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## A LOCKEAN ARGUMENT FOR BLACK REPARATIONS

(Received 17 November 2002; accepted 18 November 2002)

**ABSTRACT.** This is a defense of black reparations using the theory of reparations set out in John Locke's *The Second Treatise of Government*. I develop two main arguments, what I call the "inheritance argument" and the "counterfactual argument," both of which have been thought to fail. In no case do I appeal to the false ideas that present day United States citizens are guilty of slavery or must pay reparation simply because the U.S. Government was once complicit in the crime.

**KEY WORDS:** compensation, John Locke, reparation, right of inheritance, Jeremy Waldron

### INTRODUCTION

John Locke, if he were alive today, would support a case for reparation for African Americans based on the enslavement of their slave ancestors. At least he would do so if he reasoned consistently from his principles. This is the thesis of this essay. I will argue that Locke's views on inheritance, consent, legitimate government, freedom, and, of course, reparation, show how to correct, restate, and defend, the two main arguments for black reparations, the "counterfactual argument" and the "inheritance argument." This should be a significant result, if it is true, for Locke's principles of political philosophy are persuasive and appealing when properly understood, he is the first great liberal philosopher, and he has contributed more to how US citizens think about moral and political matters than any other philosopher.

In his *The Second Treatise of Government*, Locke's main claims about reparation are usefully summarized in Sections 10 and 11 of his chapter on the state of nature. According to Locke,

Besides the Crime which consists in violating the Law and varying from the right Rule of Reason, . . . there is commonly injury done to some Person or other, and some other Man receives damage by his Transgression, in which Case he who hath received any damage, has besides the right of punishment common to him with other Men, a particular Right to seek Reparation from him that has done it.

This right of reparation, Locke continues in the next section, "belongs only to the injured party," so that while the Magistrate who has



*The Journal of Ethics* 7: 63–91, 2003.

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the common right of punishing put into his hands, can often, where the publick good demands not the execution of the Law, remit the punishment of Criminal Offences by his own Authority, but yet cannot remit the satisfaction due to any private Man, for the damage he has received. That, he who has suffered the damage has a Right to demand in his own name, and he alone can remit: the damnified Person has this Power of appropriating to himself, Goods or Service of the Offender, by Right of Self-Preservation.<sup>1</sup>

Taking *T* to be the transgressor and *V* the one he harms or damages, the key points seem to be as follows:

1. If *T* commits a transgression and *V* is harmed as a result, *V* has a right to seek reparation from *T*. It should be noted, however, that although transgressions “commonly” cause harm they do not always do so. If *T* harms *V* without committing a transgression, or commits a transgression but without harming *V*, *V* does not have a right for reparation from *T*. To have a right to seek reparation from *T*, *T* must have committed a transgression and *V* must “receive” damage from *T*’s transgression, but it is apparently not necessary that *T* intended to transgress against *V*, or intended to cause damage to *V*. It is enough that *T* transgress against someone, (not necessarily *V*), and as a result *V* receives damage.
2. Reparation is not the same as punishment. Punishment is to deter the wrong doer and warn others; reparation is to “make satisfaction” for the harm that *V* suffered. In some cases it is impossible to make satisfaction to *V* for the harm that he suffered. In these cases reparation is impossible. An example involves murder. A murdered man’s family can perhaps receive reparation for the loss they suffer as a result of this death. But he cannot receive reparation for his death. As Locke says, “no Reparation can compensate” for murder. This suggests that reparation must compensate the injured person for his harms. But reparation and compensation are not therefore the same thing. A person can be compensated for any harm he suffers from, including a harm that is not the result of others’ transgression; and he can be compensated by those who had nothing to do with his being harmed. But he can receive reparation only for harms that he suffers as a result of others’ transgression, and he can receive it only from those whose transgressions harmed him. Consequently, if a transgressor harms me and an innocent does what he can to help defray the costs of compensating me for my harms, it does not follow that I have received reparation. I am still entitled to seek it from the only one who can give

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<sup>1</sup> John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988); *The Second Treatise of Government*, Chapter 2, Sections 10 and 11, pp. 273, 274.

it, that is, from the transgressor, though what this involves may be affected by the fact that someone has done what she can to compensate me.

3. If *T* commits a transgression and *V* is harmed as a result, *V* is entitled to seek reparation from *T*. It is unnecessary, and irrelevant that *T* get any profit or satisfaction from his transgression or from harming *V*. *T* could have been harmed as a result of his own transgression and from harming *V*, and his harms could be greater than *V*'s harms. *V* is still entitled to seek reparation from him. If I punch you and break your jaw, I am not let off the hook because I also broke my hand, more severely than I broke your jaw. If *T* does make a profit from his transgression and from harming *V*, *V* is not automatically entitled to that profit as his reparation. His reparation depends strictly on how much *T* harmed him, not on how much profit he made from harming him.

On Locke's account the slaves were clearly entitled to seek reparation from the slave holders for the slave holders committed serious transgressions that harmed the slaves. But how do we get from these propositions to proposition at issue, namely, that present day African Americans have a claim for reparation based on the enslavement of their ancestors? Locke's account does not automatically rule out that proposition because slavery ended one hundred and fifty years ago and the slaves have long since died. His account does not say that people damaged as a result of others' transgressions can seek reparation only if the transgressions occurred immediately before they were damaged; it allows that they can seek reparation for damages even if the transgressions that caused the damages occurred much earlier. Consequently, if slavery's transgressions have harmed present day African Americans, they may be entitled to seek reparation for their harms even if slavery ended a long time ago. But from whom can they seek reparation? That is the more difficult and interesting question. On Locke's account, people harmed as a result of others' transgressions may seek reparation only from the person or persons who committed the transgressions that harmed them. Consequently if slavery has harmed present day African Americans they are entitled to seek reparation from the persons whose transgression resulted in their harms, that is, from the slave holders. But, it seems, they cannot seek reparation from the slave holders because the slave holders no longer exist.

One possible solution to this difficulty is to argue that the U.S. federal and state governments helped support slavery, and consequently are implicated in its transgressions. Since these governments continue to exist, present day African Americans may be entitled to seek reparation from them. As I have already indicated, it may not matter that the transgressions

in question ended one hundred and fifty years ago. What matters is that they have harmed present day African Americans.

Several steps in this argument are controversial. Probably the most controversial is that slavery has harmed present day African Americans. This cries out for a defense because U.S. slavery ended one hundred and fifty years ago. It is not that one cannot harm others long after one is dead. If I design a bomb to go off one hundred and fifty years after my death, hide it where it will never be found, I may well succeed in harming others one hundred and fifty years after my death. But slavery is not like that at all. It has been there for all to see and examine, and scholars of all sorts, historians, economists, sociologists, and psychologists have studied it since it ended. If it was a bomb why did no one diffuse it? If it initiated a chain of harms linked as cause and effect that persists to the present day, why has that long chain remained unbroken? More particularly, why has no one broken it? To show that no one has, it is not enough to show that African Americans suffer from many disabilities. We have to show that slavery caused them. The fact that slavery ended a hundred and fifty years ago does matter after all. A hundred and fifty years is a long time, long enough for other factors to have intervened and caused the present black disabilities; in other words, these disabilities could be the result of causes other than slavery. For example, some have argued that blacks are innately less intelligent than whites and other races and that this enough to explain black disabilities. This argument has to be rebutted to make the point that black disabilities stem from slavery. More generally, if slavery did initiate a chain of causally linked harms, one has to show that blacks have not helped to keep that chain unbroken.<sup>2</sup> If I transgress on your rights and harm you I need not have caused the harms that your transgressions on others cause them. This is true even if you would not have committed the transgressions had I not transgressed on you. If my robbing you makes you distraught, and you drown your disappointment in drink, drive off, get into an accident and harm someone, he may not be entitled to seek reparation from me. He would be entitled to do so, only if my robbing you made it impossible for you to avoid getting into the accident. Had I not robbed you, you would not have caused the accident, but it does not follow that I caused the accident, if you could have avoided it. So even if slavery did harm the slaves, which, of course, it did, it does not follow that it is the cause of present black disabilities. Blacks themselves may be the cause of

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<sup>2</sup> Stephen Kershner brings up this argument along with others in "Uncertain Damages to Racial Minorities and Strong Affirmative Action," *Public Affairs Quarterly* 13 (1999), pp. 83–98.

these disabilities, if they could have avoided passing on their disabilities to their children, but did not.

