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Responsibility for Historical Injustices: Reconceiving the Case for Reparations

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Abstract

The twentieth century ended with the vindication of many of its most mistreated victims' cries for reparation.² Holocaust survivors retrieved over \$8 billion in assets frozen in bank accounts or looted by the Nazis;³ Japanese Americans interned during World War II received compensation from the U.S. government;⁴ Chile compensated descendants of Pinochet's victims;⁵ Japan redressed Korean "comfort women";⁶ and Canada paid damages to Aboriginals for forced assimilation of their children.⁷ Absent from the list was the longest suffering and most visible of groups seeking repair - African Americans.⁸

Disciplines

Civil Law | Civil Rights and Discrimination | Human Rights Law | Indian and Aboriginal Law | Law | Legal History | Torts

Responsibility for Historical Injustices: Reconceiving the Case for Reparations

Amy J. Sepinwall*

I. INTRODUCTION

“We will have to repent . . . not only for the vitriolic words and actions of the bad people, but for the appalling silence of the good people.”¹

The twentieth century ended with the vindication of many of its most mistreated victims’ cries for reparation.² Holocaust survivors retrieved over \$8 billion in assets frozen in bank accounts or looted by the Nazis;³ Japanese Americans interned during World War II received compensation from the U.S. government;⁴ Chile compensated descendants of Pinochet’s victims;⁵ Japan redressed Korean “comfort women”;⁶ and Canada paid damages to Aboriginals for forced assimilation of their children.⁷ Absent from the list was the longest suffering and most visible of groups seeking repair – African Americans.⁸

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¹ Martin Luther King, Jr., *Letter from Birmingham City Jail*, in *REVOLUTION AND THE RULE OF LAW* 12, 21 (Edward Kent ed., 1971).

² See generally Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 *COLUM. L. REV.* 689, 696-98 (2003) (presenting a very helpful overview of reparations movements in table form); Irma Jacqueline Ozer, *Reparations for African Americans*, 41 *HOW. L.J.* 479, 480 (1998).

³ STUART E. EIZENSTAT, *IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II* (2003).

⁴ Civil Liberties Act, Pub. L. No. 100-383, 102 Stat. 903 (1988) (codified at 50 App. U.S.C. § 1989b-1); Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 *B.C. L. REV.* 477 (1998).

⁵ Posner & Vermeule, *supra* note 2, at 696 n. 22.

⁶ George Hicks, *The Comfort Women Redress Movement*, in *WHEN SORRY ISN'T ENOUGH* 113, 124 (Roy L. Brooks ed., 1999).

⁷ Pamela O'Connor, *Squaring the Circle: How Canada Is Dealing with the Legacy of Its Indian Residential Schools Experiment*, 28 *INT'L J. LEGAL INFO.* 232, 251 (2000).

⁸ Opponents of reparations often argue that repair has already been conferred through the pledge of forty acres and a mule, the adoption of the Reconstruction Amendments, or the promise of affirmative action. The promise of forty acres and a mule was largely apocryphal. Special Field Order No. 15 did

Embarrassed by the satisfaction of these other victims' claims, opponents of Black reparations are left to find a legitimate ground upon which to distinguish the claims of contemporary African Americans. To this end, they construe the 140-year-long failure to offer repair not as the egregiously lengthy omission that it is, but instead as the feature that would render moot any entitlement to redress.⁹ Thus, the common rejoinder to pleas for Black reparations has opponents protesting that they never owned slaves, and so they should not be made to pay for those who did.¹⁰

state that land would be allotted for settlement by the freed Blacks, with forty acres the *maximum* lot size per family. The word "mule" never appears in the Field Order, nor does any other language suggesting that the freedmen would receive materials to assist them in cultivating the land. The Field Order was effectively rescinded by President Andrew Johnson, who returned the land to confederate soldiers in an attempt at national reconciliation. See, e.g., Alberto B. Lopez, *Focusing the Reparations Debate Beyond 1865*, 69 TENN. L. REV. 653, 654 n.8 (2002). The Reconstruction Amendments have been undermined, if not entirely eviscerated, by judicial opinions that largely robbed them of their transformative potential. See, e.g., Benno C. Schmidt, *Principle and Prejudice: The Supreme Court and Race in the Progressive Era, Part I: The Heyday of Jim Crow*, 82 COLUM. L. REV. 444, 461-72 (1982). And affirmative action has assisted white women and wealthy minority members more than poor Blacks. See, e.g., Suzanne Fields, *An Attempt to Buy Racial Justice Cheap: Many blacks, women see affirmative action as a psychological obstacle*, ATLANTA J. & CONST., Mar. 13, 1995, at 6A (describing "white women" as "the biggest beneficiaries of affirmative action"); Tung Yin, *A Crabolic Some Ball for the Nineties: Class-Based Affirmative Action*, 31 LOY. L.A. L. REV. 213, 226 (1997) (reviewing RICHARD D. KAHLENBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* (1996)) (describing Kahlenberg's view that class-based affirmative action would be superior to race-based affirmative action because the latter "currently benefits affluent Blacks" while leaving the most disadvantaged African Americans in poverty).

Indeed, the irony appears to be that the success of some of these other reparations movements derives at least partially from the as-yet-unsuccessful African American reparatationist platform. Charles J. Ogletree, Jr., *Addressing the Racial Divide: Reparations*, 20 HARV. BLACKLETTER L.J. 115, 118 (2004). And, the failure to offer reparations to Black slaves appears downright perverse in light of the fact that some slave owners were compensated by Congress when their slaves were freed! See Alfred L. Brophy, *The World of Reparations: Slavery Reparations in Historical Perspective*, 3 J.L. SOC'Y 105, 109 (2002).

For historical descriptions of the Black reparations movement dating back to Emancipation, see Lee A. Harris, *Political Autonomy as a Form of Reparations to African Americans*, 29 S.U. L. REV. 25, 29-33 (2001). The movement has not been entirely without success. State legislatures in Louisiana and California, as well as city councils in D.C., Detroit, Cleveland, Chicago, and Nashville, have all passed resolutions in support of reparations. See generally Adjoa A. Aiyetoro, Comment, *The Development of the Movement for Reparations for African Descendants*, 3 J.L. SOC'Y 133, 139 (2002). Nonetheless, none of these resolutions has yielded a program of repair. Moreover, since the harm for which repair is owed is waged at the national level, as I argue *infra* Part IV, it is national action that is called for.

⁹ See generally Saul Levmore, *Changes, Anticipations, and Reparations*, 99 COLUM. L. REV. 1657, 1688-90 (1999) (arguing that Black reparations have not been forthcoming because of the relatively large number of African American slave descendants, the long passage of time since slavery, the existence of affirmative action and other programs that might be seen as substitutes for reparations, and the dispersed character of slave descendants).

¹⁰ Perhaps most famously, Rep. Henry Hyde, R.-Ill., has insisted, "I never owned a slave. I never oppressed anybody. I don't know that I should have to pay for someone who did [own slaves] generations before I was born." Jeffrey Ghannam, *Repairing the Past*, 86 A.B.A. J. 39 (2000). See also Charles J. Ogletree, *The Current Reparations Debate*, 36 U.C. DAVIS L. REV. 1051, 1052 (2003)

Besides, they continue, the slaves are long dead and the effects of slavery now nonexistent,¹¹ so there would not be anyone who could legitimately claim compensation anyway.¹²

The opposition to Black reparations thus focuses on the temporal dislocation between slavery and the present, but the argument loses none of its force when applied to more recent injustices. After all, “righteous gentiles” in Germany did not exterminate Jews;¹³ most Japanese never availed themselves of the “comfort” of Korean prostitutes;¹⁴ and many Chileans ardently resisted Pinochet’s rule.¹⁵ If opponents of Black

(citing this objection to Black reparations); Jack E. White, *Don't Waste Your Breath: The Fight for Slave Reparations Is a Morally Just but Totally Hopeless Cause*, TIME, Apr. 2, 2001, at 48 (“[N]o matter how strong our arguments are, we'll never get white folks to pay up. Most white Americans are descended from people who immigrated here after the Civil War, so they feel no need to atone.”). See generally Joe R. Feagin & Eileen O'Brien, *The Growing Movement for Reparations*, in WHEN SORRY ISN'T ENOUGH, *supra* note 6, at 341, 343 (citing an ABC News Poll indicating that 88 percent of white respondents rejected the notion of paying reparations).

Other opponents of Black reparations argue that, given the length of time that has elapsed since abolition, any legitimate claim that would have existed then would have attenuated now. E.g., Charles Fried, Remarks at the Yale, New Haven and American Slavery Conference: The Moral Claims of the Past: Justice Across Time (Sept. 28, 2002).

Some African Americans have also rejected the idea of reparations, although not because they believe that the claims are empty or moot. Instead, they worry about the stigmatizing effect of a reparations program, e.g., John McWhorter, *Against Reparations: Why African Americans Can Believe in America*, NEW REPUB., July 23, 2001, at 32, or they deny that such a program could ever expiate the moral transgression, e.g., Bayard Rustin, *The Failure of Black Separatism*, HARPERS, Jan. 1970, at 25, 31 (“It is insulting to Negroes to offer them reparation for past generations of suffering, as if the balance of an irreparable past could be set straight with a handout.”).

¹¹ According to one study, the economic effects of slavery disappeared two generations after abolition. Bruce Sacerdote, *Slavery and the Intergenerational Transmission of Human Capital* (Sept. 10, 2002), <http://www.dartmouth.edu/~bsacerdo/wpapers/Slavery3.pdf> (last visited Oct. 4, 2006). Nonetheless, significant disparities in wealth remain between Blacks and Whites. See *infra* note 148.

¹² See, e.g., Chad W. Bryan, *Precedent and Reparations? A Look at Historical Movements for Redress and Where Awarding Reparations for Slavery Might Fit*, 54 ALA. L. REV. 599, 610-11 (2003) (arguing that the supposed precedents for reparations for slavery—compensation packages for interned Japanese-Americans and the victims of the Rosewood massacre—are in fact disanalogous insofar as these other programs awarded compensation only to the victims themselves or to their first-degree relatives).

¹³ Indeed, a proclamation issued by the district governor of Warsaw declared that anyone who “deliberately offers refuge to such Jews or who aids them in any other manner” would be punished with death. Dr. Ludwig Fischer, *The Penalty for Helping a Jew in Occupied Poland* (Nov. 10, 1941), available at <http://www.pbs.org/wgbh/pages/frontline/shtetl/righteous/> (last visited Oct. 4, 2006). Yet Yad Vashem, the Holocaust Martyrs' and Heroes' Remembrance Authority in Israel, acknowledges 21,310 non-Jews who risked their lives to help Jews escape the Nazis. See Yad Vashem, *The Righteous Among the Nations*, http://www1.yadvashem.org/righteous/index_righteous.html (last visited Oct. 4, 2006).

¹⁴ These women serviced members of the Japanese military, and so would not have been available to most civilians. See BBC News, *Korean Comfort Women Compensated*, Mar. 29, 1998, available at <http://news.bbc.co.uk/1/hi/despatches/71239.stm> (last visited Oct. 4, 2006).

¹⁵ See, e.g., Pamela Constable, *Thousands in Chile Celebrate Vote to End Pinochet's Rule*, THE BOSTON GLOBE, Oct. 7, 1988, at 1.

reparations are correct to insist that an individual may be held responsible, and hence liable, only for transgressions in which he participated directly, then none of these reparations programs is justifiable.

Supporters of Black reparations, or “reparationists,”¹⁶ have largely remained silent in the face of this challenge to their campaign.¹⁷ Instead, the recent reparations literature is rife with internal debates regarding whether legal claims should be framed in the language of compensation or restitution;¹⁸ whether they should be pursued as matters of public or private law;¹⁹ whether the legal claims can withstand procedural barriers like statutes of limitations²⁰ and standing requirements;²¹ whether the harm to be repaired is that of slavery itself or subsequent acts of racial discrimination;²² whether reparations should be premised upon distributive

¹⁶ See, e.g., Alfred L. Brophy, *Reparations Talk: Reparations for Slavery and the Tort Law Analogy*, 24 B.C. THIRD WORLD L.J. 81, 85 (2004).

¹⁷ See generally Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68, 70 n. 14 (2005) (listing some thirty recent articles or books on Black reparations); cf. Adjoa A. Aiyetoro, *Formulating Reparations Litigation Through the Eyes of the Movement*, 58 N.Y.U. ANN. SURV. AM. L. 457, 458-63 (2003) (presenting a history of the Black reparations movement); Christopher C. Jones, *Redemption Song: An Analysis of the Reparations Movement*, 33 U. MEM. L. REV. 449, 451-54 (2003) (same).

¹⁸ See, e.g., Joe R. Feagin, *Documenting the Costs of Slavery, Segregation, and Contemporary Racism: Why Reparations Are in Order for African Americans*, 20 HARV. BLACKLETTER L.J. 49 (2004) (offering an account of the harms of slavery that incorporates both the physical and psychological costs of being enslaved, which would ground a claim for compensation, as well as the unjust enrichment of slaveholders, which would ground a claim for restitution). Compare Anthony J. Sebok, *Two Concepts of Injustice in Restitution for Slavery*, 84 B.U. L. REV. 1405 (2004) (defending a compensatory justice model), and Emily Sherwin, *Reparations and Unjust Enrichment*, 84 B.U. L. REV. 1443 (2004) (same), with Bernard Boxill, *Morality of Reparation*, 2 J. SOC. THEORY & PRAC. 113, 120 (1972) (defending the paradigm of unjust enrichment), and Hanoeh Dagan, *Restitution and Slavery: On Incomplete Commodification, Intergenerational Justice, and Legal Transitions*, 84 B.U. L. REV. 1139 (2004) (same).

¹⁹ See, e.g., Alfreda Robinson, *Corporate Social Responsibility and African American Reparations: Jubilee*, 55 RUTGERS L. REV. 309 (2003); Christopher A. Bracey, *Thinking Race, Making Nation*, 97 NW. U. L. REV. 911 (2003) (reviewing GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* (2002)); cf. Brophy, *supra* note 16, at 130-35 (advocating the use of tort law not as an end in itself but instead as a useful vehicle for framing discussions about moral culpability).

²⁰ Compare Richard A. Epstein, *The Case Against Black Reparations*, 84 B.U. L. REV. 1177, 1183 (referring to the statute of limitations issue as an “impregnable” barrier to reparations suits) with Roy L. Brooks, *The Slave Redress Cases*, 27 N.C. CENT. L.J. 130, 175-77 (2005) (advancing strategies for overcoming statutes of limitation issues), and Malveaux, *supra* note 17, at 122 (arguing that statutes of limitations ought not to foreclose suits seeking Black reparations).

²¹ Epstein, *supra* note 20 at 1179-81; Eric J. Miller, *Representing the Race: Standing to Sue in Reparations Lawsuits*, 20 HARV. BLACKLETTER L.J. 91 (2004).

²² See, e.g., Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. ANN. SURV. AM. L. 497 (2003) (identifying some of the barriers for reparationists but nonetheless advocating efforts seeking reparations for slavery and the legacy of Jim Crow). But cf. Emma Coleman Jordan, *A History Lesson: Reparations for What?*, 58 N.Y.U. ANN. SURV. AM. L. 557 (2003) (arguing that reparationists should pursue their cause by seeking repair for lynchings, rather than slavery itself); David Lyons, *Corrective Justice, Equal Opportunity, and the Legacy of Slavery and Jim*

or corrective conceptions of justice;²³ whether a reparations campaign should seek to appeal to taxpayers' moral sense rather than their sense of self-interest;²⁴ whether the goal of reparations should be retribution rather than reconciliation;²⁵ whether reparationists should seek money or a more symbolic form of repair;²⁶ whether a reparations program should be mandated by government or instead voluntarily adopted by private entities;²⁷ whether the nation has already repaid its debt to Blacks in the

Crow, 84 B.U. L. REV. 1375, 1377 (2004) (locating the basis for repair in Jim Crow laws rather than slavery).

²³ See, e.g., Keith N. Hylton, *A Framework for Reparations Claims*, 24 B.C. THIRD WORLD L.J. 31, 31 (2004) (contrasting a "social welfare" – i.e., distributive – and "doing justice" – i.e., corrective – model for reparations); cf. Lopez, *supra* note 8, at 665-72 (proposing a method to rank order our corrective justice priorities, in light of scarcity, and arguing that this method militates against Black reparations). Compare Kyle D. Logue, *Reparations as Redistribution*, 84 B.U. L. REV. 1319 (2004) (conceiving of reparations as a program of race-based wealth redistribution justified on distributive, rather than corrective, justice grounds), with Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 CAL. L. REV. 683, 685 (2004) (rooting the duty to repair in society's obligation to remedy past discrimination).

