what would have happened if

compensation had promptly been paid? Is there any reason to think that this would have been passed on to descendants? It is easy to think that in many cases it would have been spent, quite possibly in ways which would have not left any tangible benefits for future generations. There is no way to settle this empirically. It is not a given that victims would have chosen to retain their compensation rather than spend it, or that they would have left it to their descendants rather than to others. Janna Thompson makes both these points in outlining Waldron's discussion of indeterminacy in relation to rectifying historic injustice. She suggests that for descendants to have a right to claim property that was taken from their ancestors, "they have to be in a position to demand what they would have received from their forebears if the injustice had not been done." The problem is that there is no way of knowing what, if anything, this might be:

Where human choice is involved, there is no fact of the matter. Even our best guesses about what people will do are often confounded. If victims of injustice had not been dispossessed, they might have disposed of their possessions in some other way. They might have gambled them away, made a bad investment, given them to someone else, or used them for their own projects. Even immediate descendants of victims have no right to assume that the property of their forebears would have been passed on to them if the injustice had not been done. The further the injustice recedes in time, the more choices that could have been made by intervening generations, the less credible this assumption. (Thompson, 2002: 111-2)

It seems, then, that significant doubt can be thrown on the claim that the descendants of victims of injustice have been harmed by the failure to compensate their forebears. It might be thought that we at least need an account of how to discount the possibility that they would not, in fact, have inherited any compensation at all, even in those cases where we think it likely, on balance, that, they would have.<sup>3</sup> This is the approach taken in scholarly literature on the subject. Such accounts typically imagine a compensation payment being made directly after the original act of injustice, and use this as the basis of a comparison of the real world with a

rectified counterfactual. This is, for example, the primary way in which George Sher has conceptualized the issue. In suggesting that the children of victims can be wronged after their conception by a failure to compensate their parents, he writes:

To see that it may well be true, we need only remind ourselves that if the wrong of not compensating the parent after the child's conception had not been done, the result would have been an improvement not only in the parent's level of well-being but also in the parent's ability to provide for the child. Hence, given only the uncontroversial assumption that improvements in the ability of parents to provide for their children are generally accompanied by improvements in what is provided, it follows that the child probably *would* have been better off if the wrong of not compensating his parent after he was conceived had not been done. (Sher, 2005: 193)

Sher goes on to argue that the fact that the failure to compensate the parent after the child's conception has "probably" made the child worse off means that "the child may well be owed some compensation for its effects". He argues that calculating this compensation is tricky, due in part to the difficulty in resolving "how much better off fully compensating the parent after the child's conception would have made the child in the normal course of events". He claims that we can only conclude with certainty that the child "is likely to be owed at least some compensation for the wrongful failure to compensate his parent after he was conceived" (Sher, 2005: 193). Bernard Boxill is more bullish about the likely harm caused to the descendants of the non-compensated, but again articulates his argument in terms of the effects of a childhood that takes place in a non-compensated context. He takes the case of two slaves, Beulah and Tom, who win their freedom but are not compensated for their unjust treatment, and subsequently conceive a daughter, Eulah:

At every point of their lives, they were entitled to seek reparation from the government... including the point just after the conception of their daughter, Eulah. At

that point and every succeeding point, it did not pay them what it owed them. This was a grave injustice to Tom and Beulah, but what is equally important here is that it certainly also harmed their daughter. As a direct result of it their daughter probably grew up in ignorance and straitened conditions, and in general with all the disadvantages of having a father and mother who had been enslaved and then prevented from recovering from the harms and disabilities of the experience, and never compensated for either injustice. (Boxill, 2003: 88)<sup>4</sup>

Lukas Meyer (writing with reference to Sher) argues in related fashion, considering the case of a failure to compensate the descendants of persons wrongfully expelled from their homeland:

[T]he harm done to them can be understood in accordance with the common understanding of harm: If those entities which stand under the obligation to provide compensation to the first generation of displaced persons do not (entirely) fulfill their obligations, they thereby harm the descendants of the first generation of displaced people by making those descendants worse off than they would otherwise be — i.e., if (sufficient) compensation had been provided by the first generation. This line of argument can be extended to the second, third, fourth etc. generation: generation X of displaced people would be fully compensated for the harm done to them were it the case that as a result of compensation undertaken the people of generation X are as well off as the people of this generation would be if the first generation of displaced people had received the compensation they were entitled to. (Meyer, 2010)