A further difficulty follows from the fact that reparation requires compensation. I follow the common view that compensating a harmed person involves bringing him to the level of well-being he would have enjoyed had he not been harmed.<sup>3</sup> This often makes it hard to figure out what compensating a harmed person requires given that it is usually hard to know what would have happened had something not happened that did happen. And then there is a more radical difficulty much beloved by critics of black reparations. It is this: had slavery never occurred, the people who make up the present generation of African Americans would not exist.<sup>4</sup> The argument for this claim depends crucially on the assumption that our identities depend on our genetic make up and consequently on the identities of our parents. If slavery had never occurred most of the ancestors of present day African Americans would have never left Africa, and it is highly unlikely that they would have met and had children with the people they did meet and have children with. Consequently, if our identities depend on the identities of our parents, it follows that the people composing the present generation of African Americans would not exist if slavery had never occurred. But how can the present black population seek reparation for harms caused by transgressions that helped cause their existence when, had these transgressions not occurred, they would never have been even conceived?

Because of its reliance on counterfactual reasoning let us call the argument described above the “counterfactual argument” for black reparation. Its many difficulties have persuaded some philosophers to try a different approach. It goes as follows: the slaves were entitled to seek reparation from the U.S. Government for its part in their enslavement but they were never given that reparation. But present day African Americans are the slaves’ heirs. Consequently, supposing that they have inherited rights to whatever their slave ancestors were entitled to, it follows that they have rights to the reparation that the government owed its slave ancestors but never paid.

<sup>3</sup> See for example, George Sher, “Compensation and Transworld Personal Identity,” *Monist* 62 (1979), pp. 378–391. See Robert Nozick’s well known statement, “something fully compensates . . . person *X* for *Y*’s action *A* if *X* is no worse off receiving it, *Y* having done *A*, than *X* would have been without receiving it if *Y* had not done *A*” [Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. 57].

<sup>4</sup> See for example, Christopher Morris, “Existential Limits to the Rectification of Past Wrongs,” *American Philosophical Quarterly* 21 (1984), pp. 175–182. Or Michael Levin, “Reverse Discrimination, Shackled Runners, and Personal Identity,” *Philosophical Studies* 37 (1980), pp. 137–149.

This argument does not say that paying the present U.S. black population the reparation that was owed to their ancestors will compensate their ancestors. The ancestors of the present black population are dead, and no compensation can make reparation for the harms they suffered. But it does not follow that their rights to reparation evaporated into nothing when they died. When people die their rights to their property, for example, are passed on to their heirs.<sup>5</sup> It is not necessary that the property be in their possession. For example, a person's debtors are not let off the hook just because he dies. The debts they owed him are now owed to his heirs. But the U.S. Government was among the debtors of the slaves, and it never paid them the debt it owed them. Consequently it owes that debt, with interest, to the heirs of the slaves, and the heirs of the slaves are their descendants, that is, the present black population. Because of its reliance on the right of inheritance let us call this argument the "inheritance argument" for black reparation.

There are important differences between the counterfactual argument and the inheritance argument. The counterfactual argument concludes that present day African Americans have a claim for reparation based on the enslavement of their ancestors. But it relies crucially on the controversial premise that slavery has harmed the present generation of black people. It did so the argument says, by initiating a chain of harms related as cause and effect and befalling the slaves and their descendants that has persisted to the present day. These causal claims were the source of the argument's weakness. They bogged it down in controversial claims that slavery continues to have harmful effects a full century and a half after its abolition. More radically, it may be impossible to state the argument coherently since it requires that people be compensated for harms caused by a transgression that was among the conditions for their existence. The inheritance argument sidesteps these difficulties. It insists that the U.S. Government supported slavery, that slavery was unjust and harmed the slaves, and consequently that the slaves had rights to reparation from the U.S. Government. But it studiously avoids relying on the assumption that slavery has harmed the present black population. It would be unaffected, for example, if the chain of harms that slavery initiated had somehow been broken, and consequently that slavery had left no deadly legacy of harms that continue to incapacitate the present black population. Suppose, for example, that the black population had somewhat miraculously recovered

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<sup>5</sup> I suggested this argument in Bernard Boxill, "The Morality of Reparation," *Social Theory and Practice* 2 (1972), pp. 113–122. A more recent statement is in Stephen Kershner, "Are the Descendants of Slaves Owed Compensation for Slavery?" *Journal of Applied Philosophy* 16 (1999), pp. 95–101.

from the effects of slavery, even without being compensated, and had prospered. Had this happened the counterfactual argument would collapse because it depends on the assumption that slavery harms the present black population. I am not saying that someone harmed as a result of a transgression may not be entitled to reparation for his harms just because he has recovered from his harms; he may be. I am saying that someone must have been harmed to be entitled to reparation, so that if at some point slavery no longer harmed the slaves descendants, from that point on they would cease being entitled to reparation for being harmed by slavery. The inheritance argument, however, would be unaffected if slavery's long reach had ended some time ago and it no longer harmed the black population. It relies on the assumption that the U.S. Government owes the present black population a debt for an unjust loss it helped to cause, and such a debt is not revoked just because the creditor has recovered from the loss and is prosperous. Of course, the present black population is not prosperous; indeed it suffers from many disabilities. But the argument does not rely on this fact.

#### THE INHERITANCE ARGUMENT

The inheritance argument does not say that African Americans have a claim for reparation based on the enslavement of their ancestors. It says they have a claim to collect the compensation that was owed to their ancestors but was never paid. With this point clearly understood, it seems to be an elegant and streamlined argument for the conclusion that African Americans have claims against the government based on the enslavement of their ancestors. There are differences concerning how the amount of compensation should be calculated. Some have suggested that it should be based on a share in the profits of slavery. This is inappropriate because, as I have argued, reparation aims to repair the injuries and losses suffered by the victim of injustice, and these may have little to do with the profit the wrongdoer may or may not have gained from his injustice. Further, it is obviously vulnerable to the claim that slavery was not profitable. On another account we simply calculate the wages stolen from slaves, and add on interest. But this too is inadequate whether the earnings are the going wages for the kind of work the slaves did, or the wages the slaves would have earned had they been free. If I am kidnapped, my losses include, but are not exhausted by what I would have earned had I been free. One possibility is that the slaves' claim for reparation could be based on the fact that they owned what they produced, which the slave holders stole, and bequeathed to their children. On that account the descendants of the slaves could claim as reparation that the property of their ancestors be returned to

them, with interest.<sup>6</sup> This is more appropriate than claiming the profits of slavery as reparation for it is based a part of the slaves' losses, but is still inadequate because slaves were not harmed only by the loss of what they produced. Their greatest harms stemmed from the loss of their liberty and they deserved reparation for those harms.