²⁴ Compare Robert A. Sedler, *Claims for Reparations for Racism Undermine the Struggle for Equality*, 3 J.L. SOC'Y 119, 127-28 (2002) (arguing that racial equality can only be achieved by appealing to Whites' sense of injustice), with Charles J. Ogletree, Jr., *Tulsa Reparations: The Survivors' Story*, 24 B.C. THIRD WORLD L.J. 13, 19-22 (2004) (adopting an interest convergence theory in support of Black reparations), and Note, *Bridging the Color Line: The Power of African American Reparations to Redirect America's Future*, 115 HARV. L. REV. 1689, 1707 (2002) (suggesting that Whites could be made to support Black reparations if they came to believe that Whites' interests would thereby be served).

²⁵ Compare Jeffrey M. Brown, *Deconstructing Babel: Toward a Theory of Structural Reparations*, 56 RUTGERS L. REV. 463, 496 (2004) ("[T]he history of civil rights discourse suggests that linking the idea of racial reconciliation to the reparations question is strategically unsound."), and Christopher Kutz, *Justice in Reparations: The Cost of Memory and the Value of Talk*, 32 PHIL. & PUB. AFF. 277, 279 (2004) ("[T]he very fungibility of money means that giving it up hurts It is the infliction of that hurt upon the donors that grounds the symbolic value of cash payment") with Roy L. Brooks, *Getting Reparations for Slavery Right—A Response to Posner and Vermeule*, 80 NOTRE DAME L. REV. 251, 254-56 (2004) (arguing that the goal of reparations ought to be forgiveness and atonement), and David Hall, *The Spirit of Reparations*, 24 B.C. THIRD WORLD L.J. 1, 3 (2004) (conceiving of Black reparations as "a great opportunity" for the nation to undergo "spiritual cleansing").

²⁶ See, e.g., Troy Duster, *Repairing the National Memory by Acknowledging the Living Presence of 'Our Childhood Locked in the Closet'*, 6 AFR.-AM. L. & POL'Y REP. 43, 45-47 (2004) (advocating a program of Black reparations that would consist of memorial statues, truth commissions, and housing reform); Lyons, *supra* note 22 at 1400-04 (proposing a National Rectification Project, which would involve a material component, including efforts to reduce the Black-White income gap, and a moral component, requiring symbolic acknowledgment of acts of past discrimination); cf. Natsu Taylor Saito, *Beyond Reparations: Accommodating Wrongs or Honoring Resistance*, 1 HASTINGS RACE & POVERTY L.J. 27, 41-41 (2003) (arguing that monetary reparations would reify an existing status quo that is itself racist because monetary awards suggest that the harms they compensate are aberrations, whereas slavery, on her account, is part and parcel of an inherently racist system).

²⁷ See, e.g., Saul Levmore, *Privatizing Reparations*, 84 B.U. L. REV. 1291, 1317 (2004) (advancing a hybrid public-private scheme that would enable individual taxpayers to contribute directly to a reparations fund, with the government collecting the payments and offering partial tax credit as inducement).

form of affirmative action and welfare;²⁸ whether a reparations program can be implemented feasibly;²⁹ and whether a reparations campaign will indeed achieve reconciliation rather than racial division.³⁰

Yet resolution of these issues, however thorny they are, will serve neither to justify a program of Black reparations nor to sell it to the public unless and until reparationists manage to provide an account of responsibility that adequately responds to that of their opponents. I argue here that none of the few attempts on this front has been or can be successful.³¹

These attempts respond to the individualist impulse animating anti-reparationists' arguments by appealing to collectivist conceptions of responsibility,³² according to which responsibility attaches to the collective first and foremost, and to its members only derivatively.³³ The contestation about Black reparations thus reduces to a contest between competing accounts of responsibility, as the individualist insistence that "no one can be responsible, in the properly ethical sense, for the conduct of

²⁸ Compare Bernard H. Siegan, *The United States Has Already Apologized for Racial Discrimination*, in WHEN SORRY ISN'T ENOUGH, *supra* note 6, at 413 (arguing that minority business set-asides, along with school desegregation efforts, and other federal and state legislation, already satisfy whatever debt the nation owed), with Albert Mosley, *Affirmative Action as a Form of Reparations*, 33 U. MEM. L. REV. 353, 355 (2003) (arguing that welfare and affirmative action, as currently constituted, were neither designed as, nor function today as, forms of repair).

²⁹ See, e.g., Peter Schuck, *Slavery Reparations: A Misguided Movement*, JURIST, Dec. 9, 2002, <http://jurist.law.pitt.edu/forum/forumnew78.php> (opposing reparations at least in part because no reparations program could be implemented feasibly); see also Lyons, *supra* note 22, at 1403 (proposing a detailed reparations program, but acknowledging that his proposal might well be "utopian"); Calvin Massey, *Some Thoughts on the Law and Politics of Reparations for Slavery*, 24 B.C. THIRD WORLD L.J. 157 (2004) (discussing both the practical problems with, as well as possible adverse consequences of, Black reparations).

³⁰ Cf. Sedler, *supra* note 24, at 123 (maintaining that reparations will neither undo the disparate treatment of Blacks nor appeal to the sense of injustice of Whites). Compare Brooks, *supra* note 25, and Randall Robinson, *What America Owes to Blacks and What Blacks Owe to Each Other*, 6 AFR.-AM. L. & POL'Y REP. 1, 1 (2004) ("[W]hen I talk about reparations, . . . I am talking about the repair of our general society. I am talking about the resuscitation of compassion."), with Robert W. Tracinski, Comment, *America's "Fields of the Blackbirds": How the Campaign for Reparations for Slavery Perpetuates Racism*, 3 J.L. SOC'Y 145, 156 (2002) (arguing that a group-based account of the harm for which repair is owed "gives the lie to the claim that reparations would 'heal the wounds' of slavery and racism. Reparations would do the opposite: they would promote a collectivist, racial concept of justice."), and John H. McWhorter, *The Reparations Racket: America Has Already Made Amends for Slavery*, CITY J., Mar. 29, 2002, http://www.city-journal.org/html/eon_3_29_02jm.html (calling reparationists segregation "victimologists").

³¹ See *infra* Part I.B.

³² See, e.g., JANNA THOMPSON, TAKING RESPONSIBILITY FOR THE PAST: REPARATION AND HISTORICAL INJUSTICE 12 (2002); George Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 YALE L.J. 1499 (2002); Seana Shiffrin, *Reparations for Slavery and Justice over Time* (manuscript on file with the author).

³³ See *infra* notes 60, 62-65 and accompanying text.

another,”³⁴ collides with a collectivist ontology in which “[t]he ‘we’ precedes the ‘I.’”³⁵

Opponents of reparations already enjoy an advantage in this debate as their arguments rely upon a conception of responsibility that American law has made familiar to us.³⁶ On this conception, responsibility is limited to the individual’s contribution, and liability may be imposed on an individual only for her actions, and only to the extent that these wrongfully caused the injury to be redressed.³⁷ Supporters of reparations are left to defend their agendas with accounts of collective responsibility, which, in their deviation from the law’s individualism, have alternately been called “barbarous”³⁸ or “pervers[e].”³⁹ Even supporters of ethical collectivism acknowledge that it “has enjoyed few philosophically sophisticated defenses”⁴⁰ and is “one of the murkiest and least explored topics in moral philosophy.”⁴¹

In fact, collective responsibility poses a problem for Black reparationists not just because it is unpopular and under-theorized. The accounts that do exist contemplate only contemporaneous injustices,⁴² and ask whether a member may be called to account for a harm the group

³⁴ H.D. Lewis, *The Non-Moral Notion of Collective Responsibility*, in *INDIVIDUAL AND COLLECTIVE RESPONSIBILITY: MASSACRE AT MY LAI* 119, 121 (Peter A. French ed., 1972).

³⁵ Heinrich Gomperz, *Individual, Collective and Social Responsibility*, 49 *ETHICS* 329, 336 (1939).

³⁶ *E.g.*, Joel Feinberg, *Collective Responsibility*, 65 *J. PHIL.* 674, 674 (1968) (“[I]n the standard case of responsibility for harm, there can be no liability without contributory fault.”); *cf.* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 *HARV. C.R.-C.L. L. REV.* 323, 374-76 (1987) (construing the standard objection to reparations as emanating from the requirements of standing, privity, and nexus in American law); Robin West, *Jurisprudence and Gender*, 55 *U. CHI. L. REV.* 1, 1-3 (1988) (noting this feature of American jurisprudence, and arguing that it reflects only men’s existential experiences). *But see, e.g.*, *Hymowitz v. Eli Lilly & Co.*, 539 *N.E.2d* 1069 (N.Y. 1989) (holding multiple manufacturers of DES, a drug ingested by the mothers of the plaintiff class during pregnancy that caused cancer in plaintiffs, liable in an amount proportional to the share of the market each manufacturer occupied at the time of ingestion).

³⁷ Three strands of liability doctrine—accomplice, vicarious, and joint and several—permit assignments of liability for the misdeeds of others. Nonetheless, these are exceptions to foundational principles in criminal and tort law, which, respectively, insist that guilt accrue only to the individual wrongdoer, *see, e.g.*, Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 *COLUM. L. REV.* 1751, 1768 (2005) (referring to personal culpability as “the first principle of domestic criminal law”), and require that the faulty party proximately cause the injury, *see, e.g.*, *RESTATEMENT (THIRD) OF TORTS* § 29 (Proposed Final Draft No. 1, 2005) (“An actor’s liability is limited to those physical harms that result from the risks that made the actor’s conduct tortious.”).

³⁸ Lewis, *supra* note 34, at 121.

³⁹ Fletcher, *supra* note 32, at 1546.

⁴⁰ Posner & Vermeule, *supra* note 2, at 706.

⁴¹ MARGARET GILBERT, *SOCIALITY AND RESPONSIBILITY* 142 (2000).

⁴² *See* THOMPSON, *supra* note 32, at 9 (arguing that most accounts of collective responsibility presuppose that members will have had the possibility to influence the actions for which they are held derivatively responsible).

committed *while she was a member in it*. Moreover, we shall see that the reasons offered to defend collective responsibility implicitly rely upon the individual's ability to control the group. Two implications thus follow: first, these accounts of collective responsibility cannot be extended to historical injustices, like slavery, for it is clear that current citizens have no ability to control the 150-year-old actions of the United States. Second, and more damningly, these accounts crucially rest upon individualist understandings of responsibility, and so fail to be collective in the requisite sense.

In other words, the debate about Black reparations reveals deep lacunae in our conceptions of responsibility that have heretofore gone unnoticed. If existing accounts of responsibility condition responsibility assignments on an individual's participation in, or influence over, the group act, then we are left with no way to explain when (or if) a group member may be held responsible for a group act that occurred long ago or far away. In particular, we are without the theoretical resources to establish that contemporary citizens bear a moral obligation to redress the harms of slavery or other acts of past racial injustice.⁴³

The primary purpose of this Article is thus to expose the inadequacies in our existing theories of responsibility, and develop a novel account that would license responsibility ascriptions for historical injustices. This account will, I believe, secure the justificatory force necessary for the reparationist to establish that contemporary citizens do indeed owe a duty of repair. A secondary task of the Article is to develop a theory of harm that explains why contemporary Blacks are the legitimate objects of that duty.

⁴³ Some authors have argued that citizens owe a moral duty to repair in virtue of the civic responsibility citizens bear, which requires each "to do his fair part in honoring the nation's obligations." Robert Fullinwider, *The Case for Reparations*, 20 PHIL. & PUB. POL. 1, 2 (2000); see also Brooks, *supra* note 25, at 279-80 (arguing that civic responsibility is a more appealing concept than guilt in explaining contemporary citizens' obligations to make repair since contemporary citizens did not commit the wrongs for which repair is sought); cf. Forde-Mazrui, *supra* note 23, at 725 ("If society as a collective entity is morally responsible, then its members may be called upon, *as an incident of membership—not personal blame*—to share the cost incurred by society in meeting its moral obligations.") (emphasis added). Yet obligations grounded in civic responsibility do not have a sufficiently reparative dimension to count as obligations of repair; we may have a civic responsibility to help those citizens who, through sheer bad luck, live below the poverty line, suffer from natural disasters, lost loved ones on September 11th, and so on. Thus, we can discharge those obligations we incur as a matter of civic responsibility without acknowledging any personal connection to the harm that we thereby eliminate. But repair requires not just restoration of the victim class, but also expiation on the part of those who wronged the victims. I go on to argue, in Part IV, that it is we who have harmed the legitimate beneficiaries of Black reparations. As such, we would fail to acknowledge our guilt were we to understand our duty to make repair in terms of civic responsibility alone.

I begin, in Part II, with the debate between individual and collective theories of responsibility. I first describe how each of these accounts underpins one side of the reparations debate, and then argue that the debate has thus far been insoluble not because it involves two distinct and irreconcilable accounts of responsibility, but because individualist commitments, which cut against reparations, operate on both sides.

In Part III, I step back from accounts of group responsibility and consider an account of group ontology. I argue that, insofar as group members are responsible for the group's existence as a moral agent, they are responsible for discharging the group's debts, no matter when these are due. In Part IV, I use the lessons of this account of group ontology to establish that the nation, as a whole, was responsible for slavery at the time that it occurred, and that contemporary citizens bear responsibility for slavery insofar as they are responsible for the nation's continued existence.

Part V is devoted to the second challenge facing a program of Black reparations – that of developing a theory of harm that would encompass contemporary African Americans. I argue that the harm to be repaired is not slavery itself but instead the continued failure to offer Black reparations, which carries with it the prospect of unjust enrichment for Whites and devastating effects for perceptions of the worth of Blacks. I conclude that contemporary citizens are morally responsible for creating and perpetuating a culture of omission in which we not only fail to discharge our debts, but also communicate our indifference to those who have legitimate claims against us.

II. INDIVIDUAL RESPONSIBILITY AND COLLECTIVE PRODUCTIVITY

“I the Lord your God am a jealous God, punishing children for the iniquity of parents, to the third and fourth generation”⁴⁴

Judeo-Christian religions may sanction the visitation of the sins of fathers on their sons, but, in secular life, we generally think it impermissible to transmit punishments intergenerationally. The task for the reparationist, then, is to offer an account of collective responsibility that elides this firmly held intuition.⁴⁵ The individualist opponent of Black

⁴⁴ *Deuteronomy* 5:9.

⁴⁵ Even George Fletcher, an advocate of collective responsibility, refers to the transmission of guilt from culpable to non-culpable individuals as a “perversion” of collectivism. Fletcher, *supra* note 32, at 1546.

reparations is not without his burden either, though, for he must explain how an institution like slavery can come about, given that it is greater than the sum of the individual contributions of slave-owners and slave supporters. In other words, she must account for the existence of genuinely collective products.

In this Part, I treat first individualism, and then collectivism. I describe the implications of each for reparations, and then draw out the deficiencies internal to each theory. I offer a solution to the individualist's difficulties here. The collectivist's deficiencies are not as easily remedied. I thus end this Part by suggesting that we abandon traditional accounts of collective responsibility, and I devote the next Part to offering an alternative account.

*A. Individualism, Reparations, and Liability*⁴⁶

Individualists deny that agents may be held responsible for the actions of others.⁴⁷ Instead, even where several agents together cause a harmful effect, each agent may be held responsible only for her contribution, and only if her contribution was faulty.⁴⁸ Correspondingly, liability may be imposed on each individual only to the extent that her faulty contribution led to harm.⁴⁹

⁴⁶ "Individualism" is sometimes raised in the reparations debate to refer to the responsibility that Blacks bear for their situation. See, e.g., James P. Hackney, Jr., *Ideological Conflict, African American Reparations, Tort Causation and the Case for Social Welfare Transformation*, 84 B.U. L. REV. 1193, 1193 (2004) (describing individualism as the principle that each of us should make his way in life based on the contents of his character, rather than his race, class, or gender); Lee A. Harris, "Reparations" as a Dirty Word: *The Norm Against Slavery Reparations*, 33 U. MEM. L. REV. 409, 414-417 (2003) (same). Other theorists have invoked individualism in the debate about reparations to refer to a notion of individuality that prevents Whites from seeing themselves as members of a privileged group and hence implicated in Black-White disparities. See, e.g., Taunya Lovell Banks, *Exploring White Resistance to Racial Reconciliation in the United States*, 55 RUTGERS L. REV. 903, 912 (2003). As I use it in this Article, however, "individualism" designates a cluster of theories describing when one may legitimately be held accountable for a wrongful act. As such, the sort of individualist theories at issue here bear on whether contemporary Americans may be held responsible for slavery or its legacy, and not whether African Americans bear some contributory fault for their current situation, or whether Whites are appropriately described as a group.