So the model is one whereby we considers a one-time failure to compensate the parent, typically immediately after the conception of the child.<sup>5</sup> Sher's aim here is to find a way round the non-identity problem, but the way the argument is set up leads naturally to the suggestion that the greater the passage of time that passes after the original act of injustice, the lesser the need for compensation (a conclusion that Sher explicitly endorses).<sup>6</sup>

In my view, this understanding of the relation between inheritance and compensation is mistaken. Such an approach fails to apprehend the full significance of the claim that a failure to rectify an act of injustice itself constitutes an act of injustice. When this is combined with an appreciation of the key role played by inheritance in the argument for harm caused by failure to pay compensation, it is possible to build a robust account of the rights of descendants, that can disregard a claim that had compensation been timely, it is probable that it would not have been received by the descendants of victims. To construct this argument, in section 2 I address the question of how we assess the harm that a victim suffers by a failure to receive due compensation, by thinking about relatively simple two-person cases, involving just wrongdoers and victims. Section 3 examines how such a failure then impacts on other parties, such as subsequent generations.

## 2. WHY THE TIMING OF RECTIFICATION AFFECTS THE LEVEL OF COMPENSATION: TWO-PERSON CASES

If X wrongs and harms Y, X acquires a duty to restore the moral balance between the two by compensating Y for the losses she has suffered as a result of her actions. As noted previously, a failure so to act constitutes a fresh injustice against Y, and as a result, X is liable for the costs associated with her failure to act in accordance with her moral obligations. One way to express this idea is to say that X should compensate Y both for the original loss caused by the initial wrongdoing, and for the opportunity cost borne by Y in lacking the resources which should have been paid to her in compensation following the initial wrongdoing. Calculating this opportunity cost is not at all straightforward. As is commonly recognized in the literature on compensatory justice, the passage of time complicates the question of how much compensation should be paid in connection with the original wrongdoing, as it can become difficult to know what aspects of an individual's life should be seen as a consequence of the wrongdoing for which the offender should bear responsibility, and which are instead properly ascribed to the choices of



the victim themselves. George Sher, for example, refers in this context to the “automatic effects” of injustice, and denies that a wrongdoer need necessarily be held responsible for all outcomes which arise, in a causal sense, from the original wrongdoing, if the victim can fairly be held responsible for at least some of her own actions or omissions, even if we accept that they would not have occurred were it not for the original injustice (Sher, 1981: 12-13; see also Waldron, 1992: 9). What has not been satisfactorily explored is the way in which the ongoing agency of the offending non-rectifying party further complicates this matter. Following an unrectified act of harmful wrongdoing, the victim lives in an ongoing context of injustice, where the offender continues to act unjustly towards her. The victim is continually wronged as, at each point following the act of injustice, she does not have access to resources which she should have received. This means that, at each point, she lacks the opportunity to utilize these resources in her life projects. There is a resulting multiplicity of ways of characterizing the loss that she has suffered as a result of the failure of the wrongdoer to pay compensation, and so a multiplicity of counterfactuals that could be invoked in order to calculate what is due to the victim in compensation. Significantly, the point which is chosen can make a big difference to what we deem the offender to owe the victim, as the level of compensation due varies at different points following the wrongful act.

Consider, for example, the following two-person examples. Victim A is wronged and harmed immediately before she is about to start a medical degree at university, being injured in a hit and run accident and requiring expensive hospital treatment. Had the harm been rectified straight away and compensation paid by the wrongdoer, she would have been able to start her course. (Imagine, for example, that there was a window of three months where this could have taken place.) Instead, the failure to pay compensation has the effect of aggravating the original injury. Unable to take up her university place, she takes a less satisfying and less well-remunerated job. Had compensation been paid directly after her injury, she would now be significantly better off than she is in her current state. There is a straightforward sense in which we can say that she has twice been the victim of injustice – once for her original injury, and

then once for the subsequent failure to pay compensation immediately after the wrongdoing. If she is to be fully compensated in the present day, it is clear that much more is needed than the original sum of money which would have sufficed in the window of opportunity following her accident and before her university course started. We should calculate what she is due in the present by comparing her actual state with that which she would have been in had compensation been paid in a timely fashion. In this particular example, this is effectively the same as the state which she would have been in had the original wrongdoing never occurred.