A more serious difficulty concerns the argument that the slaves had rights to reparation against their state and federal governments and that African Americans have inherited these rights and can press them against their state and federal governments. Each clause in this argument can be challenged. One can deny that the slaves had a claim for reparation against their state and federal governments; and one can argue that even if they did, it does not follow that present day African Americans inherit that claim and can press it against their state and federal governments.

The second problem is more serious and I concentrate on it. Supposing that the slaves were entitled to reparation from their state and federal governments, does it follow that present day African Americans have inherited the compensation their ancestors were owed and can claim it from those governments. Let us review the argument. We agreed that the slaves were entitled to seek reparation only from those whose transgressions harmed them. If we supposed that only slave holders committed the transgressions that harmed the slaves, the descendants of the slaves would have no debtor to press for the compensation that was never paid to their ancestors because, of course, the slave holders are all dead. The attempt to rope in the U.S. as a nation or the U.S. Government as the debtor was an attempt to find a way around this problem. In particular it was an attempt to find something that was around when the transgressions that harmed the slaves were committed; something that was implicated in those transgressions; and something that is still around now. The state and federal governments seem to satisfy these conditions.

The difficulty with this argument is that the U.S. federal and state governments during the period of slavery are not obviously the same governments that exist today. Or at least, if there are respects in which these governments today are the same governments that existed at the time of slavery, there are also respects in which they are not. We do not contradict ourselves, for example, when we say after an election that we have a "new," that is, a different government. Supposing that we say this because the people holding office are not the same before and after elections, it seems not unreasonable to wonder whether the governments that helped the slave holders commit their crimes are in all relevant respects the same governments that now exist; after all, the people who held offices at

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<sup>6</sup> Boxill "The Morality of Reparation," pp. 113–122.

the time of slavery are certainly not the same people who hold office today. But if the governments that now exist are not in relevant respects the same governments at the time of slavery, they could not have helped the slave holders commit their crimes, and consequently cannot be required to make reparation for the harms these crimes caused.

It will be objected that it is simply a basic fact of social ontology that governments and nations exist for centuries, and consequently that their identities cannot depend on the identities of their members. It is often appropriate to speak in this way, but not when doing so means that individuals are born burdened with duties they never took on and that are not required of them by Natural Law. The second part of the preceding sentence must not be ignored. I do not mean that the only duties we have are those we take on deliberately. We can have duties that we do not take on deliberately and are unaware that we have, if such duties are required by Natural Law. The U.S. Government at the time of slavery was complicit in the crime of slavery, and therefore had a duty required by Natural Law to make reparation to the slaves. It does not matter that the government ignored that duty, and denied and was unaware that it had the duty. It is sufficient that the government assisted the slave holders and did so culpably. None of this supports the claim that the present U.S. Government owes present day African Americans the reparation an earlier U.S. Government owed their ancestors but never paid. Since present day U.S. citizens were not complicit in the crime of slavery that claim can only be based on the morally repugnant idea that individuals can be burdened with the duties that other people incurred. Present day U.S. citizens were not even born when the transgressions involved in slavery were being committed. They cannot possibly have committed these transgressions, or consented to them, nor as far as I can tell have they ever promised to pay for the harms the transgressions caused. Further, the Natural Law does not require them to pay for the damages their ancestors' transgressions caused. Natural Law requires that we help the needy, but as I have emphasized, the inheritance argument does not suppose that present day African Americans are needy, and in any case, a duty to help the needy is not a duty to pay for harms that one's ancestors' transgressions caused. How then can it be argued that present day U.S. citizens have duties to pay for these harms? It may be argued that firms and corporations are often held accountable for debts incurred before any of the present members of the firm were alive. But the analogy between a firm or corporation and the state fails. People are not born into firms or corporations, and they can easily join or leave firms or corporations. No one has to belong to a firm or corporation. Further, when people join a corporation they understand that they are joining something

that may have liabilities that they may be assuming when they join. None of this applies to the state. People are born into states, and must belong to some state or other. We cannot say that when they came of age they were told that they were at the point of joining a firm or corporation with hefty debts they will have to pay if they join. And even if they were told this it would not mean that they freely took on the duty to pay the country's slave debts, for people are born into a country and usually have no where else they can go to readily.

I suspect that the idea that citizens can be obliged to pay debts their government incurred centuries earlier simply because it is the government of the nation to which they belong gets whatever plausibility it has from the unstated assumption that citizens inherit the nation's territory, and the debts in question are held against that territory. Since nations usually have territories the assumption carries those who take it for granted to the conclusion that citizens may owe debts their government incurred before they were born. But nations do not always have territories; there are, after all, nomadic nations. Nations can exist within other nations or states and in the territory of other nations or states. And even when nations do have a territory, they can move from one territory to another. Suppose, then that the members of a nation have to leave their ancestral territory with just the clothes on their backs. Though they certainly owe the debts they themselves incurred, does it not seem absurd to insist that they must pay the debts their ancestors incurred?

It may be objected that if I balk at the present case for black reparations I must also balk too at the U.S. reparations to the Japanese and the German reparation to the Jews. But this is not necessarily the case. I admit that citizens may sometimes inherit debts their nation's government incurred before they were born. The issue is over how to account for this. The position I reject supposes that it is enough that the government is the government of the nation to which the citizens belong. My position is that it is also necessary that the citizens inherit more than they need to be free. To be free one needs a sense of who he is, the means to communicate with others, basic skills, and culturally determined options to choose from. If people have a right to be free, this means that our descendants have a right that we leave them with an identity, language, culture and basic skills, and we cannot burden them with debts in exchange for leaving them with these things. However, if we leave them with wealth and power beyond what they need to be free, we may also leave them with debts, provided that these debts do not exceed what we left them and become a burden and limitation on their freedom. Most of all we cannot commit crimes, refuse to make reparation, and then leave them to pay what we owe. Thus I need

not balk at the U.S. making reparation to its Japanese citizens or Germany making reparation to the Jews. These cases do not involve making people pay reparations for crimes committed one hundred and fifty years before they were born, and it is more likely that those required to pay the debts of reparation participated in the injustice that caused these debts. Or if they did not it is not unlikely that they inherited enough to pay the debts without violations of their freedom.

Let us now repair the inheritance argument. Repair starts with Locke's discussion in sections 179, 180 and 183 of *The Second Treatise of Government* of the rights a lawful conqueror gets over the citizens of the country he has conquered. According to Locke such a conqueror "gets no Power but only over those, who have actually assisted, concurred, or consented to that unjust force, that is used against him" (section 179). This "Power" Locke continues, "is perfectly Despotical." The lawful conqueror "has an absolute power over the Lives of those, who by putting themselves in a State of War, have forfeited them; but he has not thereby a Right and Title to their Possessions" (section 180). Locke does not mean that the lawful conqueror cannot have a right to the possessions of those who have unjustly opposed him, but only that he does not have such a right simply because he has conquered them. As Locke goes on to make clear, the lawful conqueror has a right to reparation against those who unjustly opposed him for the damages they caused him, though that right is significantly qualified. "The right of Conquest," Locke claims, "extends only to the Lives of those who joyn'd in the War, not to their Estates, but only in order to make reparation for the damages received, and the Charges of the War, and that too with reservation of the right of the innocent Wife and Children" (section 180). This sets up a possible conflict between the lawful conqueror's rights to reparation and the rights of those who unjustly opposed him which Locke summarizes and resolves as follows:

Here then is the Case: The Conqueror has a Title to Reparations for Damages received, and the Children have a Title to their Father's Estate for their Subsistence. . . . What must be done in the case? I answer; The Fundamental Law of Nature being, that all, as much as may be, should be preserved, it follows, that if there be not enough fully to satisfy both, viz, for the Conqueror's Losses, and the Children's Maintenance, he that hath, and to spare, must remit something of his full Satisfaction, and give way to the pressing and preferable Title of those, who are in danger to perish without it. (section 183)

Locke's circumspection here, in confining liability for making reparation for damages only to those who "assisted, concurred or consented," to the transgressions causing the damages follows from the principle that a person is encumbered only by the obligations he takes on deliberately or causes by his own voluntary acts. This title can be pressed against the estates inherited by the innocent children of such citizens, with the

very important qualification that the Fundamental Law of Nature forbids pressing it so hard that the children are in danger of perishing. It should be carefully noted that Locke's contention does not require that the innocent children of transgressors make reparation for the harms their fathers' transgressions cause. This would be impossible anyway because only the transgressor can make reparation for the harms his transgressions cause, and we are assuming that the children did not commit or consent to these transgressions. But Locke's contention does not even require that the innocent children of transgressors bear the costs of compensating those whom their fathers harmed. True, a portion of the estates they inherit from their fathers is taken from them to compensate the lawful conqueror, but they do not therefore bear the costs of such compensation. One can be said to bear costs if one has to give up something to which one has a right. But the innocent children of transgressors never had a right to the portion that is taken from them to make reparation to the lawful conqueror. It might have been in their possession, but their fathers had already forfeited their own rights to it to the lawful conqueror when they harmed him unjustly. Consequently they could not have passed it on to their children.

Locke's contention suggests how to defend the inheritance argument without requiring anyone to pay for damages caused by transgressions he did not commit or consent to. Here is an outline of how this defense proceeds. It starts with the uncontroversial fact that the slave holders harmed the slaves. From this fact it follows, still uncontroversially, that the slaves had titles to reparation for some portion of the estates of the slave holders. And from Locke's claims in section 179 and 180 of *The Second Treatise of Government*, as noted above, it also seems true that the slaves had titles to reparation for some portion of the estates of those who "assisted, concurred, or consented," to the slave holders' transgressions. Further, from section 183 it follows that the slaves had titles to reparation for some portion of the estates of both these classes of people, the slave holders as well as those who assisted, concurred or consented to their transgressions against the slaves, even when they passed their estates on to their heirs, with the important qualification that the slaves were not entitled to press these titles if doing so would endanger the lives of the heirs. Assume finally that present day white U.S. citizens are the heirs of the slave holders and those who assisted, concurred or consented to their transgressions, and that present day African Americans are the heirs of the slaves. In that case it would seem that present day African Americans have titles to a part of the estates white U.S. citizens have inherited from the slave holders and those who assisted, concurred or consented to their transgressions.

Now let us look at the details of the argument. It will be readily conceded I hope that at least some white U.S. citizens have inherited assets from slave holders. Since the slaves had titles to at least a part of these assets as reparation for the harms that the slave holders transgressions caused them, and that since that part was never turned over to them, their heirs (the present day African Americans) have inherited rights to it. But it will be objected that slave holders' heirs are by now few and far between, that identifying them will be difficult, and in any case that their collective assets are too small to make claims against them for black reparation worth the trouble. If this were true present day African Americans might have to give up their claims to their inheritance, for insisting on it would run afoul of Locke's stipulation that titles to reparation may not be pressed when doing so would endanger the lives of innocents. The assumption behind the objection is that slavery did not make the slave holders rich enough to pay for the harms they caused the slaves. This assumption can be challenged, of course, but it is not obviously false. It may seem so because slavery was so harmful to the slaves, but the harmfulness of an unjust practice and its profitability are not necessarily connected. Unjust practices may be harmful, but unprofitable; or profitable, but relatively harmless. Whether slavery was profitable is a controversial issue debated by economists. Fortunately, however, we do not have to wait for that debate to be settled. There is an interpretation of the inheritance argument that does not depend on slavery being profitable.

Its first premise is that the U.S. federal and state governments committed a grave injustice when it helped the slave holders to maintain slavery. It then moves to the conclusion that most white citizens of those governments consented to this injustice. However, this inference has to be spelled out and defended because, as we have seen, Locke denied that citizens necessarily consent to their government's injustice simply because the government is legitimate. It may be objected that since on Locke's account all legitimate government is government by consent, citizens of a legitimate government necessarily consent to its transgressions and consequently must make reparation for the harm these transgressions cause. But clearly, Locke's claim that only those who "assist, concur or consent" to the government's injustice are obliged to make reparation for the damages that injustice causes would be pointless if all citizens of a legitimate government necessarily consent to their government's transgressions. We must therefore reject the view that he believed that citizens of a legitimate government necessarily consent to its injustice. A more reasonable view is that although he allowed that citizens may consent to the unjust acts of their government, such consent is not contained in the

consent they give to government that makes it legitimate. In other words, if all citizens necessarily consent to be ruled by their government if it is legitimate, but do not necessarily consent to their government's injustice, the clear implication is that citizens must make one sign of consent to their government to indicate that they consent to be ruled by it, and another sign of consent to their government to indicate that they consent to its injustice. Notoriously, Locke suggested that residence is a sign of tacit consent to a government and makes it legitimate. But what is the sign of consent citizens make to their government to indicate that they consent to its injustice? A reasonable suggestion is that a people's failure to express dissent from their government's unjust acts gives tacit consent to these acts. Since consent has to be given knowingly and voluntarily this is only true if the government does not punish dissent to its injustice, or conceals that injustice or deceives the public about it. If a government punishes expressions of dissent to its injustice, it compels citizens to not express dissent to its injustice, that is, it compels them to give a sign of tacit consent to that injustice, but signs of consent, tacit or express, do not give consent when they are made under compulsion. The U.S. South certainly tried to conceal the full horrors of the slave system, but the evidence suggests that these efforts were not successful. Consequently, since dissent from the government's support of slavery was not punished, but happened only rarely, it follows that most whites consented to their government's injustice to the slaves. But according to Locke, citizens who "assisted, concurred, or consented" to a government's injustice must help make reparation for the damages its injustice causes. Consequently the slaves had titles to reparation against the estates of practically the entire white population.

This reparation was never paid. Instead each white generation passed on its entire assets to the next white generation. I am not speaking of those few who inherited specific parcels of land or property from the supporters of slavery. I am speaking of whole generations. The whole of each generation of whites passed on its assets to the whole of the next white generation because each generation of whites specified that only whites of the succeeding generation were permitted to own or compete for the assets it was leaving behind. But as I have already shown, the slaves had titles to reparation against these assets. And we can assume that the present generation of African Americans are the slaves' heirs. Hence the present generation of African Americans have inherited titles to a portion of the assets held by the present white population, with the qualification that they cannot insist on these titles if doing so would put the present white population in danger of perishing.

This inheritance argument presented here is certain to be misunderstood and misrepresented unless some of its steps are restated and emphasized. First, it maintains that the slaves had titles to reparation against the assets of the entire white population, not just against the slave holders. As I have argued, this is because most white citizens consented to the government's support for slavery and consequently entitled the slaves to seek reparation from them. This reparation was never paid, but instead inherited by the next white generation. Since present day African Americans are the slaves' heirs, and have inherited their ancestors' rights to reparation, it follows that they have inherited titles to a part of the assets held by the entire white population. It should be emphasized that this includes white immigrants who arrived in the U.S. after the abolition of slavery. They came to take advantage of opportunities, funded by assets to which the slaves had titles, or to take natural assets including land to which the slaves also had titles. The fact that they competed for these opportunities and worked hard misses the point. They have a right to their own earnings, but it does not follow that they own the opportunities that enabled them to make the earnings. If I laboriously grow valuable crops on your fields, not knowing they belong to you, I am entitled to keep my earnings, but surely I must give you back your fields!