⁴⁷ For the sake of clarity, it will be useful to note that I use "responsibility" as shorthand for "moral responsibility" and interchangeably with "culpability" and "accountability." By "liability," on the other hand, I mean the duty to make whole as a matter of restitution or reconciliation. As should become clear in what follows, I believe that an individual may be liable to make repair even if she is not responsible—that is, culpable—for the harm occasioning the need for repair.

⁴⁸ See, e.g., Nicholas Rescher, *Collective Responsibility: Am I Responsible for the Misdeeds of Others?*, in REPARATIONS FOR SLAVERY: A READER 169, 179 (Ronald P. Salzberger & Mary C. Turck eds., 2004).

⁴⁹ See, e.g., Lewis, *supra* note 34. Joel Feinberg offers a paradigmatic statement of the position. Feinberg, *supra* note 36, at 674 ("[I]n the standard case of responsibility for harm, there can be no liability without contributory fault."). Christopher Kutz describes a related position in his Individual Difference Principle, which he denies. CHRISTOPHER KUTZ, *COMPLICITY: ETHICS AND LAW FOR A*

Individualism thus impugns the claim that the nation as a whole – even at the time of slavery – ought to have been held liable for slavery. The individualist could assent to the claim about national liability only if every American wrongfully contributed to slavery. But many Americans did not participate in slavery, and some even worked tirelessly to eradicate it. So, if individualism is true, then the claim that the nation ought to have been held liable to redress slaves is false. Moreover, if it would have been impermissible to hold the nation liable for making repair at the time that slavery ended, it would *a fortiori* be impermissible to hold the nation today to this duty, given that contemporary citizens would not even have had the opportunity to prevent or end slavery.⁵⁰

Is the individualist right that only slave-owners could justifiably have been made to pay reparations to emancipated slaves? More generally, ought responsibility to be keyed to individual actions in the way that individualism assigns responsibility? The individualist's account of responsibility presupposes that we can individuate actions and their effects, and thereby determine exactly who caused what. But this conception of agency ignores the fact that no one acts in a vacuum. Others' actions can influence our own,⁵¹ and their effects can combine with ours to form a product that can no longer be divided into distinct individualized contributions.⁵² This is true for slavery, despite the North's professed opposition to that practice, and despite abolitionist efforts to end it, as we shall see in Part V.

COLLECTIVE AGE 3 (2000) ("I am only accountable for a harm if something I did made a difference to its occurrence.").

The doctrine of respondeat superior might seem to pose a challenge to the individualist paradigm. Nonetheless, even this doctrine can be construed in individualist terms insofar as the employer is responsible for having hired that employee, or for failing adequately to supervise the employee.

⁵⁰ For a general statement that a denial of collective responsibility forecloses the transmission of liability to future generations, see Ton Van den Beld, *Can Collective Responsibility for Perpetrated Evil Persist over Generations?*, 5 *ETHICAL THEORY & MORAL PRAC.* 181, 188 (2002).

⁵¹ See, e.g., Larry May, *Collective Inaction and Shared Responsibility*, 24 *NOÛS* 269, 273-74 (1990).

⁵² Some egalitarians and feminists rely on this expansive notion of responsibility for a product in order to defend redistribution or compel recognition of women's work. See, e.g., EVA FEDER KITTAY, *LOVE'S LABOR: ESSAYS ON WOMEN, EQUALITY AND DEPENDENCY* (1999) (criticizing theories of formal equality because these neglect the fact that women are often saddled with dependency work, which entails that they are not symmetrically situated to the men with whom they are supposed to enjoy equality); Elizabeth S. Anderson, *What is the Point of Equality?*, 109 *ETHICS* 287, 321 (1999) ("From the point of view of justice, the attempt . . . to credit specific bits of output to specific bits of input by specific individuals represents an arbitrary cut in the causal web that in fact makes everyone's productive contribution dependent on what everyone else is doing. Each worker's capacity to labor depends on a vast array of inputs produced by other people—food, schooling, parenting and the like.").

But first it will be important to understand the general implications of group productivity for distributing liability among group members. There are four general cases that we need to consider. First, and simplest, is the case of equal participation, where each individual contributes to a group action in the same way and to the same extent. For example, consider two people who together move a heavy table, with each carrying an equal share of the load. In the second set of cases, each individual engages in a discrete act of wrongdoing, and together these acts produce a larger wrong. Consider, for example, the individual who, with others in a mob, participates in a riot, and smashes a store window on her own during this riot. The third case involves group action where at least some of the individual contributions make no difference to the group's eventual course. For example, a group of ten people decides that they will vote to see whether the group sees a movie or goes for coffee. Seven people vote in favor of coffee. The resulting group act is overdetermined – had any one of the group members voted the other way, the group would still have gone for coffee. Finally, there is the case where individuals together produce a joint product but each individual's contributions differ from those of the others in magnitude or kind. I consider the appropriate liability distributions for each of these cases in turn.

In the case of equal participation, the liability assignment is straightforward. If both individuals act equally negligently in carrying a table whose weight they evenly share, and the table falls and breaks, then liability ought to be equally apportioned between them. This is the individualist's paradigmatic situation of group action, where that action is nothing more than the aggregation of individual acts.⁵³

The second case, in which the individual's contribution to the group act is itself culpable, is more difficult but also far less relevant for our purposes than the remaining two cases. In our hypothetical mob scene, we may well want to assign liability to a group member both for the joint product of the group's actions (the riot), as well as the discrete elements of the group act in which she alone participated (smashing a window). The question then is how the two liability assignments ought to be combined. The answer to that question would be relevant if we wanted to determine how much liability each slaveholder bore, since each both engaged in an act of individual wrongdoing and also contributed to the institution of slavery by, for example, affirming slavery's propriety through his

⁵³ See Fletcher, *supra* note 32, at 1509-10.

slaveholding. Since we are concerned with the question of the liability that contemporary citizens ought to bear, however, and since no contemporary citizen owned or owns slaves, we may set aside questions about combined liability assignments in what follows.

It is in the last two cases – where group acts are overdetermined, or where they result from members' unequal contributions – that we depart significantly from the individualist's account of liability distribution. In the case of overdetermined group acts, individualists have insisted that it would be unfair to hold *any* of the individual agents responsible, since their contributions will have made no difference to the final product.⁵⁴ Yet even if the act could have been performed with a smaller number of participants, there is no way to determine who among the participants was superfluous. The question is not an epistemic one; instead, there just is no fact of the matter or principle that would allow us to distinguish between the contributors. Thus, for example, where seven out of ten people vote in favor of going for coffee, one of the seven could have voted the other way without affecting the result. But this is true of *each* of them, so there is no one voter in particular whose vote was unnecessary. As such, each of the seven ought to be held equally accountable for the result.⁵⁵

Finally, we come to the case of differential contributions to the group act. Here, too, I believe that each ought to bear equal liability for the result, in contrast to the individualist, who insists upon liability proportionate to contribution.⁵⁶ To see that equal sharing of liability is appropriate in these cases, consider a variation on our table-moving example, such that the two table movers are now unequally matched in strength. While the first mover, Strong, is insufficiently powerful to move the table on her own, she does supply twice as much power as Weak does when they move the table together. If all goes well with the table moving, is Strong twice as responsible for the table's displacement? No, because Weak's contribution is just as necessary as Strong's is. Put another way, Weak and Strong are symmetrically situated with respect to each other since each is just as dependent as the other for help in moving the table.

⁵⁴ See, e.g., Lewis, *supra* note 34, at 143 ("Where all are responsible no one is responsible"). But see *Corey v. Havener*, 65 N.E. 69 (1902) (holding that, where fire was caused by two defendants acting independently, a court may find both liable).

⁵⁵ Indeed, responsibility is borne equally not just among the coffee voters, but among *all* of the group's members, since all ratified the decision procedure, and all agreed to go along with its result. I elaborate on this argument in the next Part. See *infra* note 92 and accompanying text.

⁵⁶ See, e.g., Lewis, *supra* note 34, at 129-30.

Moreover, the result is the same where individuals' contributions differ in kind, rather than just in magnitude. To return to our riot example, the mob member who commits no acts of vandalism himself, but merely stands on the sideline cheering on other vandals, will bear equal responsibility for the resulting acts of destruction if his cheering was in some way necessary to the riot's occurrence (say, because it communicated that storeowners were unworthy of the respect that would protect their property from vandalism).⁵⁷ In this way, even symbolic contributions can ground liability assignments.

In short, then, no matter the nature of individuals' contributions, or the structure of the group act, liability for a combined result ought to be shared equally. While we have just articulated this principle in the context of aggregative action, we will have occasion to return to this principle in the next Part, where we will see that equal liability applies in the context of more cohesive forms of joint action as well.⁵⁸

B. Collective Responsibility

Individualist accounts of responsibility derive their appeal from our intuition that blame and guilt presuppose individual wrongdoing, and punishment ought thus to be restricted to individual wrongdoers.⁵⁹ Even in the cases of combined action that we considered in the last section, liability was distributed only among those who contributed directly to the wrongful act. So far, then, we have remained faithful to the individualist insistence that fault presupposes direct participation in the faulty act. Yet these responsibility assignments do not exhaust the space of our moral practice. We sometimes speak as if action is most appropriately ascribed to a group first and foremost, and our responses to such action are directed to *all* of the group's members, regardless of the extent of their participation. Moreover, we expect groups to redress their transgressions no matter who happens to be on their rosters at the time their debts are discharged.⁶⁰

⁵⁷ For more on the way that individuals instantiate their values through their actions, see JEAN-PAUL SARTRE, *EXISTENTIALISM* (Bernard Frechtman trans., 1947).

⁵⁸ The acts of nations, which cannot be so easily disaggregated into their individual contributions, will concern us especially there.

⁵⁹ See, e.g., Osiel, *supra* note 37, at 1765-68.

⁶⁰ To see this intuition in action, witness any lawsuit against a corporation—a complete turnover in the identities of shareholders and employees since the occurrence of the alleged harm would in no way impugn the legitimacy of the plaintiff's claim. Cf. Complaint, *Hurdle v. Am. Int'l Group, Inc.*, No. C-02-4170 (N.D. Cal. Sept. 13, 2002); Complaint, *Johnson v. Aetna Life Ins. Co.*, No. 02-2712 (E.D. La. Sept. 3, 2002); Complaint, *Barber v. N.Y. Life Ins.*, No. 02-CV-2084 (D.N.J. May 1, 2002); Complaint, *Carrington v. Fleetboston Fin. Corp.*, No. CV-02-1863 (E.D.N.Y. Mar. 26, 2002); Complaint, *Farmer-Paellman v. Fleetboston Fin. Corp.*, No. CV-02-1862 (E.D.N.Y. Mar. 26, 2002); Complaint, *Madison*

Proponents of collective responsibility offer their accounts as a means of making sense of this feature of our moral practice.

According to the collectivist, groups can believe, intend, and act freely.⁶¹ That is, groups are agents in just the same way that individuals are.⁶² As such, groups themselves are appropriate subjects of moral responsibility. Participants in a group are held responsible for its acts, then, simply in virtue of their participation; where the group itself is guilty, group members are guilty by association. As Christopher Kutz writes, “[w]hen we act together, we are each accountable for what all do, because we are each authors of our collective act.”⁶³

Now, Kutz believes that this is most obviously true in the case of ephemeral groups,⁶⁴ which are constituted through the collective act. As such, participation in the product – and thus accountability for it – necessarily goes hand in hand with membership. Thus, the group that had a picnic consists of just those individuals who intended to and did participate in the picnic. Yet he, along with other collectivists,⁶⁵ endorses collective accountability for the harmful actions of institutional or longstanding groups, where this accountability is to be transmitted to each of the group’s members even though some of those members may not have contributed to the harmful actions at all.⁶⁶ Thus, an employee may be responsible for the misdoings of her firm simply in virtue of her ongoing relationship with her firm, her adherence to the firm’s norms and procedures, and her self-understanding as a participant in the firm.

In order to justify holding members accountable for group acts in which they may not have participated, collectivists focus on the concrete or psychological benefit that group membership confers.⁶⁷ Because this

v. FleetBoston Fin. Corp., No. CV-02-1864 (E.D.N.Y. Mar. 26, 2002); Complaint, In re African Am. Descendants’ Slave Litig., No. MDL-1491, 2004 WL 3688461 (N.D. Ill. Apr. 5, 2004). These plaintiffs sued multiple corporations and their predecessors in interest for the roles that they and their predecessors played in American slavery. Each of these complaints is saddled with the different problem of bringing suit against corporations that have themselves undergone transformations in identity through mergers and acquisitions.

⁶¹ See, e.g., GILBERT, *supra* note 41, at 149-51; KUTZ, *supra* note 49, at 74-96.

⁶² I go on to deny this contention below. See *infra* note 85 and accompanying text.

⁶³ KUTZ, *supra* note 49, at 138.

⁶⁴ *Id.* at 138-39.

⁶⁵ See, e.g., PETER A. FRENCH, COLLECTIVE AND CORPORATE RESPONSIBILITY 17-18 (1984); GILBERT, *supra* note 41, at 107-22.

⁶⁶ KUTZ, *supra* note 49, at 156-63.

⁶⁷ For accounts of collective responsibility grounded in the concrete benefits of group membership, see KUTZ, *supra* note 49, at 155-57; Posner & Vermeule, *supra* note 2, at 703. For those accounts that justify collective responsibility on psychological grounds, see Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 HARV. L. REV. 959 (1992); Shiffrin, *supra* note 32.

benefit is not temporally indexed – that is, because one benefits from being a member of the group no matter when in the group’s history one belongs to it – collectivists contend that one can be made to carry the group’s burdens no matter when in the history of the group these burdens were incurred. It follows that members may be held responsible for a transgression of the group even if this transgression occurred well before their tenure in the group. As such, the fact that slavery ended a century and a half ago would be irrelevant for the collectivist. If the nation is responsible for slavery, then so are contemporary citizens (or so the argument would go).⁶⁸

The offending commitment in collectivism is thus the one that finds group members derivatively responsible for the group’s transgressions – that is, responsible for these transgressions solely by virtue of their membership in the group. Yet, as we inquire further into the reasons for which collectivists defend derivative responsibility, we shall see that these cannot sustain responsibility ascriptions for historical transgressions.

As we have seen,⁶⁹ collectivists mean different things when they point to the benefits of membership to ground members’ responsibility for group action. Some collectivists maintain that group members appropriately incur derivative responsibility in exchange for the concrete benefits that group membership affords.⁷⁰ On a second understanding, responsibility results as a corollary of the member’s identification with the group’s positive acts, and the corresponding feelings of pride the member enjoys.⁷¹ Shame, and thus liability, follow from this positive identification not as a matter of reciprocity, as in the first understanding, but instead as a matter of psychological consistency.⁷²

⁶⁸ “Feelings of pride and identification substantially contribute to and reflect what is presupposed by these forms of focused joint collaboration. But . . . then it should also follow that we must take on as part of our identification and acknowledge responsibility—as a group—for our bad actions in the past as well—even if no one of us is responsible for these actions and even if we all now would forswear such actions as antithetical to our identity and commitments.” Shiffirin, *supra* note 32, at 7.

⁶⁹ See *supra* note 67 and accompanying text.

⁷⁰ See, e.g., KUTZ, *supra* note 49, at 156 (“When we act together, we must expect that the group act may have aspects we do not know about but with which we will have to reckon The possibility of expanding our powers (or rewards) through cooperation entails the risk that the resulting act will not align with our moral interests.”); Forde-Mazrui, *supra* note 23, at 717-18 (“The consideration for such advantages gained from group membership is that burdens incurred or experienced by the collective group may fairly be shared by the entire membership.”); Posner & Vermeule, *supra* note 2, at 703 (“People enter relationships in order to obtain the benefits of collective action; in the process they become blameworthy for the harms that occur as a result of collective action.”).