In the second example, however, Victim B is a gambler, who regularly loses all the money available to him. Suppose that we hold that he is also due compensation for a harm suffered, which the offender has refused to pay. Ten years pass. Throughout this period, he persistently requests compensation, but this request is refused. After ten years, can he plausibly maintain that he is a victim of injustice? Suppose that we accept that if the compensation had been paid, it would almost certainly no longer be in his possession: he would have lost it gambling. (Perhaps he saves up all the money he has in a given year, and places it on the number 13 on a roulette wheel on each birthday. Every time he has done this for the last ten years, he has lost.)<sup>7</sup> It seems highly probable that had the money been paid, he would be no better off in material terms than in his current position.<sup>8</sup> If we imagine a situation where compensation was paid immediately after the act of injustice, and ask whether he is now worse off or better off than he would be had the compensation been paid, it might appear as if there is no need for compensation to be paid at all. But this is to mischaracterize the nature of the ongoing injustice which he has suffered. He is not simply the victim of injustice for the one-off failure to pay compensation ten years ago, he is also the victim of injustice for the ongoing refusal to pay compensation ever since this point. Imagine that ten seconds before he places his first annual gamble, he requests that his compensation be paid. The request is denied. He gambles, and then ten seconds later again demands his payment. Is there any reason to think that the act of gambling the money in his possession means he is no longer entitled to compensation? It does

not seem so.<sup>9</sup> If this is the case, it is not clear why ten years, rather than ten seconds, should make any difference to this claim.

It might be thought that the length of time of non-possession here is, in fact, of moral relevance. Jeremy Waldron, for example, has argued that the non-possession of property does make a difference to one's entitlement to property, maintaining that entitlements depend on the property in question playing a particular kind of role in the life of the individual, in a way which is only possible if the individual is able to possess and rely upon the property in question (Waldron, 1992: 18-19). It is important to appreciate, however, that this argument does not apply to this case. This is not a situation whereby an individual has an item of property which, for example, she loses and does not see for a number of years, but which another innocently finds, and makes a central part of her life. Rather, the failure to pay compensation is an active and ongoing wrongful harm, which continually fails to advance the interests of the victim. We are not speaking here of compensation for past injustice. Rather, we are discussing compensation for the ongoing, rolling refusal to pay compensation for past injustice. The ongoing agency of the party refusing to rectify means that the clock is continually reset.

The level of compensation owed, then, differs according to how we conceptualise the failure to pay compensation. If we assume that the wrong is straightforwardly that of refusing to pay directly after the act of injustice, we have one counterfactual. In some cases, however, determining the level of compensation by reference to this temporal point lets the wrongdoer off the hook, by not taking sufficient account of the fact that she has continued to refuse to pay compensation beyond this point. The non-payment of compensation, then, complicates the counterfactual element in compensatory justice more than has been hitherto recognized. It is not just the case that there a multiplicity of possible states in which the victim might be had the act of injustice taken place. We must also take stock of the multiple different points at which compensation could have been, but was not paid – each with a potentially significantly different effect on the life of the victim. Every day, indeed every moment, following the act of

injustice is a possible point where compensation could have been paid, and payment coming at different points (when the victim was dissuaded from buying shares in what was to become a successful company on account of her low levels of cash reserves; when the victim was about to put her life savings into a doomed business venture, and so forth) could plausibly have had clearly differential impacts on her well-being. Which of these possible points in time should be the baseline for the calculation of the level of compensation which is owed? There are three significant points that might be nominated: <sup>10</sup>

1. Point of initial harm: calculate the level of compensation due by working out what was due at the original point of wrongdoing, and carrying forward this amount to present (with added interest).
2. Point of payment of compensation: calculate the level of compensation due by working out what is due at the point at which the wrongdoer seeks to pay compensation.
3. Point of highest harm: calculate the level of compensation by identifying the point or points at which compensation would have had the maximum benefit for the victim.

My argument in this section is that (1) is the minimum which is due in contexts where the non-payment of compensation represents an ongoing wrongful act on the part of the offender. This is because the initial non-payment of compensation effectively creates a monetary debt owed by offender to victim. This debt can go up in circumstances where we hold it to be fair to say that the non-payment of the debt has led to greater harm to the victim. It cannot, however, go down, even in circumstances where the original act of injustice is no longer as harmful to the victim as it was at the point where compensation was originally due. Allowing approach (2) would permit this possibility, but it is this move which understates the ongoing agency of the offender. Instead, approach (2) is appropriate in cases where a third party who is not guilty of wrongdoing in relation to the victim, such as the state, is seeking to compensate her for the initial harm she suffered at the time of the original act of wrongdoing. In such a context, it is legitimate to ask in a straightforward way how the victim's state of well-being is in comparison

to a state where the original act of injustice never took place. If, for example, the third party concludes that though the victim was initially harmed she has now recovered, and is in fact perhaps now even better off as a result of the wrongdoing (perhaps she wrote a best-selling book about her experience), it would be reasonable to conclude that she does not need to be compensated. Such a move, however, is not available to the offender, since the offender's wrongdoing is not limited to causing the original harm to the victim, but also extends to not paying the compensation that was due after the initial harm. Once this compensation is not paid, the victim is harmed in the same way that a debtee is harmed by a debtor's wrongful refusal to repay a loan. In such a context, the debtor's debt persists, and it may go up, if the debtee suffers further losses as a result of the debtor's non-payment.