Second, the argument does not depend on slavery being profitable or on the slave holders being rich enough to pay for the harms it caused. Remember that transgressors and their helpers do not have to make a profit from their transgressions in order to have to make reparation to their victims. They have to make reparation, even if they have to dip into their earnings, including those earnings they made by their own sweat and using their own brains. Consequently, it is useless to repeat that many whites owed nothing to slavery and made their money honestly. Even if this is true, they consented to their government's injustice to the slaves and thereby entitled the slaves to seek reparation from them. So it would make little difference to the argument if slavery operated at a loss, and made no profits that are even close to being enough to repair the harms that it caused. The slaves had titles to reparation not only against the slave holders, but against practically the entire generations that consented to slavery, even if their wealth owed nothing to slavery. And surely it cannot be seriously argued that the entire white population of the slave holding generations was not rich enough to make reparation to the slaves, and to meet the basic needs of their immediate heirs, especially when we note that its assets included the territory claimed by the U.S.

Third, the argument does, however, depend on each white generation inheriting assets from the slave holding generations that were more than

enough to pay the costs of making reparation to the slaves. Remember its premises. The transgressor can be compelled to make reparation from his crime, even if he made no profit from it, and even if making reparation puts him in danger of perishing. This is no injustice to him for he has forfeited his right to life by committing his crimes. But this is not true of his innocent beneficiaries. Of course, on purely logical grounds they cannot be required to make reparation to his victims, for only he can do that. But they cannot be rightfully compelled even to bear the costs of compensating his victims. If they have inherited assets from him they can rightfully be compelled to part with that portion of these assets that his victims have titles to as reparation, but as I suggested earlier, in that case they do not suffer any costs they have a right not to suffer. But they cannot rightfully be compelled to part with anything they did not inherit from him in order to pay the costs of compensating his victims. For example, they cannot be compelled to part with their own earnings, or what they received lawfully from others. Finally, even if they did inherit assets from him, they have to part with no portion of these assets, including that portion his victims have titles to as reparation for the harms he caused them, if this will put them in danger of perishing. In such a case the victims rights to reparation are canceled by the Fundamental Law of Nature that requires that as many innocents as possible be saved.

Of course, the inheritance argument relies on the right of inheritance, but as Jeremy Waldron and others have correctly argued, that right may be outweighed or fail to hold if circumstances change in certain ways.<sup>7</sup> For example, my heirs do not have a right to inherit my property if their inheriting it means that others will have to die or to live in destitution. If the right of inheritance is generally limited in this way the right to inherit the reparation owed to one's ancestors is also similarly limited. I think this is what Waldron means when he says that certain historic wrongs may be "superseded."<sup>8</sup> Although Europeans stole Australia and the Americas from the native populations, we cannot insist that their descendants and heirs return Australia to the Aborigines and the territory of Canada and the U.S. to the Indians. Where would the millions go? Or should the Aborigines and Indians allow them to stay as their subordinates? Should they say that all inhabitants of the Americas who are not Indian must pay an exorbitant rent to Indians? We must certainly reject these proposals, even if we condemn the way that the U.S. Government treats Native Americans.

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<sup>7</sup> Jeremy Waldron, "Superseding Historic Injustice," *Ethics* 103 (1992), pp. 4–28. See also David Lyons, "The New Indian Claims and Original Rights to Land," *Social Theory and Practice* 4 (1977), pp. 249–272.

<sup>8</sup> Waldron, "Superceding Historic Injustice," p. 24.

To avoid misunderstanding, it is perhaps worth stressing that the limitation on the right of inheritance is not a statute of limitation.<sup>9</sup> In this connection, statutes of limitation are based on the fact that the passage of time often makes it hard to know who is owed what. The mere passage of time does not do this, of course, but evidence for ownership often becomes less clear with the changes that accompany the passage of time. This need not always be the case. Original ownership may still be clear after hundreds of years. The Indians in the Americas is a case in point. After several hundred years of European occupation, it is still absolutely clear that the Indians were the original owners of the Americas. The point is that a right to inherit may be limited if honoring it leads to morally dangerous or repugnant inequalities, even if we are absolutely clear on who the original owner is, and who his beneficiaries are. The various arguments for high taxes on inheritance or for abolishing inheritance altogether are based on this point.

The most radical way to defend the limitation on the right of inheritance is to argue that the right to property is not a natural right, but a conventional right that we design to secure our justice and well being. An exception may be made, following Jean Jacques Rousseau, for the right to subsistence, but that aside, it is arguable that our system of property rights and its various rights of inheritance are conventional.<sup>10</sup> It should be noted, however, that the limitation on the right of inheritance can be defended even with the assumption that property is a natural right. Locke, himself, the source of the idea that property is a natural right is a case in point. Indeed, the limitation on the right of inheritance is an elaboration and perhaps an amplification of Locke's argument in section 183 that a child's right to inherit his father's estates is limited by the right to reparation of his father's victims. These people have a right to take from enough from the child's inheritance to make reparation of the damages his father's injustice caused them. That is, the child's right to inherit his father's goods is limited by their right to seek reparation from his father. Also, of course, as Locke emphasizes, their right to seek reparation from the child's father is limited by the child's right to subsistence. And finally, their heirs' right to inherit their goods, which includes the reparation they were owed but never paid, may in turn be limited by the circumstances in which it is pressed. I may inherit a right to the reparation that was owed my mother and never paid to her, but I cannot press that right against the

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<sup>9</sup> I owe this point to Angelo Corlett.

<sup>10</sup> See the discussion in Jean Jacques Rousseau, *The Social Contract*, ed. Roger Masters (New York, St Martin's Press, 1978), Book 1, Chapter 1X "On Real Estate," pp. 56–58; and Book 11 Chapter XI "On the Various Systems of Legislation," pp. 75–76.

heirs of those who owed my mother reparation if doing so puts them in danger of perishing. Indeed, Locke put a general limitation on the right to property in section 42 of the First Treatise, that seems to put stricter limits on the right to inherit. According to Locke, a man may not “justly make use of another’s necessity, to force him to become his Vassal, by withholding that Relief, God requires him to afford to the wants of his Brother.” This suggests that I may not, on Lockean grounds, insist on my right to inherit my mother’s property if doing so will turn the heirs of those who owed my mother reparation into my subordinates.