⁷¹ See, e.g., Dan-Cohen, *supra* note 67; Shiffirin, *supra* note 32.

⁷² “[T]here must be a group of objects and events—the space shuttle and the Vietnam War are perhaps good examples—that are so prominently linked to American identity that virtually every

Contrary to the collectivists' arguments, however, our everyday moral judgments suggest that neither reciprocity nor psychological identification furnish a sufficient reason for holding group members derivatively responsible for the group's acts. Instead, as we shall now see, each of the two considerations is simply an effect of group membership, not a ground of members' obligations.

Taking the issue of reciprocity first, consider that individuals who are not part of the group may yet benefit from its transgressions. For example, a company that violates an environmental protection law in order to manufacture, and thus sell, its wares at a discounted price benefits not only shareholders but also non-shareholding consumers of the resulting products.⁷³ If members (shareholders), but not nonmembers (consumers), are to be held responsible for the resulting harm (environmental damage), it cannot be the fact of benefit alone that explains the responsibility ascription. Thus, benefiting from a group transgression is not a sufficient condition for being held responsible for that transgression. But neither is benefiting from membership necessary to justify the responsibility ascription. Is the disgruntled participant absolved of her duty to try to steer the group away from wrongdoing because she does not happen to be benefiting from her membership? In short, benefiting from membership is not even relevant to determining whether members may be held responsible for the group's activities.

Do considerations of identity provide a better ground for holding group members responsible? These too prove to be irrelevant. An individual

American sees herself as the author of at least some of them and feels pride or shame with regard to them. Denying responsibility for all such objects and events is tantamount to repudiating one's American identity altogether." Dan-Cohen, *supra* note 67, at 98; see also GILBERT, *supra* note 41, at 129 (describing "membership remorse," the remorse felt by group members just in virtue of their membership); Posner & Vermeule, *supra* note 2, at 710 (describing a similar phenomenon as "moral taint"); Shiffrin, *supra* note 32, at 7. Stanley Bates offers an evocative statement of the phenomenon when he quotes a Vietnam veteran who, upon learning of the massacre at My Lai, exclaimed, "I wanted to get those people. I wanted to reveal what they did. My God, when I first came home, I would tell my friends about this and cry—literally cry. As far as I was concerned, it was a reflection on me, on every American, on the ideals that we supposedly represent." Stanley Bates, *My Lai and Vietnam: The Issues of Responsibility*, in *INDIVIDUAL AND COLLECTIVE RESPONSIBILITY: MASSACRE AT MY LAI*, *supra* note 34, at 143, 158. Alasdair MacIntyre makes an even stronger claim when he argues that individuals are partially constituted by the histories of their families and cultural groups, so that liability follows not as a matter of a self-chosen identity but instead as a matter of metaphysics. ALASDAIR MACINTYRE, *AFTER VIRTUE* 220-21 (2d ed. 1984).

⁷³ See also Thomas Nagel, *Introduction*, in *EQUALITY AND PREFERENTIAL TREATMENT* xi (Marshall Cohen, Thomas Nagel & Thomas Scanlon eds., 1977) (presenting the fictitious but plausible case of an Egyptian flax grower at the time of slavery who benefits from the influx of American cotton on the world market, and denying that this flax grower could be held responsible for slavery or its economic effects).

who is not a member of the group may experience a psychological connection to it no less fierce than that which members enjoy. Consider an American Francophile who has never visited France, purchased anything from France, or contributed to France in any other way. (Imagine that his Francophilia is satisfied by watching French films when these air on television and listening to French language tapes that he borrows from the library.) No matter the extent of his French pride or shame, it would be both incorrect and unfair to conclude that he was responsible for any French achievements or missteps.⁷⁴ If true Frenchmen are to be held responsible for these, then a psychological connection to France must not itself be sufficient. But nor is that connection even necessary. The disaffected American who laments every U.S. policy decision and vocalizes his contempt for the nation to all who will listen may well bear no less responsibility for American transgressions than does the diehard patriotic citizen. Psychological identification, then, like the receipt of material benefits, turns out to be beside the point when it comes to grounding group members' responsibility for group wrongdoing.

Perhaps what matters, then, is neither the material nor the psychological benefit an individual derives from group membership, but instead the opportunity to control the group's activities.⁷⁵ Indeed, what distinguishes the shareholder or Frenchman from other consumers and Francophiles, respectively, is the relative ability of each to affect the course of his group's activities.⁷⁶ Of course, this ability exists only during the member's tenure in the group. As such, locating derivative responsibility in members' opportunities to control their groups entails that members may

⁷⁴ This point is just a specific application of Hume's statement that one cannot derive an "ought" from an "is." DAVID HUME, A TREATISE ON HUMAN NATURE, bk. III, pt. II, § 2 (L.A. Selby-Bigge ed., 1978); cf. THOMPSON, *supra* note 32, at 12 (objecting to accounts of collective identity predicated on individuals' self-conceptions on the ground that not all those who are group members, and thus ought to share responsibility, will in fact conceive of themselves as such).

⁷⁵ See, e.g., Feinberg, *supra* note 36, at 687 ("[I]f the conditions of justifiable collective liability—group solidarity, prior notice, *opportunity for control*, etc.—are not satisfied, group liability in these cases would seem unjustified.") (emphasis added); see also THOMPSON, *supra* note 32, at 9 (arguing that most accounts of collective responsibility presuppose that members will have had the possibility to influence the actions for which they are held derivatively responsible).

⁷⁶ It may be that membership not only facilitates but also compels intervention in the group's endeavors where the group threatens to engage in wrongdoing. For example, an obligation to discourage group wrongdoing (or at least refrain from encouraging it) would arise in virtue of membership itself if the groups to which we belonged and the actions they undertook were taken to reflect our own attitudes about the individuals whom these actions touched. See KUTZ, *supra* note 49, at 139-40. On the other hand, the obligation to deter the group from wrongdoing may be one that both members and non-members bear, but of which many (if not all) non-members are relieved given the difficulty of affecting the group as an outsider.

be held responsible only for group transgressions that occur during the course of their membership.⁷⁷ In other words, if this is the ground for collective responsibility, then group members may be held accountable only for contemporaneous injustices.

Yet even when they are restricted in this way, responsibility assignments are likely to be problematic, if not false, for at least some group members. Should the faculty member on sabbatical when her department made a commitment to pursue some project be bound by the obligations that result from the commitment?⁷⁸ What about the group member who strenuously and steadfastly fought against a proposed course of action – if he could not have done any more than he did to oppose this course, can we still say that he had the ability to control the eventual group action?⁷⁹ Or, to take a more mundane example, do we really expect that citizens will follow every legislative activity, and lobby their politicians in favor or against proposed bills, such that we could honestly contend that each citizen had the opportunity to control Congress's activities?⁸⁰

If we are right to worry about questions like these, then we will think it fair to ascribe responsibility only after we assess the situation of each participant to determine whether the opportunity for control was, in fact, within his grasp. But once we undertake an individualized assessment of this kind, we will not have moved very far beyond an individualist assignment of responsibility. In this way, collective responsibility, at least insofar as it is grounded in a member's opportunity to control group action, reduces to individual responsibility.

It is no surprise, then, that reparationists have failed to secure the moral ground for their position. The theories of responsibility to which they point justify responsibility ascriptions only for contemporaneous injustices. But slavery is an ancient injustice, and so collectivism cannot do the requisite justificatory work. Moreover, these theories require that we evaluate individually each member's opportunity to control the group. In

⁷⁷ The statements of Posner and Vermeule, and of Kutz, cited *supra* note 70, reflect this presupposition insofar as they contemplate roughly contemporaneous benefits and missteps.

⁷⁸ Cf. Feinberg, *supra* note 36, at 687-88 (using the example of a philosophy department that had approved a student's thesis prospectus after two of its members agreed to supervise the project, and then found itself saddled with this student once both members had left the department).

⁷⁹ This is just the case of the ardent abolitionist. See *infra* Part III.C.

⁸⁰ Bruce Ackerman, for one, has argued that citizens will likely privilege their private pursuits over political engagement. He thus recommends that citizens be called upon to engage politically only when their constitutional regime faces a possible transformation. BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 231-65 (1991).

this way, collectivist accounts embody the very individualist commitments that militate against reparations.

At this point, the reparationist faces two possible escape routes. She can try to locate yet another ground of responsibility that would not render her account reducible to individualism, or she can abandon the project of finding a genuinely collectivist ground for responsibility and instead attempt to enlarge our understanding of group action so that we can hold all members accountable for group actions in virtue of some indirect contribution that each makes. In the next Part, I adopt the latter course, although I leave open the possibility that collectivism could be rehabilitated were some other ground of collective responsibility to be found.

III. GROUP ONTOLOGY

In this Part, I offer an account of group ontology that allows us to see that *all* members of a group contribute to each of its acts insofar as all are responsible for its agency. To this end, I first argue that group identity consists of nothing more than a group's defining characteristics. I then argue that the apparent agency of groups derives from actions in which each member participates.

A. Group Identity

"The people of America today *is* the people of white, propertied, Christian males who founded the Constitution in the 1780s, who gave itself self-government with one hand while branding slaves . . . with the other. That people grew into this one; we are they."⁸¹

"The story of the Negro in America is the story of America."⁸²

Collectivists generally believe that groups exist over and above the members that constitute them.⁸³ It is certainly true that the identity of a group is independent of the identities of its members, so that changes in the

⁸¹ JED RUBENFELD, *FREEDOM AND TIME* 158 (2001).

⁸² James Baldwin, *Notes of a Native Son*, in *COLLECTED ESSAYS* 5, 19 (1998).

⁸³ See, e.g., Owen Fiss, *Groups and the Equal Protection Clause*, in *EQUALITY AND PREFERENTIAL TREATMENT*, *supra* note 73, at 84, 125 (arguing that a group is an entity with a distinct identity that persists independently of the identities of its members); GILBERT, *supra* note 41, at 2-4 (arguing for the existence of a "plural subject").

group's roster need not change the nature of the group itself.⁸⁴ Yet, from the fact that a group's distinguishing characteristics may be independent of those of its members, we ought not hastily to conclude that the group enjoys an existence over and above those characteristics. Instead, the group itself, considered apart from its members, may consist of nothing more than its defining features, in much the same way that a melody consists of nothing more than its notes.⁸⁵

To see this, consider the following examples of group transitions. In the first, individuals join together to form a social group. Later, the individuals disband, and an entirely different set of individuals bands together to form a group with the same name. The new group expressly repudiates *all* of the old group's purposes and activities. It is reasonable to conclude that the new group is not the same as the old group – it shares nothing more with the old group than its name.

Contrast this with a case in which a group again undergoes a complete change of roster, except now new members identify with the old group and adopt most of its purposes and activities. Here, it would seem like the new group is sufficiently continuous with the old group for us to consider both to be the same group. Thus, for example, the resurrected fraternity chapter that renounces the hazing rituals practiced by the chapter's earlier incarnation is numerically identical to the earlier chapter so long as the current fraternity members willingly inherit other features of the group's identity, like its traditions, history, and so on, and expect to be recognized as a current instantiation of that earlier chapter.

What distinguishes the first case from the second is the members' choice in the first case to effectively obliterate the old group, and, in the second case, to carry the group on. But if there really were some group-identity that existed over and above the group's characteristics and the members themselves, then a decision among the members to change the group's characteristics would not be so determinative of the group's identity.

Moreover, this reductionist take on group identity remains true even where group members have less than total control over the form of the

⁸⁴ See, e.g., KUTZ, *supra* note 49, at 72 (arguing that a group is nonextensional insofar as its identity is independent of the identities of its members).

⁸⁵ JEAN-PAUL SARTRE, *THE TRANSCENDENCE OF THE EGO: AN EXISTENTIALIST THEORY OF CONSCIOUSNESS* 73-74 (Forrest Williams & Robert Kirkpatrick trans., 1937) ("If we take a melody, for example, it is useless to presuppose an X which would serve as a support for the different notes The subject of the predicate here will be the concrete totality, and the predicate will be a quality abstractly separated from the totality, a quality which has its full meaning only if one connects it again to the totality.").

group's survival. To see this, consider the following two examples. In the first case, a set of individuals takes up most, or even all, of a group's practices, but gives itself a new name, and expects that the "new" group will be taken to be a different entity from the group with the old name. Thus, for example, consider Philip Morris's decision to change its name to Altria in the wake of the tobacco litigation.⁸⁶ In the second case, the same individuals who belonged to an old group decide to replace their group with a group with new practices (and perhaps a new name), and they also expect their group to be treated like a different entity. Take, for example, the transition from Nazi Germany to post-war Germany.

Both cases pose a challenge to the supposition that members determine whether groups persist through time. But if outsiders to the group insist on treating Altria as if it were nothing more than Philip Morris sporting a new name, this does not yet establish that a group can enjoy an existence that is irreducible to the group's identifying characteristics. It establishes only that members' decisions about group persistence through time are not wholly determinative; instead, the perceptions and expectations of outsiders also have a role to play. Sometimes, outsiders will refuse to acknowledge a change in the group's identity for schematic reasons – the actual change in the group's features is so insignificant that it would frustrate our schemes for identifying groups were we to countenance the proffered change in identity (hence, the skepticism that Altria really is anything other than Philip Morris).⁸⁷ But in other instances, the refusal is prudentially based. Thus, for example, having rewritten its constitution and repudiated the horrific Nazi acts, post-war Germany could successfully convince the world that a new regime had taken hold. Nonetheless, the new regime had prudential reasons for acceding to demands for repair:⁸⁸ the perpetually self-inventing nation is not one with which other nations will likely deal for fear that this nation's transformative impulses will rear their head whenever the nation might otherwise be called to account for wrongdoing. For this reason, then, post-war Germany would be taken to constitute a new group, but one that would be saddled with the debts of the old group as the price of establishing its good faith.⁸⁹

⁸⁶ See, e.g., Stuart Elliot, *If Philip Morris Becomes Altria, Its Corporate Image May Lose Some of the Odor of Stale Smoke*, N.Y. TIMES, Nov. 19, 2001, at C13.

⁸⁷ See, e.g., National Center for Tobacco-Free Kids, *Philip Morris Can't Hide*, <http://tfk.grassroots.com/pmch/> (last visited Oct. 4, 2006).

⁸⁸ This is not to suggest, however, that prudential reasons represented the sole motivation for offering repair.

⁸⁹ Cf. THOMPSON, *supra* note 32, at 51 (arguing that a new regime might undertake reparations in order to convince outsiders that it repudiated the practices of the old nation).

More generally, while members have control over the content of the group's core commitments, they have no such control over the group's past. As a group establishes itself, it becomes identifiable by those outside of the group too. As such, newer initiates into the group cannot pretend that it is distinct from a group of the past even while they embrace parts of the history of that earlier group. Likewise, members cannot revise or rewrite the history of the group at whim if they expect that others will treat the group as self-identical over time. In short, both members and outsiders have a role to play in determining whether and in what form a group persists. But the important point for our purposes is that, together, members and outsiders completely determine whether and in what form a group persists. As such, the group's traditions, cultures, values, and so on "maintain their significant character" only through "a continuous current of individual minds."⁹⁰

B. Group Agency

"Everybody is co-responsible for the way he is governed."⁹¹

If I am right that a group is nothing more than a set of identifying characteristics, then group agency is but a convenient fiction. For a group, as nothing more than a set of predicates, cannot act at all, let alone act in a way that would appropriately subject it to our moral responses. Instead, the moral agency of the group depends on two features, both of which issue from the direct actions of individual members. First, the group must be able to have action performed in its name. For this to be the case, some group members must actually carry out particular acts of the group. Even more importantly, group members must establish a set of procedures –

⁹⁰ Morris R. Cohen, *Communal Ghosts and Other Perils in Social Philosophy*, 16 J. PHIL., PSYCHOL. & SCI. METHODS 673, 683 (1919); see also *id.* at 683 ("The unity of France or of the Catholic Church rests in the mode of thought and action which millions of Frenchmen and Catholics habitually follow. If by an impossible event they should all simultaneously lose all memory and habitual manner of responding, the French nation and the Catholic Church would cease to exist."). Ronald Dworkin makes a similar point about the moral agency of corporations. RONALD DWORIN, LAW'S EMPIRE 171 (1986) ("The personification is deep: it consists in taking the corporation seriously as a moral agent. But it is still a personification not a discovery, because we recognize that the community has no independent metaphysical existence, that it is itself a creature of the practices of thought and language in which it figures.").