Can we go further than insisting that at least compensation judged at point (1) is due to the victim, and affirm the maximal advantage to victim model described under (3), which would, of course, necessarily include (1)? There is a case for doing so. If it is indeed the case that we believe that a victim has suffered further losses as a result of the non-rectification of injustice, the offender cannot complain if she is held accountable for these losses. In failing to act upon her rectificatory duties, the offender leaves herself open to considerable moral risk, since there is always the possibility that the non-payment will have some very serious effect on the victim. This kind of risk is a familiar feature of cases where wrongdoing causes unanticipated levels of harm to victims: if I wrong another, and my wrong causes more harm than I expected, my obligations to the victim are typically not limited to compensating her up to the point of harm which I expected my actions to cause. The tort law principle that holds that "those who use violence on other people must take their victims as they find them" (*R v Blaue*, 1975) reflects this claim, for example, which is commonly illustrated by the argument that an assailant who assaults an innocent party and then discovers that the victim suffers from a rare medical condition, such as having a skull with the fragility of an eggshell, should nonetheless pay for the victim's potentially expensive medical costs (for general discussion see Hart and Honoré, 1985). The desirability of enshrining such a principle in law is debatable, but it has obvious normative

appeal: there is a cost in this case which must be borne by someone, and the wrongdoing of the assailant provides us with a sufficiently good reason to shift this cost from victim to wrongdoer.<sup>11</sup> The same principle is at play in cases of unrectified wrongdoing, where the act of non-rectification, following on from the original wrongdoing, causes the wrongful harm. If I secretly sabotage my neighbour's fire extinguisher, I put her life in serious danger. I damage her property and have a duty to repair the extinguisher. Leaving the extinguisher unrepaired is evidently an ongoing wrongful act, and one which could have very serious consequences if there were to be a fire in my neighbour's house. I may suddenly find myself liable, in such circumstances, for massive compensatory costs, that far outweigh what I would have owed after my initial wrongdoing, but prior to the fire. Suppose, then, that I steal £100 from you, and repeatedly refuse to return it to you. There is an obvious sense in which the ongoing refusal may be more harmful than the original misappropriation: you may see my actions as disrespectful, and your resentment may have a much more significant effect on your life than the harm caused by the original loss. But in addition, I leave myself open to the possibility that you may end up in a situation where the lack of £100 causes a much more significant loss to you. If this does happen, then my failure to pay the £100 will potentially constitute a serious harm which leaves me open to much more substantial rectificatory obligations. This cost will have to be borne by someone, and since it stems from my morally culpable actions, it should not be left to fall where it lies, but should be transferred to me. Each new day when those with rectificatory obligations fail to pay compensation is a day when they may find themselves responsible for a further, related harm befalling their victim, and if this does happen, it is they who should bear this cost.

There are, then, some contexts where (3) seems to be the correct approach, and where it seems right for the victim to choose the point at which the failure to compensate caused them maximum disadvantage, and maintain that they should be compensated for the failure to pay compensation at this specific point and thereafter, for it is true that at this specific point they suffered a particular harmful injustice at the hand of the offender. Imagine a case where M fails