But do these reasonable limitations on the right of inheritance have any relevance to whether African Americans have a right to inherit the reparation owed their slave ancestors? Here it is important to note these limitations do not abolish or cancel that right. They do not imply, that is, that there is no right to inherit at all. They allow that there is such a right, and that it holds in normal circumstances, but that it fails to hold or is outweighed when allowing it to hold would make innocent people destitute, or create large inequalities that are likely to lead to exploitation and domination. In other words, we cannot set aside the inheritance argument just because it depends on the right of inheritance. We can set aside the inheritance argument aside only if implementing it would make innocent people destitute or create large inequalities that are likely to lead to their exploitation and domination. But would implementing the inheritance argument have these results? Surely not. The slaves were horribly harmed by slavery, but making reparation to them would not have required turning over a continent to them. It would have called for no horrendous uprootings of populations, or driven anyone into poverty, or created morally outlandish inequalities. The slaves would not suddenly have become the masters and the whites their subordinates. The U.S. could have made reparation and suffered mild discomfort at worst. As for the right of inheritance of their heirs, we must remember that it is not limited by the mere length of time between benefactor and heir. The right of inheritance is limited by the dangerous and morally repugnant inequalities that would result from honoring it. These could appear after one generation, or fail to appear after ten generations. We are certainly not speaking here of a statute of limitations. It would be wrong for someone’s immediate heir to insist on his right to inherit his father’s goods if this would cause undue hardship to others, or put him in a position to oppress them. *And it would be right for someone’s distant heir to insist on her right to inherit her father’s goods if this could save her from hardship or oppression at the hands of her debtors. But is not this latter case exactly like that of African Americans in the U.S.? Would they not save themselves from hardship and*

*oppression at the hands of their debtors if they insisted on their right to inherit the reparation that was owed their slave ancestors and never paid? So let us hear no complaints that their demand for their inheritance is an unfair and unjustified insistence on their inheritance rights!*

The idea that the slaves could have received land as reparation may suggest a more interesting objection. Locke's argument in section 184 is that a just conqueror may not seize any part of a country's territory as reparation for the damage that country's citizens caused him unjustly, and this may suggest that he meant that land could never be used to make reparation. If this suggestion were sound, Locke's disreputable purpose would seem to be to make sure that wealth and power remained in the hands of rich land owning families. In fact, however, the suggestion stems from a simple oversight. A glance at Locke's argument shows that he was placing limits on how reparation could be made to a just conqueror, that is, a foreign power, not on how reparation could be made in general. That is, he was not denying that citizens of the same country could make reparation to each other in land, but only that they could not make reparation to a foreign power in land they hold in their own country. Presumably Locke was worried that if a foreign power was allowed to seize a part of a country's territory as reparation, that territory could become riddled by enclaves held and governed by foreign powers, and ruled out making reparation to just conquerors in land to prevent that from happening. Clearly Locke's restrictions on reparation being made in land or territory would invalidate the inheritance argument if that argument viewed the slaves or their descendants as seeking a part of the U.S. on which to establish themselves as a sovereign state. Separatists have made such arguments, of course, but the present argument is not one of them. It does not view the slaves or their descendants as aiming to establish a foreign held enclave within the territory of the U.S. It views the slaves and their descendants as citizens of the U.S. seeking their due from other citizens of the U.S. If they receive land or territory as reparation, it would remain within the country and under the jurisdiction of its government.

But what is so wrong with a country's territory becoming riddled with foreign held enclaves? One possibility is that this would undermine the ability of the country's government to protect its citizens and secure their lives and property. But this answer seems unsatisfactory since it proposes to certainly sacrifice one person's rights, here the just conqueror, to avoid merely endangering the rights of others, here the citizens of the country. Consequently, the suspicion may reemerge that Locke was indeed trying to keep the country's territory in the hands of wealthy land owning families. First, let me put this suspicion to rest. If some wealthy land owners

owe a just conqueror reparation, they can sell their land to their fellow citizens and use the funds to pay the just conqueror's reparation, holding back enough to keep their children from starving. In this way the just conqueror would get his reparation without acquiring jurisdiction over the other country's territory, and though the children do not inherit all of their father's property, they cannot complain, if they inherit enough to live on, because their right to inherit was always limited by the right to reparation of those their parents unjustly damaged. That suspicion aside, we can concentrate on Locke's reason for ruling out seizing land in another country as reparation. It did go deeper than the worry that foreign held enclaves might undermine the ability of the government of the country to protect its citizens. It was this: allowing a just conqueror to seize part of another country's territory as reparation would violate the principle that the only legitimate government is government by consent. This is because the just conqueror would become the government of the people in the part of the country's territory he seized, but these people do not consent to be ruled by him just because he owns the land on which they stand.

It will be objected that this cannot be Locke's reason for ruling out just conquerors taking land in another country as reparation because he famously claimed that residence in a country gives tacit consent to its government. If the people in the territory held by the foreign power remained there, would not that famous claim imply that they consented to be governed by the foreign power? And would that not mean that it was their legitimate government?

This complaint ignores Locke's solution to the deep "boundary" problem of whose consent is relevant to whether a government is the legitimate government of a group of people. Locke's solution was that only the consent of the members of the society that group belongs to is relevant, and only the consent of the majority of the members of that society can make any government of a part of that society a legitimate government. If a group of people is not a society, the consent of its members to a government does not make it their legitimate society. But what is a "society?" By "society" Locke meant the "Community" individuals make when they consent to form one body for their "comfortable, safe, and peaceable living," and thereby obligate themselves to submit to the "determination of the majority and to be concluded by it." Supposing that the majority of a society determine that certain individuals are its government, it follows that they are its legitimate government. The maxim that all legitimate government is government by consent still holds true because by consenting to be a member of the society, its members obligate themselves to submit to the determination of the majority of the society. With one further assump-

tion we can now see why Locke would have believed that allowing a just conqueror to seize land in another country would mean that the people of those enclaves would not be governed legitimately. That assumption is that the people of a country are a society. Given that assumption it is highly unlikely that a just conqueror who carved out an enclave in that country would be the legitimate government of the people in that enclave, even if they remained there. These people consented to be ruled by the government chosen by the majority of their society, not by a government chosen by a minority of their society. But they are probably only a minority of their society. Consequently, even if all of them remained where they were, and therefore consented tacitly to be ruled by the just conqueror, it does not follow that the majority of their society consented to be governed by him. Indeed, it is highly unlikely that the majority of the society consented to be governed by him. Therefore, he cannot be the legitimate of the people in the enclave.

But suppose that the just conqueror seized a part of the country that contained a majority of its inhabitants. If they remained where they were, and residence is tacit consent, a majority of the society would consent to be ruled by him, and he would therefore be the legitimate government of the people in the part of the country he had seized. But it seems we are entitled to draw an even stronger conclusion, given Locke's view that the government chosen by the majority of a society is the legitimate government of that society. It is this: the just conqueror is the legitimate government of the entire society. This is because the people in the part of the country he seized consent to be ruled by him, and they are a majority of the society.

At this point it seems reasonable to conclude that Locke wanted to rule out a foreign power's becoming the legitimate governments of other countries in this way, and that is why he ruled out just conquerors acquiring parts of a country as reparation. But someone may object that Locke's assumptions commit him to this possibility and his attempt to rule it out is improvised and indefensible on his own assumptions. One might try to respond to this objection by arguing that allowing a just conqueror to satisfy his title to reparation by seizing part of a country's territory would violate someone else's more pressing rights. But whose? I can think of none, given that the people get a legitimate government. A better way to respond to the objection is to challenge the assumption that the people in the part of the country that the just conqueror seizes as reparation consent to be ruled by him because they remain where they are. This assumption overlooks that consent can only be given freely. We cannot freely consent to something when it is proposed by someone who has us in his power and is entitled and able to make bad things happen to us as he chooses. But

the just conqueror is entitled and probably able to make bad things happen to the people in the enclave he owns. He can expel them from it if he chooses, and being expelled from one's home is a bad thing. It follows that the people in the enclave cannot freely consent to be ruled by him, though they may give signs of consent to the idea. Consequently, he cannot be their legitimate government.

It follows that one of the conditions of legitimate government is that the people of a society must always own the territory they stand on completely clear of all debts and encumbrances. That is, debts cannot be held against the territory of a country. If debts could be held against the territory of a country, the people of that country could not have a legitimate government, and they therefore could not be free. People do not only need an identity, skills, and a language, to be free. They also need a place on which to stand and to settle their affairs and conduct their common business without fear of being expelled from it. A national territory may suggest that a nation is wealthy enough to pay its debts, but the debts cannot be held against the national territory itself. A generation can encumber their descendants with a national debt, if they leave enough moveable wealth to pay the debt. They cannot, however, encumber their descendants with a national debt held against their territory. If they could their descendants could not have a legitimate government, but would be born the subordinates of another power, which is, of course, impossible on Lockean grounds.