⁹¹ KARL JASPERS, THE QUESTION OF GERMAN GUILT 31 (E. B. Ashton trans., 1947) (cited in George Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 YALE L.J. 1499, 1531 (2002)). See also Annette Baier, *Can Individualists Share Responsibility?*, 21 POL. THEORY 228, 234 (1993) ("The dirty hands belong always to the politicians, not to those who let them be elected and who passively contribute to the maintenance of the institutions that give them their particular share of power.").

rules of recognition,⁹² if you will – that make these acts the *group's* acts, rather than those of the individuals who actually carry them out. In this way, while only some members need participate directly in the group's act, all are responsible for it *qua* group act insofar as all are responsible for the procedures that allow us to attribute the act to the group itself.

The second feature required for group agency is the group's extension through time. Members who intend that their group enter into commitments with outsiders effectively promise that the group will persist until these commitments are fulfilled.⁹³ More generally, for the group to engage in the sort of moral relationships that persons engage in, the group cannot be transitory. For our responses to the actions of persons necessarily arise after these actions occur. Were the group to dissolve immediately after it acted, our response to its actions would then have no object.⁹⁴

But note that those members who ensure the group's persistence through their membership are not necessarily the same individuals as those who belonged to the group at the time that it committed a faulty act. It is in the decision of later members to extend the life of a group that committed an earlier transgression, then, that we can locate a ground for holding group members responsible no matter their date of entry into the group.⁹⁵

⁹² See JULES COLEMAN, *THE PRACTICE OF PRINCIPLE* 81 (2001); H.L.A. HART, *THE CONCEPT OF LAW* 107-10 (1961); JEFFRIE G. MURPHY & JULES L. COLEMAN, *PHILOSOPHY OF LAW* 32 (1990).

⁹³ Thus, for example, if the United States had entered into a long-term environmental protection treaty with another country many years ago, a newfound rejection of environmental protection among contemporary citizens would not license their breaching this treaty. Their change in values would, however, permit them to refrain from entering into further agreements of this kind no matter whether this would do violence to the conception that earlier citizens had of their country.

⁹⁴ Of course, individuals do sometimes spontaneously form groups for the purpose of completing a distinct act, after which the group disbands. Collectivists believe that, for purposes of assigning responsibility, it is appropriate to treat these ephemeral groups in the same way that we treat longstanding groups. See, e.g., KUTZ, *supra* note 49, at 138; Virginia Held, *Moral Responsibility and Collective Action*, in *INDIVIDUAL AND COLLECTIVE RESPONSIBILITY: MASSACRE AT MAI LAI*, *supra* note 34, at 101 (arguing that a random collection of individuals can act together and thus be collectively responsible). I fail to see what the collectivist assignment of responsibility adds, however. It makes sense to adopt a group ontology where some, but not all, of the members of a group engage in wrongdoing. In the case of ephemeral groups, which are constituted by the group action, *all* of the so-called members have necessarily committed any wrongful act that the "group" has committed. Moreover, we can arrive at the collectivist's preferred liability distribution—equal shares among participants—without relying on notions of collective action, as demonstrated by the liability distributions in cases of combined individual action that we considered above, see *supra* text accompanying notes 53-58.

⁹⁵ For a different defense of transgenerational obligations, see THOMPSON, *supra* note 32, at 1-23 (arguing for transgenerational obligations on universality grounds: to the extent that we would expect future generations to be bound by the commitments we forge, so too must we fulfill the expectation of earlier generations that we would be bound by the commitments they forged).

In short, all members are responsible for a group's actions at the time that they occur, because all of these members are responsible for the content of the procedures that allow actions to be recognized as those of the group. All subsequent members are responsible for the consequences of earlier (as well as contemporaneous) group action, because all of these members are responsible for conferring agency status on the group.⁹⁶

This account of group agency combines the lessons we drew from the individualist-collectivist debate. The account preserves a collectivist spirit insofar as it acknowledges that group action is a kind of collective product, since group members who do not participate directly in the group's act are nonetheless necessary for its occurrence. Yet the account deviates from collectivism insofar as responsibility refers here not to an assignment imposed first and foremost on the group and then on its members only derivatively. Instead, members are *actually* responsible for group action insofar as they are responsible for allowing the group to act. On this understanding of responsibility, then, group action becomes compatible with the individualist insistence that responsibility presuppose a causal contribution.

The account has two other advantages over traditional accounts of collective responsibility. First, it allows us to dispense with concerns that latecomers to a group ought not to bear responsibility for the group's earlier transgressions. These concerns are felt in the reparations context especially, given that many citizens emigrated to the United States well after abolition.⁹⁷ On the account of group agency advanced here, however, immigrants represent the easy case, since their decision to join the nation is explicit, whereas Americans born here have generally only tacitly accepted their national membership.

The second advantage arises from the account's reductionism. Collectivists who contend that groups enjoy an existence over and above that of their members must establish that the current nation is identical to

⁹⁶ If this account of group identity is correct, one might think it curious that individuals decide to perpetuate preexisting groups—particularly those with debts to discharge—rather than constantly reassembling to form new groups, and thereby freeing themselves of the past's claims. Two prudential considerations may at least partly explain our attachment to groups that predate us. First, while these groups may be burdened by obligations, they may also be assigned entitlements. Why not take part in a group that is about to sow the fruits of the labor of earlier group members? Second, individuals who are quick to claim a group transformation whenever creditors come knocking on the door risk scaring away those who would otherwise interact with the group, and thereby forego the prospective benefits of cooperation. (For more on this point, see *supra* note 89 and accompanying text.) In addition to these prudential considerations, it is possible that individuals prefer groups with connections to the past for the intrinsic value that continuity confers.

⁹⁷ See, e.g., White, *supra* note 10.

the one that participated in slavery if they are to have any hope of justifying reparations. While several collectivists have noted that national identity must hold over time if subsequent generations are to incur liability for the transgressions of earlier ones,⁹⁸ none of these authors has offered a theory of national identity over time. Most reparationists have ignored the question altogether.⁹⁹ Indeed, until very recently, even political theorists had dispensed with the question, recoiling from a conception of the nation that would paint it as a unitary entity, rather than as a collection of different and frequently unequal peoples.¹⁰⁰

The account of group ontology offered here circumvents the need to elaborate a complete theory of the metaphysics of national identity. Recall that, on a reductionist account, groups are nothing more than their distinguishing characteristics. In this way, whether and in what form a group survives is entirely conventional: group members explicitly or implicitly agree that they will carry on the group's existence. Outsiders accept or reject changes in the group's defining features according to conceptual schemes about what makes a group identical over time that are themselves conventional. Reductionism thus entails that we need not ascertain what features of groups are essential to their identity, or how much alteration of these features the group may sustain before it loses its identity. Instead, reductionism takes group identity out of the metaphysical realm and places it in the hands of the individuals who, through their intentions and actions, decide the question themselves.

On the account of group ontology advanced here, then, questions about the identity of the nation over time find a straightforward answer: insofar as the changes to the nation have been consistent with the modes of alteration set out in its founding document,¹⁰¹ and insofar as citizens have intended to carry on the nation and, to this end, have acted in its name, we may conclude that the nation that existed at the time of slavery is the same as the nation we inhabit today.

⁹⁸ *E.g.*, THOMPSON, *supra* note 32, at 74-75; Posner & Vermeule, *supra* note 2, at 740-41 (2003).

⁹⁹ *See, e.g.*, Commission to Study Reparation Proposals for African Americans Act, H.R. 40, 109th Cong. (2005); BORIS BITTKER, *THE CASE FOR BLACK REPARATIONS* (1973); RANDALL ROBINSON, *THE DEBT: WHAT AMERICANS OWE TO BLACKS* (2000).

¹⁰⁰ Jed Rubenfeld, for example, contends that the idea of a single national people, "[I]ong neglected by serious political and cultural thought, . . . [has] been left instead to the depredations of fascists and ethnic cleansers." RUBENFELD, *supra* note 81, at 147-48. Rubenfeld is undeterred, however, from providing his own account. *See id.* at 152-58.

¹⁰¹ *But see* BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998) (arguing that Reconstruction and the New Deal were revolutionary precisely because they transformed the nation using extra-constitutional means).

IV. NATIONAL RESPONSIBILITY FOR SLAVERY AND REPAIR

“All white people . . . are implicated . . . so long as [they] participate in America in a normal way and attempt to go on leading normal lives while any race is being cheated and tormented.”¹⁰²

The strategy for holding contemporary citizens liable for discharging the debts to which slavery gave rise should now be clear: by extending the life of the nation that participated in slavery, contemporary citizens appropriately incur the debts of this nation. What remains to be established is that the nation, as a whole, did in fact participate in slavery. Yet ascribing slavery to the nation as a whole is problematized by three considerations: first, the apparently private nature of slavery; second, northern abstention from slavery; and, third, abolitionist resistance to slavery. I address each of these considerations in turn.¹⁰³ I end this Part with a statement of the implications of the nation’s involvement in slavery for contemporary citizens.

A. Governmental Participation in Slavery

Slavery was institutionalized through federal law.¹⁰⁴ In fact, recognition

¹⁰² JONATHAN KOZOL, *DEATH AT AN EARLY AGE: THE DESTRUCTION OF THE HEARTS AND MINDS OF NEGRO CHILDREN IN THE BOSTON PUBLIC SCHOOLS 12* (1985).

¹⁰³ I note that a complete response to the first two concerns would entail a lengthy survey of the vast literature on the nation’s complicity in slavery, and hence exceed the scope of this Article. I restrict myself to key facts necessary to establish the claims I advance. For further information about the nation’s involvement in slavery, see, e.g., DON E. FEHRENBACHER, *THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT’S RELATIONS TO SLAVERY* (2002); ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877* (2002); GARRY WILLS, “NEGRO PRESIDENT”: JEFFERSON AND THE SLAVE POWER (2003) (arguing that Jefferson acceded to the three-fifths provision in the Constitution in order to curry political favor); cf. Edieth Y. Wu, *Reparations to African Americans: The Only Remedy for the U.S. Government’s Failure to Enforce the 13th, 14th, and 15th Amendments*, 3 CONN. PUB. INT. L.J. 342, 403 (2004) (locating the ground for repair in the nation’s failure to fulfill the Reconstruction Amendments).

¹⁰⁴ See generally Commission to Study Reparation Proposals for African Americans Act, H.R. 40, 109th Cong. (2005) (finding that “the institution of slavery was constitutionally and statutorily sanctioned from 1769 through 1865”); Kevin Outterson, *Slave Taxes, in SHOULD AMERICA PAY? SLAVERY AND THE RAGING DEBATE ON REPARATIONS* 135, 143 (Raymond A. Winbush ed., 2003) (hereinafter *SHOULD AMERICA PAY?*) (describing the federal and state financial gains through the direct and indirect taxation of slavery); Lyons, *supra* note 22, at 1385-89 (describing in detail the federal government’s role in slavery in the eighteenth and nineteenth centuries); Donald A. Lancaster, Jr., Comment, *The Alchemy and Legacy of the United States of America’s Sanction of Slavery and Segregation: A Property Law and Equitable Remedy Analysis of African American Reparations*, 43 HOW. L.J. 171, 178-82 (2000) (highlighting the articles of the constitution that enshrined property rights in Black slaves); *Does America Owe a Debt to the Descendants of Its Slaves*, HARPERS, Nov. 2000, reprinted in *SHOULD AMERICA PAY?*, *supra*, at 79, 104-105 (offering a legislative and judicial

of slaves as property was a condition of confederation, with the representative of South Carolina threatening to withdraw his state from the potential union if the Continental Congress even decided to debate the issue.¹⁰⁵ The Declaration of Independence, at least as interpreted in the infamous *Dred Scott* decision,¹⁰⁶ revealed that neither slaves nor their descendants were to be “acknowledged as a part of the people, nor intended to be included in the words used in that memorable instrument.”¹⁰⁷ Perhaps more famously, the United States Constitution provided that, for purposes of representation and taxation, each slave would count as three-fifths of a free man.¹⁰⁸ Another constitutional provision mandated that fugitive slaves be delivered to their owners, thereby placing the law of slave-holding states above that of free states.¹⁰⁹ A third provision prohibited Congressional foreclosure on the importation of slaves until at least 1808, thereby ensuring that American participation in the international slave trade could continue at least until then.¹¹⁰

Other federal statutes followed. In 1793, Congress passed the Fugitive Slave Act,¹¹¹ which allowed slave owners to seize their runaway slaves even if the latter had managed to escape to a state in which slavery had already been abolished. The Act also imposed fines of \$500 on those who harbored fugitive slaves.¹¹² In addition, slavery provided the revenue that would protect the country in battle as Congress, on two occasions, raised money for threatened military engagements by imposing a direct federal tax on slaves.¹¹³ These efforts reveal not just that the nation facilitated or

history of slavery); David Lyons, *Unfinished Business: Racial Junctures in U.S. History and Their Legacy* (Oct. 25, 2002) (unpublished manuscript, on file with author) (describing the legal entrenchment of slavery).

¹⁰⁵ Outterson, *supra* note 104, at 143.

¹⁰⁶ *Dred Scott v. Sandford*, 60 U.S. 393, 410 (1856) (finding that the phrase “all men are created equal” could not have been intended to include “the enslaved African race” for, if it had, the conduct of the Declaration’s drafters “would have been utterly and flagrantly inconsistent with the principles they asserted”).

¹⁰⁷ *Id.* at 407.

¹⁰⁸ U.S. CONST. art. II, § 1, cl. 3.

¹⁰⁹ U.S. CONST. art. IV, § 2, cl. 3. For this reason, some reparationists have cited the Takings Clause of the Constitution as a ground for repair. See, e.g., Dennis Klimchuk, *Unjust Enrichment and Reparations for Slavery*, 84 B.U. L. REV. 1257, 1275 (2004) (“[W]hat was wrong with slavery was that slaves were treated as things rather than persons.”); Yanessa L. Barnard, Note, *Better Late Than Never: A Takings Clause Solution to Reparations*, 12 WASH. & LEE J. C.R. & SOC. JUST. 109 (2005).

¹¹⁰ U.S. CONST. art. I, § 9, cl. 1.

¹¹¹ Fugitive Slave Act of 1793, ch. 7, § 3, 1 Stat. 302, 302-03 (repealed 1864).

¹¹² *Id.*

¹¹³ The first such occasion sought to finance an anticipated naval engagement against France in 1789, and the second funded the War of 1812. Outterson, *supra* note 104, at 145-46. Outterson also describes the indirect financial gains the federal government enjoyed from slavery. For example, it was only because it had so much cotton to export that the United States imported so freely from Europe,

gained from slavery in specific ways; its role was far more crucial: without the coercive power of the state, slavery would have been pragmatically (if not also conceptually) impossible.¹¹⁴

Yet some opponents of Black reparations argue that precisely because slavery was legal, it was not wrong and hence ought not to be subject to demands for compensation.¹¹⁵ After all, we would appear to violate the “prohibition on retroactivity, according to which the legal status of actions and transactions must be determined by the applicable rules of their time,” were we to impose duties of repair on those who acted under a legal regime that countenanced their conduct.¹¹⁶

Several responses to this objection suggest themselves. First, the legal status of slavery was assured, at least in part, by denying the franchise to those who would be enslaved.¹¹⁷ The fact that slavery was legal thus might well be construed as symptomatic of the problem, rather than a sign that there was no problem. Others have similarly argued that, in the antebellum period, “warlords ha[d] displaced the state and held it at bay while they imposed their own law on the subjected populations. When the state becomes strong enough to displace the warlords, it has no moral duty to respect the warlord’s law.”¹¹⁸ Still others adopt an economic rationale to defend the retroactive application of moral norms later enshrined in law, arguing that imposing liability upon those who cooperate with “extremely immoral yet legally sanctioned practices” may cause these cooperators “to internalize the bad effects of such practices . . . and thus ameliorate the systematic competitive advantage such citizens frequently have vis-à-vis those who refuse to engage in such immoral activities.”¹¹⁹

While I find all of these lines of response compelling, they are unnecessary in light of my account of the harm for which repair is owed. In what follows, I argue that the harm occasioning repair is not slavery

with duties on imported goods accounting for 90 percent of federal revenues between 1789 and 1815. *Id.* at 148.