to pay compensation to N over a ten year period. Five years into this period, N drunkenly burns down her uninsured house, destroying all the property in her possession. Clearly, at the end of the ten year period, N would be ill-advised to characterize the injustice of M's actions as a failure to pay compensation the night before the fire, since in all probability the payment would have been lost. However, M's ongoing failure to remedy the situation means that N can instead point to the period directly after the fire, when she was destitute and in great need of money, was owed money by M, but where M refused to act in accordance with justice. The foregoing argument notwithstanding, however, there are some contexts where picking the point of maximal harm to the victim seems problematic. One difficulty here is that knowledge of such a feature of compensatory justice would allow a victim to game the system, and rack up massive entitlements to compensation. Suppose you are wrongfully refusing to pay me £10 which you owe me in compensation. Every day, I send you an email. The email contains two buttons: one marked "Yes, I will pay compensation", the other marked "No, I refuse to compensate". If you click the first, ten pounds is automatically deducted from your account, and a bet is placed at an online bookmaker's at odds of 20/1. If you click the second, nothing happens. Suppose that every day, you click the second button. Sooner or later, the 20/1 bet will come good, and at that point, I will be able to argue that your specific act of wrongdoing that day in refusing to compensate me has left me £200 worse off. The email you receive the next day has the same two buttons, but now I request that you place the £200 you owe me on the 20/1 bet. Clearly, if you continually refuse to pay, your debts will mount up considerably! Confronted with this sort of example, we have two choices. We can bite the bullet, and accept that non-rectifying wrongdoers are liable when their victims are prevented from making hypothetical winning gambles, but cannot offset the losses from hypothetical losing gambles against these winnings. Alternatively, we can hold that all that is owed in such cases is the opportunity cost of the gamble: so the stake, rather than the winnings. Neither solution is ideal: intuitively, we want a solution that does not allow for gaming of this sort, but which is also sensitive to the idea that victims may lose out significantly from being unable to make life chances with risk attached, but for which they would have been well-placed had it not been for the unjust actions of others.

Such problems are not unique to our current topic as they are general dilemmas in compensatory justice, which arise, for example, in situations where a victim is denied a chance to gamble by an initial act of wrongdoing. (If I steal a pound from you, which you were about to spend on a winning lottery ticket, do I owe you £1, or the millions you would have won had I not acted unjustly?) A full resolution to this question is not necessary for the topic in hand, however: for now, all that matters is that it is accepted that once the offender has failed to pay the initial degree of compensation, the debt can go up but it cannot go down. This is in itself sufficient to launch a robust model of rights to compensation for the descendants of victims of injustice.

### 3. COMPENSATION AND THE NEXT GENERATION: THREE AND FOUR-PERSON CASES

It was previously noted that standard accounts of how the failure to pay compensation can harm the descendants of victims employ a counterfactual which assumes that the harm which they suffer is that of compensation not being paid directly after the original act of injustice. The foregoing argument relating to the timing of compensation shows that this need not be the case. The two-person examples employed up to this point demonstrate how the level of compensation owed to a victim can vary depending on the point of time we employ in calculating the harm caused by the non-fulfillment of rectificatory obligations. However, these two persons, wrongdoers and immediate victims, are not the only persons affected by the ongoing injustice of non-rectification. When we expand the two-person case to include third parties, we can see that it is possible to consider the effect on descendants of a failure to pay compensation to their forebears immediately prior to their forebears' death. This has significant implications for the descendants' entitlements.

Imagine the following: person A seriously wrongs person B, injuring her so that her quality of life is permanently impaired. It is straightforward to maintain that A owes B significant compensation. In theory, this should seek to repair the damage that A has inflicted upon B. So,



imagine that there is a pill that B can take, which will totally eliminate the effects of A's actions. This pill is very expensive, and B cannot afford it. A, however, is wealthy, and could easily pay for the pill. A clearly has a duty to pay for the pill on B's behalf. This duty obtains as soon as A inflicts injury upon B, and is the minimum which A owes to B: there may also be further duties owing from the upset B experiences as a result of her experience. What happens if A does not immediately pay for the pill? The injustice is straightforwardly exacerbated: for every day that B suffers avoidable pain which could be eliminated were A to fulfill her rectificatory duties, the injustice visited upon B becomes worse and worse. This means that, as time passes and A fails to act in relation to B, her wrongdoing gets worse and worse. A no longer owes B simply the amount of money which would pay for the pill – this is what was owed at the time of the injustice - but with every day that passes, B suffers pain and discomfort which itself stands in need of compensation. This compensation will not be directly related to B's pain in the same way as the pill is related to B's pain. There is no way that compensation can cancel out the pain which B has suffered in the sense of bringing it about that B is not a victim of unjust pain suffering: this has occurred, and is a fact of history. Rather, the purpose of compensation here is to provide a counter-balance to this pain. Ideally, it should leave B indifferent between a state where she experienced no pain, and one whereby she both had the pain but also has some separate benefit.<sup>12</sup> So, if A agrees to pay for the pill five years after the original act of injustice, there is still the matter of the pain which B has experienced for the preceding five years. Let us imagine that £10,000 represents a fair amount of compensation for these five years of pain. Suppose, however, that A refuses to pay the money. B develops an unrelated terminal illness. Now we introduce a third party. On her deathbed, B calls for A, and begs A to pay her the money that she owes her, so that she can leave it in her will to her daughter, C. A refuses, and B dies uncompensated. What should we say about the rights of C in this case?