It may be objected that this last conclusion is unwarranted, on Lockean grounds, as long as the people of the country are free to emigrate and join other societies. Or in the case of a just conqueror seizing territory as reparation, that the people in that territory can have legitimate government if they are free to leave it, and either join other societies, or join the other members of their society in the territory he does not hold. Clearly the second alternative need not always be available, since of course, the just conqueror may be entitled to seize all or most of the territory of a country as reparation. In that case the people in the territory he holds can either stay where they were and be ruled illegitimately, or scatter to join other societies. The latter option would be tantamount to the dissolution of the society, a catastrophe Locke describes in section 211. When that occurs, Locke observed, the members of the society are "scattered," from the "Protection of and Dependence on" their society, and forced to "shift" for themselves and to seek asylum in other societies. Locke surmised that the "usual and almost only way" societies are dissolved is by conquest, but I think that we can say that conquest dissolves a society only if it scatters the society's members and expels them from their territory. But suppose that the members of the society refuse to be scattered, even if

they are expelled from their territory. Can they exist as a society without a territory? We can judge their prospects by considering the prospects of a nation without a territory. A nation without a territory, one that lives within the territories held by or controlled by other nations, survives at the pleasure of their hosts, and its members normally live in fear and apprehension, and are always in danger of being persecuted, hounded, scattered, and forced to seek asylum in other nations. If a society is like a nation in this respect, one reason why Locke was so concerned that a society never lose its territory should be clear. But there is another reason. Societies are not like nations only in the respect that they cannot easily exist without a territory. Societies are also like nations in the respect that they provide individuals with the culturally determined options they must have to be free. No wonder then that Locke in his *The Second Treatise of Government* insisted that no conqueror, however just, can “turn them out of their Inheritance, which ought to be the Possession of them and their Descendants to all Generations” (section 184).

#### THE COUNTERFACTUAL ARGUMENT

I now argue that the counterfactual argument is not as hopeless as so many have supposed. Many philosophers have given up the counterfactual argument because it relies on the controversial empirical claim that slavery causes present black disabilities, and because it seems undone by the paradoxical result that if slavery had never happened the present generation of African Americans would not exist. I take up these difficulties in turn.

No one I would talk to denies that slavery harmed the slaves, but many not altogether unreasonably wonder whether it also harms the slaves' descendants. Harms allegedly traceable to slavery persist in the black population; we speak, for example, of the legacy of slavery. But so many vast political and economic changes have occurred since U.S. slavery ended one hundred and fifty year ago, that it makes sense to ask whether some of them have something to do with, or even perhaps are the real causes, of the alleged legacy of slavery. I cannot take up these possibilities here, and focus instead on the most provocative argument that slavery has not caused the alleged legacy of slavery, namely, that if the harms of slavery have persisted it is blacks' own fault because they passed on the disabilities of slavery to their children, and they could have avoided doing so.

Some philosophers may want to dismiss this argument on the ground that it blames the victim. This is too sweeping. Of course, no one can be blamed for harms he suffers because of some other person's injustice.

But even severely injured victims can be blamed if their injury does not incapacitate them, yet they do nothing to recover from it, and wallow instead in their misery. Nevertheless plain decency demands that when unjustly harmed people fail to recover from their injuries, they should be blamed reluctantly, and only if we are sure that they were not incapacitated by their injuries and that no one else or nothing else has prevented them from recovering. Accordingly, if some of the harms of slavery seem to persist in the present black population, the question is whether we can be satisfied that blacks are to blame for this.

We cannot absolve blacks from blame just because the U.S. Government never made reparation to the slaves. Any deliberate and avoidable failure to pay reparation is, of course, a grave injustice, and may very well add to and exacerbate the harms that it leaves uncompensated, but the failure to make reparation for slavery does not explain why the harms of slavery have persisted. Reparation is not a necessary (or sufficient) condition for recovery from the harms of injustice. Many unjustly harmed people have pulled themselves up by their bootstraps, and not only succeeded, but flourished, despite never being compensated. It also seemed strained to absolve blacks of blame on the ground that slavery incapacitated them. The injuries of slavery were severe, but theories of human incapacitation like the “Sambo” personality and black dependency are implausible.<sup>11</sup> People are rarely incapacitated, even after they have been severely injured. The real reason why blacks should be absolved from blame is that the U.S. Government did not merely fail to compensate the former slaves, but continued to persecute them after they were freed. Indeed, adding injury to injury it prevented them from even competing for opportunities that were already owed to them as compensation and which therefore should simply have been turned over to them. This double injustice with its resultant harms, continued through succeeding generations, makes a powerful case for claiming that if the slave holders and their federal and state governments harmed the slaves, the white generations after emancipation have caused these harms to persist, that is, have caused them to be passed from the slaves to their descendants. In short, if slavery put blacks on the canvas, later whites made sure they stayed there.

If these considerations are true, the idea that the present black population is entitled to seek reparation for the harms that slavery caused it is a

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<sup>11</sup> The idea of the “Sambo” Personality is raised in Stanley Elkins, *Slavery a Problem in American Institutional and Intellectual Life* (Chicago: University of Chicago Press, 1959), Chapter 3. See also Howard McGary’s interesting attempt to cast doubt on the Sambo personality in “Resistance and Slavery,” in Howard McGary and Bill Lawson (eds.), *Between Slavery and Freedom* (Bloomington: Indiana University Press, 1993), pp. 35–54.

careless and misleading way of stating the counterfactual argument. The present black population is not entitled to reparation for the harms that slavery caused it because slavery, that is the slave holders and their helpers, did not cause it any harms. The succeeding white generations caused the harms that entitles blacks to reparation. They did so by preventing the slaves and their descendants from recovering from the harms that slavery caused them. It is this injustice, the injustice of preventing the slaves and their descendants from recovering from the harms that slavery caused the slaves, not the injustice of slavery, that is the cause of the harms that entitles the present black population to reparation.

It may be argued that since the white generations after emancipation did not directly cause the injuries of slavery, but only prevented the slaves and their descendants from recovering from those injuries, that their responsibility for compensating them must be significantly reduced. This argument assumes that those who unjustly prevent the unjustly harmed from recovering are less responsible for making reparation for these harms than those who caused these harms unjustly in the first place. But this assumption is mistaken. If I unjustly prevent someone from recovering from harms others unjustly caused him, harms that he would otherwise have recovered from, I am the unjust cause of his remaining in his harmful condition. In other words, I harm him as surely as those who first harmed him, and our positions differ only in when we harmed him. They harmed him first, and I harmed him later. Otherwise our positions seem exactly the same. Had they not intervened he would not be harmed, and had I not intervened, he would also not be harmed. Consequently, it seems that he is as entitled to seek reparation from me as from those who harmed him in the first place. If this is correct, and it is also correct that the white generations after emancipation prevented the slaves and their descendants from recovering from the harms of slavery, it seems that the duty of every white generation to repair the slavery based harms of the corresponding black generation is no less encompassing and no less stringent than the duty of the slave holding generation to repair the harms of slavery.

Notice that this is not the inheritance argument all over again. It does not say that the present black generation is the slaves' heir and inherits a right to the reparation the government owed its slave ancestors and never paid. It says that every government since emancipation has unjustly prevented its black population from recovering from injuries originating in slavery, and its conclusion is the counterfactual claim that every government since emancipation has a duty to bring its black population to the level of well being it would have enjoyed had the injustice of the government never occurred.