¹¹⁴ The coercive power of the state is necessary to ensure that each respects the holdings of others. Without this power, no one would be secure in her possessions. See, e.g., HUME, *supra* note 74; cf. Alfred L. Brophy, *Norms, Law, and Reparations: The Case of the Ku Klux Klan in 1920s Oklahoma*, 20 HARV. BLACKLETTER L.J. 17 (2004) (adopting a similar line of argument to elucidate the connection between the federal government and the KKK).

¹¹⁵ See, e.g., George Schedler, *Responsibility for and Estimation of the Damages of American Slavery*, 33 U. MEM. L. REV. 307, 346 (2003).

¹¹⁶ Dagan, *supra* note 18, at 1166.

¹¹⁷ Forde-Mazrui, *supra* note 23, at 711-12.

¹¹⁸ Keith N. Hylton, *Slavery and Tort Law*, 84 B.U. L. REV. 1209, 1219-20 (2004).

¹¹⁹ Dagan, *supra* note 18, at 1172.

itself but instead the nation's failure to offer repair for slavery.¹²⁰ This failure waged a dignitary and material injury, and it is *this* injury that ought to be redressed. Because, on my account, the harm to be repaired dates back to the time when slavery was *no longer* legally sanctioned, opponents of reparations may not call upon slavery's one-time legality to immunize themselves from demands for repair.

B. The "Free" States

Despite the fact that slavery was sanctioned at the highest levels of government, some opponents of Black reparations insist that the nation as a whole could not have been responsible for slavery since the nation was starkly divided on slavery's permissibility. Indeed, they contend, so opposed was the North to slavery that it fought a war to end it.¹²¹ Yet these protestations likely confer more virtue on the North than it deserves. Economic reasons appear to explain the North's abolitionist commitments better than moral ones do,¹²² with the North seeking to secure labor positions for the growing white population, which it could not easily do so long as cheap slave labor remained available. In addition, the slave trade was vital to northern shipping interests.¹²³ The Civil War also finds its roots in self-interest rather than righteousness, as the North sought to preserve the Union and the South sought to preserve slavery.¹²⁴ We have good reason to question the virtue of these Northerners, then, who would "claim at once the praise of piety for disallowing [slavery] . . . and the praise of justice for their faithful adherence to a voluntary compact that

¹²⁰ See *infra* notes 169-73 and accompanying text.

¹²¹ Newt Gingrich and George Will are among those who have described the North's reasons for entering the Civil War in this way. Robert S. McElvaine, *They Didn't March To Free the Slaves*, L.A. TIMES, July 25, 1997, at B9.

¹²² See, e.g., James Grahame, *Life as a Free Black*, in WHO IS TO BLAME? OR CURSORY REVIEW OF "AMERICAN APOLOGY FOR AMERICAN ACCESSION TO NEGRO SLAVERY" 51 (1842), reprinted in WHEN SORRY ISN'T ENOUGH, *supra* note 6, at 336. See generally THE ANTI-SLAVERY DEBATE: CAPITALISM AND ABOLITIONISM AS A PROBLEM IN HISTORICAL INTERPRETATION (Thomas Bender ed., 1992) (presenting a lively debate about the role of capitalism in the abolitionist movement).

¹²³ Saito, *supra* note 26, at 44. While it is true that Congress passed a law prohibiting the slave trade in 1808, which was the earliest it was constitutionally permitted to do so, slavery itself remained legal until the ratification of the Thirteenth Amendment, at the close of the Civil War; see David E. Wilkins, *African Americans and Aboriginal Peoples: Similarities and Differences in Historical Experiences*, 90 CORNELL L. REV. 515, 517-18 (2005). Thus, the apparent abolitionist spirit animating the ban against the slave trade ought to be seen as no more than an instance of "preservation through transformation." Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2119 (1996).

¹²⁴ McElvaine, *supra* note 121, at B9.

blends their national name, character, and power with the support and perpetuation of that practice.”¹²⁵

C. Abolitionism and Group Existence

More compelling is the claim that the abolitionist contingent impugns an ascription of national responsibility for slavery. I believe that the ascription survives, however, in virtue of two considerations. First, racist abolitionists may yet have contributed to a culture that would lead to slavery. Second, non-racist abolitionists would have contributed to the nation in benign ways that would nonetheless have facilitated its support of slavery.

Some abolitionists, while clearly opposed to slavery, may yet have openly harbored racist attitudes toward Blacks.¹²⁶ If slavery can be considered a collective product, its producers ought to include not only those who owned slaves but also those who expressed white supremacy in other ways.¹²⁷ Both sets of individuals normalized Black inferiority and thus created a culture in which slavery could flourish. In this way, we can use our insights of Part III to point to a collective product – a culture of racism – to which supporters and some opponents of slavery contributed. They are thus responsible for slavery’s existence, whether they endorsed that practice specifically or not.

Of course, one might object that no individual can be responsible for his culture, because culture is ontologically prior – it constitutes the individual.¹²⁸ Yet our discussion of group ontology, and the role of

¹²⁵ James Grahame, *Why the North and South Should Have Apologized*, in WHO IS TO BLAME? 1, 8 (1842), reprinted in WHEN SORRY ISN’T ENOUGH, *supra* note 6, at 347, 348.

¹²⁶ It was certainly clear that the North as a whole engaged in *de jure* and *de facto* racial discrimination. See, e.g., Grahame, *supra* note 122, at 51 (contending that, in the North, free Blacks were “sternly excluded from all social equality with the whites, from all political franchises and most civil rights,” and describing an 1828 Connecticut law that denied that free Blacks were citizens of the United States). Consider also that it was Justice Bradley, appointed to the Supreme Court as part of the Republicans’ strategy of advancing the freedom of Blacks through Reconstruction, see ACKERMAN, *supra* note 101, at 211, 247-48, who wrote the opinion in the *Civil Rights Cases*, 109 U.S. 3 (1882), finding, *inter alia*, that the Thirteenth Amendment did not prohibit discrimination in places of public accommodation.

¹²⁷ Cf. LARRY MAY, SHARING RESPONSIBILITY 51 (“[A]ll those people who hold racist attitudes in communities where racially motivated violence occurs share in the responsibility for these harms.”); Fletcher, *supra* note 32, at 1524 (defending increased penalties for hate crimes on the ground that any one of these may incite future acts of violence against members of the victimized group).

¹²⁸ MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 179 (1982) (arguing that we are compelled to understand ourselves “as members of this family or community or nation or people, as bearers of this history, as sons and daughters of this revolution, as citizens of this republic To imagine a person incapable of constitutive attachments such as these is not to conceive an ideally free and rational agent, but to imagine a person wholly without character, without moral depth.”); *cf.* 2

members in extending the life of a group, puts the lie to this objection: cultures die out, which suggests that the institution and solidification of a culture are not sufficient to guarantee its survival. Instead, a culture's continued vibrancy depends on individuals acting in conformity with their cultural norms. This action not only reinforces the culture but also serves to communicate these norms to newer initiates into the culture. In this way, even if individuals derive their identities from their culture, they may be held responsible for both further entrenching their culture and transmitting it to future generations.

More generally, the initial plausibility of cries that "society made her do it" or that "he was culturally conditioned to engage in wrongdoing" can be explained by the fact that culture is ubiquitous in a self-obscuring way – its omnipresence can lead us to believe that it is part of the natural fabric of the world when, in fact, it is an artificial creation.¹²⁹ Thomas Flynn describes this as the "inertial sedimentation" of prior group practices.¹³⁰ These practices become so routinely adopted that we come to take them as given. Yet the apparent givenness of culture does not entail the actual tyranny of culture over its adherents. The causal relationship should be at least reciprocal, if not reversed altogether.¹³¹ In the case of slavery, then, some abolitionists may accurately be credited with the culture that promoted it, for "[t]hose who participate in creating the banality of evil bear a portion of the guilt for the accidental offender whose actions bespeak the mentality of the crowd."¹³² As such, their opposition to

KARL MARX, CAPITAL 864 (Ernest Rhys ed., Eden & Cedar Paul trans., J.M. Dent & Sons Ltd. 1946) (1930) ("Inasmuch as I conceive the development of the economic structure of society to be a natural process, I should be the last to hold the individual responsible for conditions whose creature he himself is . . .").

¹²⁹ Cf. Cohen, *supra* note 90, at 683 (attributing our reification of culture to a knee-jerk reaction against the radical atomization entailed by social contract theories).

¹³⁰ Thomas Flynn, *Collective Responsibility and Obedience to the Law*, 18 GA. L. REV. 845, 851 (1984).

¹³¹ For a defense of the view that the individual and collective share equiprimordial ontological status, see Noam J. Zohar, *Collective War and Individualistic Ethics: Against the Constriction of "Self-Defense,"* 21 POL. THEORY 606, 616-18 (1993).

¹³² Fletcher, *supra* note 32, at 1544. While I agree with Fletcher that individualists who promote hatred share culpability with those who act on this hatred, I disagree with his conclusion that "[r]ecogniz[e] the mitigating effect of the [group's] guilt would mitigate the responsibility of the offender . . ." *Id.* at 1539. If our argument above about the role of individuals in maintaining and transmitting their culture is right, then we may say that the criminal helps to create the climate of moral degeneracy that allegedly impairs her second-order sensibilities because she instantiates her degenerate values through her criminal activity. Of course, she may have inherited these values from those who came before her and whose example she followed. Nonetheless, we would have to adopt a very cynical view of the capacity for critical reflection were we to infer from the fact of this inheritance that the individual was thus unable to assess these values. Fletcher's account thus begs a whole host of questions about individuals' cognitive and volitional abilities.

slavery itself is no embarrassment to the claim that the nation as a whole ought to be held responsible for that institution.

Moreover, even if many abolitionists deplored not just slavery but any state of affairs in which Blacks did not enjoy full equality with Whites, it would still be correct to assign responsibility for slavery to the nation as a whole. Indeed, the lessons of Part III mandate this result: during the time that they were citizens, even the most fully egalitarian abolitionist shared with her slave-supporting fellows responsibility for the nation's existence and its apparent agency. In this way, every one of them was responsible for the nation's actions. Since, as we saw, participation in slavery was among these actions, citizens living during the time of slavery may legitimately be held responsible for it. It is for this reason that Lincoln could accurately proclaim that "[God gave] to both North and South this terrible war as the woe due to those by whom the offense came."¹³³

*D. Contemporary Citizens and the Duty of Repair*¹³⁴

The theory of group ontology advanced above aims to show that the nation, *qua* agent, can exist only through the intentional acts of individuals who adopt procedures for acting in its name and agree to extend the nation through time. Contemporary citizens of the United States are thus responsible for the nation's continued existence and moral agency. Yet the nation that contemporary citizens have decided to extend harbors a history that has dark, as well as glorious, phases. Moreover, this history is not unencumbered. It bequeaths a set of obligations on those who would adopt it as their collective past. Contemporary citizens incur the nation's debts, including its debt for slavery, then, because they extend the nation itself. It is thus entirely appropriate to hold contemporary citizens liable for making repair. Indeed, in this sense the responsibility of contemporary citizens

Even if Fletcher were right, however, that individuals who live in a culture of evil lack the capacity to revise their vicious intentions, his conclusion that the *guilt* of these individuals ought to be mitigated would still be unwarranted. Of course, we might want to temper the punishments we would otherwise inflict on these individuals. Yet to argue that their guilt itself is in some way diminished is to suggest that their actions are more justified than these would be if undertaken with full knowledge of the good and expansive freedom of the will. The quality of an action, however, does not turn on the mental or the volitional state of the actor performing it. Whatever we think of Fletcher's argument for collective responsibility for the content of one's culture, then, we ought not to draw from it the implication about guilt mitigation that Fletcher himself draws.

¹³³ Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), in LOIS J. EINHORN, ABRAHAM LINCOLN THE ORATOR: PENETRATING THE LINCOLN LEGEND 179, 180 (1992).

¹³⁴ For an overview of the conceptual terrain in intergenerational ethics, as well as the philosophical tools and theories available to think about such issues, see generally Lawrence B. Solum, *To Our Children's Children: The Problems of Intergenerational Ethics*, 35 LOY. L.A. L. REV. 163 (2001).

corresponds, appropriately, with the African notion of “ubuntu” – the notion that “no one can be healthy when the community is sick.”¹³⁵

Yet, while a decision to be a part of this country is sufficient to ground an obligation to make repair, it is not yet sufficient to make reparations a reality. Again, the debt that we incur is a debt for slavery but, to echo the opponent of reparations, the slaves are long dead. As such, there are no legitimate living claimants of slavery reparations. What is needed, then, is a harm that is distinct from but related to slavery, so that the ground of citizens’ obligations can coincide with the basis for the would-be recipients’ entitlements. In the next Part, I identify a harm in which contemporary citizens have engaged, and of which contemporary Blacks have been the victims, and stake the case for reparations there.

V. REPAIRING FAILURES OF REPAIR

“[N]eglecting or expunging the historical record is a way of undermining and insulting individuals as well.”¹³⁶

Until now, we have presumed that slavery engendered a compensable harm and have focused on the question of who should bear the duty of redressing this harm. Yet just what is the nature of this harm such that it reaches into the present and provides a legitimate claim to individuals who have never known the shackles or misery of slavery, or even those of their ancestors who did? In this Part, I critique the theories of harm that others have marshaled and advance an alternative to them. I conclude that it is not slavery itself that grounds the legitimate claim of contemporary Blacks but instead the expressive harm of the nation’s continued failure to offer repair that does so.

Before turning to specific accounts of the harm for which reparations are allegedly owed, however, it will be useful to confront a general objection to Black reparations according to which *no* account of the harm suffered by the descendants of slaves could entitle them to redress. On this objection, which is a version of Derek Parfit’s non-identity problem,¹³⁷

¹³⁵ Eric K. Yamamoto, Susan K. Serrano, & Michelle Natividad Rodriguez, *American Justice on Trial—Again: African American Reparations, Human Rights, and the War on Terror*, 101 MICH. L. REV. 1269, 1335 (2003).

¹³⁶ Jeremy Waldron, *Superseding Historical Injustice*, 103 ETHICS 4, 6 (1992); cf. Maria Grahm-Farley, *The Master Norm: On the Question of Redressing Slavery*, 53 DEPAUL L. REV. 1215, 1219 (2004) (“When racism is eradicated, the memory of slavery will have lost its value in the present.”).

¹³⁷ DEREK PARFIT, *REASONS AND PERSONS* 351-61, 366-79 (1984).

descendants of slavery may not bewail slavery or the disadvantages it created because they would not have existed had slavery not occurred.¹³⁸ The objection hinges on three premises: first, and uncontroversially, one's identity is fixed both by the identities of one's parents and the point in time when they procreated. Different parents would obviously possess different genetic material and so yield a different child; the same parents who procreated at a different time would have a genetically different combination of sperm and egg fuse, and so would still produce a different child. The second premise is also unproblematic: slavery led to meetings among partners that likely would not have occurred otherwise, and it led to procreative occasions that almost certainly would not have occurred otherwise. From the first two premises, then, we may conclude that the particular children who were born to slaves owe their existences to slavery. Correspondingly, the particular descendants of these children also would not have existed but for slavery.

The third premise is more problematic: one may claim to have been wronged in the actual world only if there is a relevantly similar world in which one exists and where the unjust act did not occur. Arguably, then, if the unjust act was the *cause* of one's existence, then one has no ground for complaint against this act, because there is no other possible world in which it is the case *both* that one exists, *and* that the unjust act did not occur. I shall argue that this premise is false, but the argument depends on the nature of the claim pressed by the descendants of slavery. Some reparatationists ground their claims to repair first and foremost in the compensation that the slaves themselves ought to have received, which descendants of these slaves would arguably have inherited.¹³⁹ Other reparatationists trace the miserable conditions facing many Blacks today to slavery, and argue for repair as a means of redressing this misery.¹⁴⁰ In

¹³⁸ Stephen Kershner, *The Inheritance-Based Claim to Reparations*, 8 LEGAL THEORY 243 (2002).