This article maintains that C is entitled to the £10,000. There are two ways that this argument might be made. The first is simply to maintain that she has inherited an entitlement to the £10,000: that the rights violation of B gives rise to a bequeathable entitlement which does not

die with her. Alternatively, one can argue that she has been harmed by her failure to inherit the £10,000, which should have been paid immediately prior to B's death. These may on the surface appear to be rather different arguments, stemming from the previously distinguished harm and inheritance accounts. In this type of case, however, it seems that either approach leads to the same conclusion. The two are, in this instance, intimately related, since a failure to pay compensation to which another is entitled is itself a harmful act of injustice which gives rise to compensatory obligations. From the moment of B's death, for as long as C does not receive payment from A she is herself a victim of injustice, and so the ongoing character of A's wrongdoing is preserved.

This conceptualization of the nature of an ongoing failure to compensate reconfigures how the claim that contemporary parties can inherit an entitlement to compensation is normally made. As stated previously, writers such as George Sher have modeled the harm that descendants have suffered by means of comparison with a counterfactual whereby their parents were compensated after the point of their conception. One can see why this point is chosen if one's aim is merely to circumnavigate the non-identity problem, but there is no reason to think that non-payment of compensation at this point is the only, or the most relevant, point at which the child is harmed. Speaking of "the wrongful failure to compensate his parent after he was conceived" obscures the fact that the ongoing failure to pay compensation both before and after the point of conception is all part of the offender's continuous wrongdoing. From this perspective, ongoing non-rectification constitutes a worsening and deepening of the original act of injustice, and potentially leaves the agent responsible for non-rectification with reparative obligations that increase, rather than decrease, with time.

This has clear relevance to the main argument of this article. The point directly prior to the death of the victim is likely to be an obvious point for determining what compensation is due to the heirs of victims of injustice, since it enables them to characterize their disadvantage in terms of their failure to inherit the compensation that should have been paid to the victim, and

minimizes the degree of counterfactual speculation which enters into the account. It is true that inheritance plays a role in this account, but nothing need be assumed about whether a given agent would have been likely to have received the compensation payment as a bequest in the situation where the payment was made immediately after the act of injustice. Rather, the relevant question is whether they would have inherited the compensation had it been paid immediately prior to the death of the victim. Of course, this question still needs to be answered affirmatively if a claim for inherited compensation is to be plausible. It may be thought that this again introduces counterfactual speculation into the argument. How can we know who would have been bequeathed the compensation had it, in fact, been paid and bequeathed? There is an issue of sorts here, and one could certainly imagine situations where this could be problematic, but the problems to which it gives rise are easily overstated. In the majority of cases, the identity of a given victim's rightful heirs will be perfectly obvious: the set of people who receive that part of her estate which is in her possession at the time of her death. Doubtless complicated questions will arise as to the proper distribution of payment in cases where there are multiple such heirs, but unless there is a particularly strong reason to think otherwise, the most reasonable assumption is that the entitlement to compensation is passed on along with the rest of the estate.<sup>13</sup>

The move from two-person to three-person cases, then, has the potential to allow compensatory claims to span across generations, allowing the heirs of victims effectively to inherit rights to reparation. Even the three-person case, though, is limited in contexts which lie some distance in the past, since it rests upon the agent possessing rectificatory obligations to both victim and heir being the same person. It should be clear, however, that it would be reasonably straightforward (though beyond the scope of this article) to construct a four-person case, allowing not only entitlements to, but also responsibility for, the payment of compensation to pass from one generation to the next. Inheritance is again the key idea here. If we accept that a given individual possesses a duty to pay compensation to another, there is no reason to assume that this lapses in the event of the death of the duty-holder. Suppose we

accept that, in the example above, A has a duty to make a payment of a given sum of money to B. A dies, and leaves her estate to D. So long as it is the case that the sum of money that A has left to D is greater than the debt which A owes to B, there seems no good reason to deny the claim that D has inherited the debt to B along with the rest of A's estate: this is essentially just a liability which must be discharged before D is morally entitled to take possession of the property bequeathed to her. If this is accepted, then it does not matter if A dies with an unfulfilled obligation to B (the original victim) or to C (the subsequent victim): if we accept that A has an unpaid debt to either, and if D inherits from A an estate greater in value than this debt, then it seems relatively straightforward to maintain that the debt should be paid. Things are certainly more complicated if the value of A's estate does not exceed the debt owed to B or C. The debt can only be said to have been inherited in a straightforward way if the inheritance is a net benefit to D: if it is not, a further argument would be needed to hold D liable for A's unpaid debts (for relevant discussion, see Gosseries, 2004; Miller, 2007: 135-161). Such a claim would be beyond the scope of this article: it is sufficient for present purposes to note that an acceptance of the possibility of inheriting debts to victims in situations where one's overall inheritance is greater than the value of the debt allows for the possibility of valid compensation claims stretching across multiple generations.