But it may seem that this argument is confounded by a version of a difficulty noted earlier, namely, that compensating the present black population for the harms that slavery caused it is impossible because if slavery had never occurred the present black population would not exist. The objection is that this difficulty reappears in the case for black reparations I have just developed. Although this case does not call for compensating the present black population for the harms of that slavery caused it, but it may seem to call for compensating the present black population for harms caused by policies enacted and enforced before it was conceived. If the enactment and enforcement of these policies affected who was conceived in succeeding black populations, had they not occurred the present black population would not exist.

But the counterfactual argument I am now defending does not call for compensating the present black population for harms caused by transgressions that occurred before its members were conceived. To see how it works, let us imagine two slaves, Tom and Beulah released from slavery. The government owed them compensation for having helped enslave them, and also for the discriminatory laws it enacted after they were released from slavery and that prevented them from recovering from slavery. At every point of their lives, they were entitled to seek reparation from the government harms these injustices caused them, including the point just after the conception of their daughter, Eulah. At that point and every succeeding point, it did not pay them what it owed them. This was a grave injustice to Tom and Beulah, but what is equally important here is that it certainly also harmed their daughter. As a direct result of it their daughter probably grew up in ignorance and straitened conditions, and in general with all the disadvantages of having a father and mother who had been enslaved and then prevented from recovering from the harms and disabilities of the experience, and never compensated for either injustice. More particularly, she probably acquired from them, by imitation and necessity, many of the habits and qualities they had acquired under slavery which the government's policies had prevented them from shaking off. Supposing that she was harmed as a result, and by a governmental injustice, it follows that she had a right to compensation from the government for the harm its injustice to her parents caused her. That is, she has a right against the government that it bring her to the level of well being she would have enjoyed had her parent been compensated for being enslaved, and for being prevented from recovering from the injuries of slavery.

Several steps of this argument are worth stressing. First, the argument is not that Eulah has a claim to the compensation her parents Tom and Beulah's were owed and never paid. If that were the argument we would

have an inheritance argument, not a counterfactual argument. Eulah's claim for compensation is for harms she herself suffered, though she would not have suffered these harms had her parents been compensated for their injuries or allowed to recover from them.

Second, the amount of the compensation Eulah is owed does not depend on the amount of compensation they were owed. It depends on the harms she suffered, and though she suffered those harms because they were not compensated, repairing them may be much more, (or much less), than the compensation they were owed.

Third, in addition to Eulah's own claim for compensation she may have an inheritance-based claim to their compensation as well. She has a claim to be compensated for her harms, and they have a claim to be compensated for their harms, and neither claim is canceled because the other is met. Consequently, the fact that she was harmed because they were not compensated and can claim compensation for that harm does not mean that they lose their claim to be compensated for their harms, or that she loses her right to inherit that compensation from her parents. In other words, the counterfactual argument I am now urging is compatible with the inheritance-based argument.

Fourth, though Eulah's claim for compensation was for the harms she herself suffered from, some of them had their origin in slavery for she suffered them because her parents were harmed as a result of slavery, prevented from recovering from these harms, and never compensated.

Fifth, Eulah's claim for compensation is not confounded by the argument that she would not exist had the injustice that caused her harm not occurred. That injustice was not slavery, which occurred before she was conceived, and indeed was one of the causes of her being conceived. Neither was it any of the various injustices the government and society committed against her parents before she was conceived. These injustices did not cause her harms because had they not occurred she would not have existed. The injustice or injustices that caused her harms was the U.S. Government's failure to compensate her parents after her conception, as well as the unjust policies it enacted and enforced to prevent them from recovering from the effects of slavery. Had those injustice not occurred, had her parents been compensated, and allowed to recover from the effects of slavery, she would have lived in less straitened conditions, and would have been less constrained to imitate and duplicate their slavery acquired qualities and habits, and in general, would not suffer from the injuries from which she suffers. Neither, on the other hand, would she not exist had the U.S. Government not enacted and enforced its unjust policies. These events occurred after her conception, and had they never occurred, her

existence would not have been affected because she would already have been conceived.

Now there is no reason why the argument cannot be repeated for Eulah's children, that is, Tom and Beulah's grandchildren. The U.S. Government did not compensate their mother; this injustice harmed them; and they therefore had a claim for compensation against the government for the harm its injustice of failing to compensate their mother caused them. Their claim for compensation is not a claim to inherit the compensation she was owed for her harms, but a claim for compensation for their own harms. The amount of their compensation does not depend on the amount of her compensation, but on how much the failure to compensate her harmed them. I suspect that it will be greater than her compensation, given that there are many of them and one of her. *In addition to their claim for compensation for their injuries, they may also have an inheritance-based claim for the compensation she was owed but never paid.* Their claims for compensation are for harms they themselves suffered from, but some of these harms would have their origin in slavery since they suffered them because their mother lived in straitened conditions, and she lived in straitened conditions because her parents, Tom and Beulah were harmed by slavery, prevented from recovering from these harms and never compensated. And again, there is no danger that their grandchildren would fail to exist had the injustice that caused their harms not occurred, for that injustice was not slavery or the failure to compensate their grand parents which occurred long before they were conceived and were probably among the conditions for their conception, but the failure to compensate their mother, which we can suppose occurred after<sup>12</sup> they were conceived. Proceeding in this way we can arrive at the present generation of African Americans. They are entitled to seek reparation from the government for the harms it caused them by failing to compensate their parents.

The counterfactual argument for black reparations that I have just sketched requires us to get involved in the details of social causation and slavery's legacy. This is not a drawback, but an advantage. As Waldron notes, when we are urged to let bygones be bygones, we must remember that "thinking quickly fills up the vacuum with plausible tales of self-satisfaction, on the one side, and self-deprecation on the other." In other words, the rigorous study of slavery and the interventions of succeeding white populations will contribute to our self-esteem. Through it we will see that these depredations caused our disabilities; we will overcome lingering doubts of our own abilities; and reparation, if we should get it, would do us more good.

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<sup>12</sup> Waldron, "Superceding Historic Injustice," p. 6.

One final point. Recently African American philosophers have showed that since the Enlightenment many of Europe's greatest philosophers held views that can only be described as racist.<sup>13</sup> Efforts are also underway to show that these philosophers produced racist theories; in particular, that they devised philosophical theories designed to justify the subordination of non-Europeans.<sup>14</sup> Although I believe these efforts are bound to help us to better understand and perhaps to reject philosophical views that we take for granted, I hope that the present essays suggests that we must proceed judiciously. Racist philosophers may have racist theories, but they may also produce theories that can be used to defeat racism. Locke may be a case in point. He wrote the Constitution for the Carolinas that provided for black slavery, and his theory of property seems to have been designed to justify the European seizure of the Americas from the Indians.<sup>15</sup> Yet, as I have tried to show here, his theory of reparation can be used to justify reparation for the descendants of those he supposed were justifiably enslaved.

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<sup>13</sup> See, for example, Emmanuel Eze, "The Color of Reason," in Emmanuel Eze (ed.), *Postcolonial African Philosophy* (London: Blackwell Publishers, 1997), pp. 103–140.

<sup>14</sup> See, for example, some of the essays in Tommy Lott and Julie Ward (eds.), *Philosophers on Race* (London: Blackwell Publishers, 2002).

<sup>15</sup> See, for example, James Tully, "Rediscovering America: The Two Treatises and Aboriginal Rights," in *An Approach to Political Philosophy: Locke in Contexts* (Cambridge: Cambridge University Press, 1993), pp. 137–178.