¹³⁹ See, e.g., MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 152 (1964); Molefi Kete Asante, *The African American Warrant for Reparations: The Crime of European Enslavement of Africans and Its Consequences*, in SHOULD AMERICA PAY?, *supra* note 104, at 3, 10-11 (citing forced labor, sexual abuse, loss of innocence, and torture as among the grounds for reparation); Gary Washburn, *Daley, Council Join in Slavery Apology*, CHI. TRIB., May 18, 2000, at N1 (reporting a 46-1 vote in favor of a Chicago resolution urging Congress to consider the question of paying reparations to contemporary African Americans for the suffering of slaves).

¹⁴⁰ See, e.g., BITTKER, *supra* note 99, at 12-29 (locating the ground for repair in segregation and Jim Crow); *Conference: Race, Law and Justice: The Rehnquist Court and the American Dilemma*, 45 AM. U. L. REV. 567, 672 (1996) [hereinafter *Conference: Race, Law and Justice*] (grounding repair in the disadvantage Blackness has conferred). Cf. Angela Davis, Keynote Address at Conference: Race, Law and Justice: The Rehnquist Court and the American Dilemma (Sept. 21, 1995), in 45 AM. U. L. REV. 567, 636-45 (1996) (defending affirmative action by appeal to the cumulative disadvantage that Blacks have suffered).

what follows, I take up each set of claims separately. I argue that each can overcome the non-identity objection, but is plagued with other difficulties that are not as easily defeated. I end with a defense of a novel brand of contemporary harm, in which repair is owed not for deprivations that slavery itself produced, but instead for those resulting from the insult unleashed by the nation's continued failure to offer repair.

A. Inheritance-Based Claims for Repair

Recall that, according to the non-identity problem, an individual who owes her existence to a set of circumstances may not object to these circumstances since, without them, she would not have existed at all. The problem with this premise is that it ignores the fact that some injustices are not identity-dependent. Inheritance-based claims, in particular, do not depend for their legitimacy on the particular identity of the claimant. While it may be true that the particular child who happened to issue from two slaves would not have been born had slavery not occurred, her claim to the reparations payments owed her parents holds regardless of who she happens to be, for *any* child born to these parents would have had a claim to this compensation. As such, this particular child's identity is irrelevant to assessing the legitimacy of her claim. For the same reason, the non-identity problem poses no real obstacle to the claims of the less proximate descendants of slaves, even though it is true that they too would not have existed but for slavery.¹⁴¹

Of course, that inheritance-based claims survive the non-identity objection does not entail that they cannot otherwise be impugned. To raise an inheritance-based claim, slave descendants would first need to establish the nature of the claim their slave ancestors could have brought, and then argue that they were the legitimate heirs of the right to make good on this claim. There are two common candidates for the nature of the claim that slaves could have brought – a claim to compensate them for the harm and abuses involved in enslavement,¹⁴² and a claim to compensate them for their labor.¹⁴³

¹⁴¹ Using a group-based conception of harm, *e.g.*, Fiss, *supra* note 83, one can arrive at a different reply to the non-identity objection in the case of reparations: Where a victim was victimized because of her group, all members of the group should be compensated. Since *any* child born to two African Americans will be African American, the child's claim to compensation as a group member does not turn on his or her particular identity. Of course, as the race-based harm recedes into the past, newborn Blacks will have a decreasingly compelling claim for restitution, since the expressive significance of the harm likely dissipates with time.

¹⁴² *E.g.*, Asante, *supra* note 139, at 10-11 (citing forced labor, sexual abuse, loss of innocence, and torture as among the grounds for reparation); *see, e.g.*, Washburn, *supra* note 139 (reporting a 46-1 vote

Assuming that the freed slaves would have been entitled to sue either for the abuses they suffered or labor they furnished, would their descendants have a right to make good on these outstanding claims? Descendants could claim this right only if they could establish that they were deprived of a share of their inheritance because their slave ancestors never received *their* dues.¹⁴⁴ Yet the deprivation likely cannot be established. Even if contemporary Blacks could identify their slave ancestors, and it is not clear that they could,¹⁴⁵ it would be near impossible to determine what share of the owed compensation would have trickled down to these descendants. Members of the intervening generations might have spent all of the compensation money, in which case these descendants would be no worse off in the actual world where their slave ancestors were never compensated than they would have been in a world where this compensation had been paid.¹⁴⁶ Indeed, according to one study, the disadvantage resulting from the failure to compensate the slaves for their labor seems to have disappeared within two generations from the time of

in favor of a Chicago resolution urging Congress to consider the question of paying reparations to contemporary African Americans for the suffering of *slaves*).

¹⁴³ *E.g.*, KING, *supra* note 139, at 138 (tracing African Americans' plight, and thus the justification for reparations, to "the robberies inherent in the institution of slavery"). Boris Bittker rejects any ground for reparations that restricts the historical lens to slavery since this restricted view invites objections based on the failure of identity between contemporary Blacks and slaves, and contemporary Whites and slave-owners. BITTKER, *supra* note 99, at 9. Indeed, Bayard Rustin rejected the idea of reparations on just this ground: "'If my great-grandfather picked cotton for 50 years, then he may deserve some money, but he's dead and nobody owes me anything.'" *Id.* at 10 n.10.

¹⁴⁴ It is worth noting that, where claimants seek something other than compensation, the United States has been willing to take reconciliatory measures even without proof that the descendants of victims of historical injustices had suffered financially because of the harm to their forbears. For example, the U.S. apologized to native Hawaiians in 1993 for the annexation of their ancestors' lands in 1897, Pub. L. 103-150, 103d Cong., 107 Stat. 1510 (1993), and in 1997, the U.S. agreed to investigate the land claims of contemporary Mexican-Americans whose ancestors' land titles were ignored under an 1848 treaty. *See generally* Posner & Vermeule, *supra* note 2, at 696-98 (presenting a whole host of reparations programs in table form).

¹⁴⁵ *See, e.g.*, Schuck, *supra* note 29. Anthony Appiah has made the intriguing claim that there are more White descendants of slaves than there are Black ones, suggesting that color, at least, will not be a reliable guide. Anthony Appiah, Remarks at the Yale, New Haven and American Slavery Conference: The Moral Claims of the Past: Justice Across Time (Sept. 28, 2002); *cf.* BITTKER, *supra* note 99, at 71-104 (1973) (providing a thorough and compelling account of the problems involved in identifying claimants in a reparations program aimed at rectifying racial discrimination resulting from segregation and Jim Crow). *But see* Ghannam, *supra* note 10, at 39 (reporting that recent research has already identified which slave fortunes were made by which Louisiana families, and which slaves were owned by these families).

¹⁴⁶ THOMPSON, *supra* note 32, at 110-12; *see also* BITTKER, *supra* note 99, at 28.

abolition.¹⁴⁷ So the failure to compensate the ex-slaves seems to have had no direct economic effect on contemporary Blacks.¹⁴⁸

More generally, even if contemporary Blacks could make out a legitimate inheritance-based claim for repair, it is not clear that reparationists would be wise to stake their case on this ground. Laws of bequest carry with them their own concerns about equity as they tend to exacerbate existing income disparities.¹⁴⁹ A program that seeks to restore racial equality should, if possible, avoid reliance upon mechanisms that conduce to economic inequality.¹⁵⁰

Of course, not all bequests are material and those that are not need not (and generally do not) upset socioeconomic gradients. Thus, those who demand reparations as recompense for the lost African heritage do not implicate equity-based concerns.¹⁵¹ The strategy is promising, for the

¹⁴⁷ Sacerdote, *supra* note 11.

¹⁴⁸ This is not to suggest that Blacks do not occupy a position of disadvantage in this country. See, e.g., RANDALL KENNEDY, *RACE CRIME AND THE LAW* (1997); ORLANDO PATTERSON, *THE ORDEAL OF INTEGRATION: PROGRESS AND RESENTMENT IN AMERICA'S "RACIAL" CRISIS* (1997); WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* (1996); Van B. Luong, *Political Interest Convergence: African American Reparations and the Image of American Democracy*, 25 U. HAW. L. REV. 253, 253 (2002) (reporting that, in 1999, the net worth of the average African American family was \$7,000 compared with \$84,400 for the average White American family); Ransford W. Palmer, *Reparations and the Black-White Income Gap*, 6 HOW. SCROLL SOC. JUST. L. REV. 71, 71-73 (2003) (presenting statistics revealing gross wealth disparities between Blacks and Whites over the age of 55); Lancaster, *supra* note 104, at 191 (citing disparities in college attendance between Whites and Blacks).

¹⁴⁹ See, e.g., Michael Hout, *Houses Divided: A Study of One of the Most Troubling Gaps Between White and Black America*, WASH. POST, Feb. 15, 2004, at BW3 (reviewing THOMAS M. SHAPIRO, *THE HIDDEN COST OF BEING AFRICAN AMERICAN: HOW WEALTH PERPETUATES INEQUALITY* (2004)). In the context of the debate about returning aboriginal lands, Jeremy Waldron has argued that what counted as an unjust seizure at the time that it occurred "may be transformed, so far as its ongoing effect is concerned, into a just situation if circumstances change in the meantime." Waldron, *supra* note 48, at 205, 221. The circumstances Waldron has in mind include population growth and/or resource scarcity, either of which could entail that the Aboriginals in question were no longer entitled to the expropriated lands. *Id.* at 217-22. Christopher Kutz has made a similar argument in the context of reappropriation of land in Eastern Europe. Kutz, *supra* note 25, at 296-302; see also Samuel T. Morison, *Prescriptive Justice and the Weight of History*, 38 CREIGHTON L. REV. 1153 (2005).

¹⁵⁰ THOMPSON, *supra* note 32, at 110. Thompson does make an exception for what she calls "lifetime-transcending interests," *id.* at 114-22, which motivate the projects to which one devotes his life even while they often cannot be completed within one lifespan. Thus, the individual who begins a newspaper, say, ought to be allowed to bequeath it to her children, since they have likely been invested with a valuation of the newspaper that their bestowing parent would share. These children are thus likely to pursue their parents' project with greater zeal than would the stranger who would receive the newspaper through some redistribution program were all bequests to be forbidden.

¹⁵¹ See ROBINSON, *supra* note 30; see also Jewel Crawford, Wade W. Nobles & Joy DeGruy Leary, *Reparations and Health Care for African Americans: Repairing the Damage from the Legacy of Slavery*, in *SHOULD AMERICA PAY?*, *supra* note 104, at 251, 253 (describing the flourishing African culture that existed before the slave trade); Yaa Asantewa Nzingha, *Reparations + Education = The Pass to Freedom*, in *SHOULD AMERICA PAY?*, *supra* note 104, at 299, 303-305 (condemning American curricula for their celebration of white slave owners like Washington and Jefferson).

cultural loss is one of the worst devastations wrought by slavery. As Randall Robinson contends, while other human rights crimes have claimed millions of lives, only slavery

has hulled empty a whole race of people with inter-generational efficiency. Every artifact of the victims' past cultures, every custom, every ritual, every god, every language . . . wrenched from them and ground into a sharp choking dust. It is a human rights crime without parallel in the modern world. For it produces its victims *ad infinitum*, long after the active stage of the crime has ended.¹⁵²

There is no doubt that we all have much to regret about the loss to the world of these cultural treasures. It is not yet clear, however, that this loss is compensable. Indeed, here, a different and more pernicious sort of non-identity objection arises. We were able to escape the standard objection earlier by pointing to a loss that a slave descendant would suffer no matter who he happened to be. Whatever other problems attach to inheritance-based claims, it is at least coherent for a descendant to claim, "I was unjustly deprived of *this* bequest." This claim is just elliptical for the statement, "the child of my mother/father was unjustly deprived of his bequest," where the statement is true for whatever child results. But the claim, "I was unjustly deprived of my culture" (where "my culture" is supposed to refer to the African culture of the speaker's forbears) is incoherent because the "I" is constituted by the culture in which it develops.¹⁵³ The claimant would not be who he is in the world where the culture of his ancestors had been preserved and bestowed upon him.

Perhaps the meaningfulness of the claim could be rescued if Robinson's charge that African Americans were no more than empty hulls were true – in that case, African Americans would not be individual selves at all and so there would not be a concern about a failure of reference between their current beings and the individuals who would have resulted had the cultural loss not occurred. But Robinson's charge is false – African Americans grow up with a culture at least as robust as that of their African forbears (although, in the wake of white oppression, that culture may be

¹⁵² ROBINSON, *supra* note 30, at 216.

¹⁵³ See, e.g., SANDEL, *supra* note 128, at 179.

less glorious).¹⁵⁴ The culture that perished is no more the culture of Black Americans than it is the culture of White Americans. However tragic its loss, then, this culture cannot ground a program of *Black* reparations.

To sum up, reparationists who stake their claims on inheritance-based grounds will have to establish appropriate lineages, contend with unwieldy counterfactuals about how much money would have trickled down to the slave descendants had the slaves been paid, defend rights to bequest, and articulate a harm that claimants actually suffer. At this point, the difficulties facing inheritance-based claims appear too daunting to warrant further pursuit.

B. Reparations and Contemporary Harms

Faced with the challenges of making out a convincing inheritance-based claim for reparations, some reparationists focus instead on the legacy of slavery for race relations today. These theorists ground a claim for redress in the disadvantages that flow not from slavery itself, but instead from the more recent discriminatory measures that slavery enabled.¹⁵⁵ Focusing on the stigmatizing vestiges of slavery, rather than slavery itself, has the advantage of circumventing worries about identifying the actual descendants of slaves or slave owners. I will argue that there are two problems with this justification for reparations, though. First, it too is susceptible to the non-identity problem, albeit not insuperably. Second, the harms to which this justification points are in fact ancillary to the true harm for which repair is owed. I end with a description of this harm.

To begin with the non-identity problem, we should note that the defense marshaled against it in the last section is unavailing here. There, we argued that the non-identity problem did not apply because the harms for which compensation was sought were not identity-dependent: any child born to slaves was deprived of his rightful inheritance, and so his precise identity did not impugn the legitimacy of his claim. Here, however, the claimant contends that she is owed for harms that *she* herself actually suffers. Identity is thus clearly at issue, and so we will have to address the non-identity problem head-on.

¹⁵⁴ See, e.g., JOHN H. MCWHORTER, *LOSING THE RACE: SELF-SABOTAGE IN BLACK AMERICA* (2000) (arguing, inter alia, that African American culture is infected with a cult of victimology, separatism, and anti-intellectualism). But see, e.g., Alfred L. Brophy, *Losing the (Understanding of the Importance Of) Race: Evaluating the Significance of Race and the Utility of Reparations*, 80 TEX. L. REV. 911 (2002) (contesting McWhorter's social science data, and arguing that discrepancies in income and success between Blacks and Whites can be accounted for by acts of past discrimination, rather than African American culture).

¹⁵⁵ See generally *supra* note 140.

Recall that the problem aims to foreclose complaints about the circumstances of an individual's creation where she would not have been born had these circumstances been otherwise. The proponent of the non-identity objection is right to insist that it would be non-sensical for the resulting child to claim, "You harmed me when you created those circumstances," since "me" had no referent at the time that the circumstances were produced. But where the consequences of an act linger, such that they continue to harm our claimant at a time after her birth, then she ought to be entitled to repair for these lingering effects. To see this, consider the case of a child who is born to slaves who met as a result of slavery, but who conceive only after they have been emancipated. Assume further that the mother and father would not have met were they not slaves, so that the resulting child owes his existence to slavery. If the first few years of this child's life are spent in misery because his parents are without adequate means to provide for him, are we compelled to say, along with the proponent of the non-identity objection, that he may not claim redress for this misery? If we believe that a slaveholder is accountable not only for his actions at the time that they occur, but also for at least the proximate consequences of these actions, then we need not exclude compensation for the child from the debts that this slaveholder owes.

Of course, sometimes the non-identity objection is construed not as a conceptual thesis, where claims are dismissed because no victim exists at the time when a harm is alleged to have occurred, but instead as an economic thesis, where claims are dismissed because the great good that the alleged victim receives in having been born far exceeds whatever disadvantages flow from the circumstances of her creation.¹⁵⁶ Leo Katz, for example, has argued that the "blessings of living in the United States,"¹⁵⁷ which would not have accrued to slave descendants in the absence of slavery, might be sufficient to outweigh the inheritance of which these descendants were deprived.¹⁵⁸ Here, what is claimed is that the slave descendants, whoever they are, might in fact be better off for slavery, and hence ineligible for repair on compensatory grounds.