#### 4. CONCLUSION

This article has argued that conventional accounts of compensatory justice in general, and of the inheritance of rights to compensation in particular, have understated the importance of the ongoing agency of the wrongdoer who refuses to put rights wrongs for which he or she is responsible. It may be that the reader finds some of the conclusions outlined above, and in particular the potentially demanding duties which they place on offending parties, counter-intuitive. This is understandable. It is commonly, and correctly, held that the passage of time often has the effects of lessening the effects of past wrongdoing. Many wounds, both physical and mental, heal with time. Many people are able to put their past suffering largely to one side,

and manage to get on with their lives, even in contexts when they have suffered grievous wrongdoing. Of course, this is not true in all cases, and the suffering and relative disadvantage of some victims gets worse, not better, with time. Regardless, it is important not to confuse the question of whether the condition of the victim is improving or deteriorating with the question of whether the offender's wrongdoing is increasing or lessening. Regardless of the answer to the first question, in a context of unrectified injustice, there is a sense in which an offender's wrongdoing is always increasing, because, straightforwardly, in refusing to rectify injustice they are adding new wrongful actions to their previous misdeeds. It may be in some cases that the severity of wrongness of their actions is less bad than was the case for their original misdeed, though, in some cases, the failure to rectify may constitute a worse act of wrongdoing. Regardless, in refusing to put right their wrongs, offenders necessarily worsen their position from a moral point of view. It is striking that this seemingly obvious fact has received scant treatment until recently in writing on past wrongdoing. The conclusion is that there is a real danger of complacency on the part of offenders that their rectificatory duties have lapsed with the passage of time, whereas my argument suggests that in many cases, the opposite may well be true. Historic injustice may well be a matter of history, but the patterns of disadvantage and suffering which have resulted in many parts of the world from the ongoing refusal of those responsible for past wrongdoing to comply with their rectificatory obligations are very much features of the contemporary world, and they cry out for redress.

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<sup>2</sup> This is not to imply that the non-identity problem does have force if this approach is not employed: I argue against such a position in Butt (2009), Chapter 4. The point here is rather that the approach in question does not need to engage with the non-identity problem, and so the question of whether or not the non-identity problem has force is, in this context, moot.

<sup>3</sup> Some, indeed, have suggested that the very possibility – not even the probability – that compensation may not have been bequeathed is sufficient to undermine the claims of descendants. Andrew I. Cohen outlines this position in outlining the “voluntarist objection” against the inheritance of rights to compensation: “If X wrongfully harms Y and Y is thereby unable to contribute to some improvement in Z’s welfare, has X also wrongfully harmed Z? According to what I call the *voluntarist objection*, the answer is no. Specifically, the objection is that, in the case of reparations to a victim who later has children, the claim to compensation is the parent’s and not the children’s. On this objection, transgressors are not liable for third-party welfare setbacks that depend on an intervening agent’s will. The parent (the transgressor’s original victim) has the right to dispose of the commodities she never received from the transgressor. The child’s unrealized welfare gain would not compound the liability of the parent’s transgressor. It is not a compensable welfare setback but a sort of “windfall loss.” (Cohen, 2008: 85-6.) As will become clear, this article rejects this voluntarist position, and holds that some instances of third-party welfare setbacks should indeed be seen as compensable, rather than windfall losses. Adopting the voluntarist position in relation to the cases discussed later in the article, where the failure to pay compensation immediately prior to the death of an individual who leaves their estate to another significantly sets back the interests of this other agent, results in what I take to be highly counter-intuitive conclusions. It might be noted, in any case, that it is not clear what reasons should be taken as supporting the voluntarist position: what is the justification for the claim being advanced here? It is quite true that wrongfully harming an individual will typically set back the interests of a wide range of individuals, and that both the legal and moral theory of compensation needs to limit the liability of offenders in such cases, but this valid point does not lead to the further conclusion that third-party welfare setbacks that depend on an intervening agent’s will are necessarily non-compensable, regardless the degree of probability which we attach to our judgement of how the intervening agent would have acted in the absence of injustice,

<sup>4</sup> Boxill combines this account of counterfactual harm with a property-based account of inheritance which allows individuals, subject to certain conditions, to inherit compensation payments which should have been paid to their

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ancestors. He does not, however, consider the particular mechanism with which this article is concerned: specifically, the harm which is caused to those entitled to inherit by a failure to pay compensation.

<sup>5</sup> For a further characterization with this form, see Cohen, 2008: 83-4.

<sup>6</sup> In “Transgenerational Compensation”, Sher describes the reasons for this as being independent from the ongoing injustice argument, and refers the reader to his discussion in “Ancient Wrongs and Modern Rights” (1981). This argument holds that the longer the passage of time following an act of injustice, the more it will be the case that individuals’ welfare levels will be the result of choices for which they bear responsibility, rather than the automatic effects of the act of injustice in question. Meyer summarises Sher’s view as follows: “the strength of later generations’ claim to compensation — owing to the failure of providing sufficient compensation to the first generation that suffered the initial harm — may wane over time. The more the descendants’ well-being can be attributed to actions or inactions for which they themselves or members of the intermediate generations are responsible, the less the hypothetical state of affairs that would obtain had the direct victims received adequate compensation is relevant for the determination of the claims of the indirect victims” (Meyer, 2010). I discuss the issue of the automatic effects of injustice in Butt (2009), Chapter 4, but it should be clear that this conclusion is only sustainable if one assumes that the failure to compensate is a one-off event. Boxill does not make this assumption and explicitly does not accept that the saliency of historic injustice wanes over time, and consequently his account is much closer to my own.

<sup>7</sup> B’s gambling habit, of course, might be taken to provide a reason as to why the debt should not be paid, if it was held that doing so would not be in B’s interests: it is assumed here that this is not A’s motivation. Whether a debt should in fact be paid in contexts where doing so is likely to be harmful to the person to whom the debt is owed is a difficult question which is beyond the scope of this article, but even if it is felt that the money should not straightforwardly be handed over to B, there are other courses available to A other than just keeping the money for his own benefit, such as putting the money into a trust fund or using it to benefit B in some non-monetary fashion.

<sup>8</sup> This is not to deny that he might have suffered non-material losses as a result of his inability to gamble. One way in which he might have been better off is that he would have had the slightly dubious pleasure of gambling and losing: for the sake of the example, we might specify that he is actually happier not gambling than he is gambling and losing. There might be further losses stemming from the lack of autonomy that B has been able to exercise over the course of his life, as distinct from the degree of pleasure which he experiences when gambling, though this kind of loss is admittedly harder to fit into a compensatory justice framework.

<sup>9</sup> There is an asymmetry here in terms of the risks borne by offenders and victims which may seem counter-intuitive until we remember that the offender has chosen to perpetuate the situation by failing to fulfill her obligations. By withholding payment, the wrongdoer insulates the victim from any risk as to what might have happened had compensation been paid.

<sup>10</sup> I am grateful to a reviewer for *Ethical Perspectives* for suggesting this typology.

<sup>11</sup> It might be that we believe that liability in such cases should be limited, such that once unanticipated costs pass a certain point they should either be left to lie where they fall, or should be borne by some collective, such as society



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as a whole. This can be fitted into my argument, which would then maintain that a wrongdoer who fails to rectify wrongdoing which then has unanticipated consequences should pay costs up to the point where the liability limitation kicks in. It should be stressed that this potential restriction only applies to the unanticipated consequences of not rectifying wrongdoing: when the consequences are predictable, the wrongdoer has no such defence.

<sup>12</sup> This should not be expressed in terms of B being indifferent between not being wronged and between being a compensated victim of injustice. It is perfectly reasonable for B to maintain that she would have preferred not to have been a victim of injustice even if the compensation she has received leaves her better off in an all-things-considered sense than she would have been had the injustice not occurred.

<sup>13</sup> I further discuss the appropriateness of assuming that the heirs of victims are entitled to inherit the entitlements of the victims in Butt (2009), Chapter 5. Should it be thought that this raises serious questions, it might be instructive to reflect on the following two questions: 1) What should happen in cases where a victim explicitly writes a will stating that she wishes the compensation that should be paid to her to go to her heirs? 2) Do we really believe that something different to what happens in (1) should occur in a case where a victim leaves her entire estate to a given individual, but makes no specific reference to compensation which she was due at the time of her death in her will?