¹⁵⁶ Seana Shiffrin, for example, seems to understand the non-identity problem in this way. "[T]he so-called non-identity problem trades on an implausible, economically-influenced caricature of what constitutes a harm or a wrong. On this view, a claim that one has been harmed or wronged is undercut by a demonstration that the overall position of the person or the overall outcome of the episode in question is beneficial . . ." Shiffrin, *supra* note 32, at 2.

¹⁵⁷ Leo Katz, *What To Compensate: Some Surprisingly Unappreciated Reasons Why the Problem Is So Hard*, 40 SAN DIEGO L. REV. 1345, 1364 (2003).

¹⁵⁸ *Id.* at 1364-65.

Even if life in America were a blessing for all African Americans (and we have already seen reasons to doubt that this is so),¹⁵⁹ the objection would remain utterly perverse. For example, reduced to its most absurd, the objection would entail that former slave-owners could do whatever they wanted to the child in our hypothetical so long as the child's later years were filled with enough happiness to make his life, on balance, a life worth living.¹⁶⁰ Indeed, a comparison with the situation of American Holocaust survivors, many of whom enjoy greater success, on average, than their American Jewish contemporaries who were not victimized by the Holocaust, is instructive here.¹⁶¹ It seems plain that the survivors' relative success presumably did not diminish the warrant for repair. After all, reparations were owed not for the economic deprivation that the Holocaust entailed but for the horrible abuses that Jews, gypsies and homosexuals suffered.¹⁶² As such, the subsequent success of the survivors was irrelevant to the legitimacy of their claims. Similarly, need did not factor into considerations about whether Japanese Americans interned during World War II were owed compensation.¹⁶³ But neither can the suffering of Blacks be reduced to economic deprivation. I go on to argue that this deprivation is concomitant with and results from a dignitary harm, and that it is this harm that furnishes the ground for repair.¹⁶⁴ Thus, no matter the gains in standard of living that the United States provides over

¹⁵⁹ See *supra* note 148. But see Raymond A. Winbush, *Interview with Chester and Timothy Hurdle, Barbara Ratliff, and Ina Hurdle-McGee, October 29, 2002*, in *SHOULD AMERICA PAY?*, *supra* note 104, at 315, 318 (interviewing children of freed slaves, one of whom expressed gratitude for slavery since it allowed her to be born in America).

¹⁶⁰ See *id.* at 2-3.

¹⁶¹ Daniel Goleman, *Holocaust Survivors Had Skills To Prosper*, N.Y. TIMES, Oct. 6, 1992, at C1 (citing research conducted in the early '90s which revealed that "though the [Holocaust] survivors had, on average, less education, their careers were more successful and their incomes greater" than other American Jews of the same generation).

¹⁶² That the Holocaust reparations package involved more than just restitution of property can be seen from provisions that make the package conditional on the recipients' relinquishment of any further claims against Germany and Switzerland, and that have these countries indemnify the financial institutions that are the named payers. If the banks were merely returning stolen property, then there would be no reason to think that this return foreclosed claims against countries that colluded with Hitler. See generally STUART EIZENSTAT, *IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II* (2003); cf. Elizabeth Tyler Bates, *Contemplating Lawsuits for the Recovery of Slave Property: The Case of Slave Art*, 55 ALA. L. REV. 1109 (using the Holocaust restitution cases as a justificatory source for claims that would seek compensation for crafts and works of art executed by slaves).

¹⁶³ A lawyer involved in the Japanese reparations campaign tells the story of William Hohri, one of the leading activists for Japanese reparations, who intended to use his compensation money to purchase a Jaguar. The final amount of compensation, however, was so small that Hohri was only able to afford a Nissan, the license plate for which read "REDRESS." *Conference: Race, Law and Justice*, *supra* note 140, at 652-53.

¹⁶⁴ See *infra* Part V.B.

the African countries of the slaves, these gains cannot and do not undercut the expressive injury that Blacks suffer, and for which they are owed repair.

So much, then, for the non-identity problem. Turning now to the merits of reparations claims that ground themselves in contemporary harms, we can recognize two varieties of such claims. The first, advanced by Boris Bittker, grounds repair in the official sources of racial discrimination that produced Jim Crow, segregation, anti-miscegenation laws and so on.¹⁶⁵ As he writes, “[t]he status of American blacks today stems unmistakably from the years when segregation enjoyed the nihil obstat of *Plessy v. Ferguson*, and no one . . . can doubt that the life of blacks in America will bear for decades the scars of a century of discrimination.”¹⁶⁶

The second sort of claim adopts a more metaphoric approach to the harm, locating it in the privilege that attaches to being white-skinned, or the disadvantage that flows from being brown-skinned, both of which are traced to slavery.¹⁶⁷ Ralph Ellison captured the operation of this white skin privilege when he wrote that

[m]any whites could look at the social position of blacks and feel that color formed an easy and reliable gauge for determining to what extent one was or was not American. Perhaps that is why one of the first epithets that many European immigrants learned when they got

¹⁶⁵ See BITTKER, *supra* note 99, at 12-29.

¹⁶⁶ *Id.* at 19.

¹⁶⁷ See, e.g., *Conference: Race, Law and Justice*, *supra* note 140, at 672 (“[B]ecause of racism, there is a white-skin privilege, so that any white person walking down the street is going to be treated differently than any black person walking down the street.”); Lolita K. Buckner Inness, *Tricky Magic: Blacks as Immigrants and the Paradox of Foreignness*, 49 DEPAUL L. REV. 85, 125 (1999) (describing the reaction of a wealthy Jamaican emigrant to United States: “[h]e discovered once he reached the United States that the assured social status to which he had become accustomed was no more, and that he was subject to the same racial discrimination that any other Black person was.”).

Experiments have borne out this White skin privilege: Whites and Blacks posing as job, loan or housing candidates have arrived at interviews with identical sets of credentials. Even for blue-collar jobs, Black candidates were 20-25% less likely to advance in the hiring process. Black applicants also faced discrimination in contacts with realtors and were more likely to be turned down for loans. Tuneen E. Chisolm, *Sweep Around Your Own Front Door: Examining the Argument for Legislative African American Reparations*, 147 U. PA. L. REV. 677, 706 (1999); cf. Anita Indira Anand, *Visible Minorities in The Multi-Racial State: When Are Preferential Policies Justifiable?*, 21 DALHOUSIE L.J. 92, 127 (1998) (“White males, by virtue of their colour and gender, benefit from a social atmosphere in which that is the best thing to be.”).

off the boat was the term ‘nigger’ – it made them feel instantly American.¹⁶⁸

Though Bittker and Ellison offer compelling and evocative statements about race relations, their accounts of harm share the time-limiting feature that is the Achilles’ heel of more traditional arguments in favor of slavery reparations. As the era of Jim Crow, segregation and overt private discrimination recedes in time, citizens will again be able to protest that they never participated in or endorsed any of these practices, and most Blacks are too young to have suffered from them anyway. Yet, even as these citizens issue their protestations, the disadvantage accruing to Blacks will remain.¹⁶⁹ So, neither Bittker nor Ellison’s account of harm makes the case for Black reparations compelling.

Yet there is a way to preserve the timeliness of calls for repair. Rather than viewing Jim Crow, segregation, de facto discrimination, and the disadvantage that arises from Blackness as the causes of a harm for which repair is owed, we should construe these phenomena as the products of a culture that has denied Black claims to repair and thereby communicated that to be Black is to be inferior. The failure to make repair thus relates back to slavery, but persists through to the present and links that ancient injustice to the more modern discriminatory practices that Bittker and Ellison decry, sweeping them all up into a harm in which we have participated, along with all members of the nation since the time of Reconstruction.

The transgression that is the ongoing failure to make repair thus adopts a cyclical pattern:¹⁷⁰ at the close of the Civil War, the nation owed reparations to the freed slaves since the nation as a whole participated in slavery, as we saw in Part IV. The failure of the nation to offer reparations to the freed slaves blighted their emancipation and demeaned the abuses they had suffered. This failure effectively signified that Blacks did not

¹⁶⁸ Ralph Ellison, *What America Would Be Like Without Blacks*, in *THE COLLECTED ESSAYS OF RALPH ELLISON*, 577, 582-83 (John F. Callahan ed., 1995); see also *Does America Owe a Debt to the Descendants of Its Slaves?*, *supra* note 104, at 91 (citing comedian Chris Rock, who famously said to his white interlocutor, “Despite all the changes in society, you wouldn’t switch places with me, a black man. And I’m rich!”).

¹⁶⁹ See *supra* note 148.

¹⁷⁰ Cf. Forde-Mazrui, *supra* note 23, at 708-09. Forde-Mazrui identifies a recurring harm that he thinks grounds a duty to repair. He locates this harm in the material effects for the present generation of the failure to redress past discrimination. The account I elaborate here, however, is rooted in an expressive harm, and the act giving rise to this harm—*viz.*, our willful neglect of the legitimate cries of Blacks for repair—is not an act of past discrimination but instead an insult that persists to this day.

merit equal justice. Moreover, it entailed that the poverty of the newly freed people would persist until they could overcome it through their own financial gains, an eventuality unlikely to occur soon after Emancipation, given the freed people's relative lack of marketable skills. In this way, the initial failure to make repair yielded both material and expressive harms – it sustained an unjustly created disadvantage and it perpetuated an unfounded conception of Blacks as morally unworthy.

These harms were themselves compensable, and their legitimate claimants included not only the newly freed slaves but also their children, who would have suffered from both harms too. Failure to redress the children of slaves constituted an offense against them and *their* children (i.e., the freed slaves' grandchildren) for the same reasons.¹⁷¹ The transgression has been repeated in every generation through to the present one. It should be clear, then, that neither state-sanctioned discrimination nor a white skin privilege is an independent harm for which repair is owed; both are the necessary corollaries of a regime in which to be Black is to have one's moral claims ignored or denied.¹⁷²

Like the culture that practices it,¹⁷³ the omission is omnipresent and hence invisible to its practitioners. Yet this omission is likely far more salient to those whom it deprives. Moreover, the deprivation is likely felt by *all* Blacks living in America today. For the decision to deny claims of repair (and, again, the persistence of this decision should not fool us into believing that it is not being made all the time) is not formed in contemplation of a subset of Blacks comprising the slaves' descendants. Instead, the United States has refused even to begin a process of truth and reconciliation,¹⁷⁴ and so offends every Black since, for all we know before this process begins, any Black could be a slave descendant.¹⁷⁵

¹⁷¹ Leo Katz suggests that even if reparations were to have been paid to the slaves or some generation of their descendants, subsequent generations of slave descendants might nonetheless have valid claims to repair. Katz, *supra* note 157, at 1365-66. He premises the suggestion on an analogy to a rape victim who acquires an inheritable disease from her rapist, and he wonders whether compensation for the victim and her child, who inherits the disease, would extinguish the claims of future descendants who also inherit the infection. The analogy is inapt, however, for the harm of slavery or the nation's subsequent indifference to its debt is not like an infectious disease—sincere and robust reparations would eradicate the harm once and for all.

¹⁷² Cf. Matsuda, *supra* note 36, at 390 (arguing that the fact that there is no cognizable legal claim that contemporary Blacks can wield in their quest for reparations is not only a sign of their relative powerlessness but also an injury in itself, because this lacuna “signifies the political non-personhood” of Blacks).

¹⁷³ See *supra* notes 129-31 and accompanying text.

¹⁷⁴ See Commission to Study Reparation Proposals for African Americans Act, H.R. 40, 109th Cong. (2005), a bill that proposes, inter alia, to “establish a commission to examine the institution of slavery, subsequent de jure and de facto racial and economic discrimination against African Americans,

In this way, contemporary Blacks suffer an actual harm for which contemporary citizens are culpable not just through their symbolic association with the nation. Instead, in their failure to discharge the debts for which they are liable, these citizens repeat the transgression that has been the fate of African Americans since emancipation.¹⁷⁶ Because this construction of the harm implicates *all* contemporary citizens, Blacks will, on this account, both receive and owe repair. Yet this outcome is what acknowledgment of Blacks' full membership in the moral community requires.

In short, slavery provided the initial ground for Black reparations, but the warrant for redress has been sustained by the nation's continued neglect of and indifference to the cries of Blacks for justice. For this reason, the force of their cries does not attenuate as time progresses; if anything, the cumulative omission only heightens the offense, for it extends the historic exclusion of Blacks from full membership in the moral community. Thus, those who plead for absolution on the ground that they had nothing to do with slavery and so should not be made to pay for it thus get the issue completely wrong. It is precisely *because* we did nothing that we should be made to pay.

VI. CONCLUSION

Existing theories of responsibility fail to establish how an individual member of a group may legitimately be held responsible for actions the group undertakes before his or her tenure in it. Individualist accounts

and the impact of these forces on living African Americans." The bill has been introduced, and defeated, every year since 1989. Compare White, *supra* note 10 ("Heck, we couldn't even persuade Bill Clinton, who is practically kin, to apologize for slavery, much less pony up any cash. Is there any reason to think George W. Bush—let alone a majority in Congress—would be more receptive?"), with Yamamoto, *supra* note 4, at 483 (citing President Clinton's apology to indigenous Hawaiians for the illegal U.S.-aided overthrow of the sovereign nation), and Stuart Eizenstat, Keynote Address (Nov. 1, 2001), in 25 *FORDHAM INT'L L. J.* 205, 216 (2001) (underlining the significance of the apology issued by President Rau for Germany's participation in the Holocaust: "I think all of us felt that had that statement not been made, there would have been a sense of incompleteness to the DM 10 billion settlement.").

¹⁷⁵ Cf. Ryan Fortson, *Correcting the Harms of Slavery: Collective Liability, The Limited Prospects for a Class Action Suit for Slavery Reparations, and the Reconceptualization of Whites' Racial Identity*, 6 *AFR.-AM. L. & POL'Y REP.* 71, 125 (2004) (arguing that focusing exclusively upon Black slave descendants, rather than all contemporary Blacks, obscures present day discrimination).

¹⁷⁶ Cf. Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 25, 25 (Amy Guttmann ed., 1994) (arguing that misrecognition—that is, the failure to recognize the humanity or uniqueness of another—can be a form of contempt and oppression).

unduly ignore the relationships between individuals' contributions to a collective product, and inappropriately limit liability to the magnitude of an individual's direct contribution to a harmful act, rather than the extent of harm he directly or indirectly caused. Collectivist theories licitly assume that responsibility presupposes control over the group act, and hence, when it comes to historical injustices, fail to arrive at responsibility ascriptions significantly different from those the individualist would countenance. By turning to an account of collective agency, however, we can see how each member contributes to the group's apparent moral status, and how each may thus be held responsible for wrongdoing no matter when in the group's history the wrongful act occurred.

It is through such an account that we can locate the duty Americans bear to repair the legacy of slavery, for we are members of the same nation as those of our forbears who practiced, promoted, or otherwise facilitated slavery. Slavery was their transgression; the failure to repair it has been ours. While the debt they bequeathed to us may not have arisen from a transgression for which any of us is guilty, each of us *is* guilty for failing to discharge this debt. We are guilty even if we have never thought about reparations before – indeed, we would be guilty because we had never thought about reparations before. We are guilty because together we have perpetuated a culture that turns its back on its moral obligations, and does so with special ease when those obligations concern Blacks. We are guilty because we have refused even to issue an apology,¹⁷⁷ and so we have communicated that we repudiate the legitimate claims that may be imposed on us, rather than repudiating our shameful past. We must halt the cycle of our collective transgression, and compensate those who have been shackled by our indifference. We must make repair.

¹⁷⁷ Indeed, some commentators argue that the true motivation behind the United States' withdrawal from the 2001 United Nations World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance was a proposed U.N. declaration proclaiming that slavery was a crime against humanity. See, e.g., Lorenzo Morris, *Symptoms of Withdrawal—The U.N., The U.S., Racism and Reparations*, 6 HOW. SCROLL SOC. JUST. L. REV. 49, 50-51 (2003); Michelle E. Lyons, Note, *World Conference Against Racism: New Avenues for Slavery Reparations?*, 35 VAND. J. TRANSNAT'L L. 1235, 1238 (2002); cf. Anne Bayefsky, *The U.N. World Conference Against Racism: A Racist Anti-Racism Conference*, 96 AM. SOC'Y INT'L L. PROC. 65, 71 (2002) (citing resistance among European Union delegates to having to pay reparations for slavery).

