

## Giving the Dead Their Due<sup>1</sup>

Social injustices leave legacies that outlive their immediate victims. The victims' descendants often argue that reparations are owed for these injustices, and these arguments are not always unheeded. Eight Sioux tribes were awarded \$105 million by the U.S. Supreme Court in 1980 as reparations for lands seized in the Black Hills in 1877.<sup>2</sup> Holocaust victims and their descendants have received reparations from Germany and Swiss banks and corporations complicit in the Holocaust. Other cases have been less successful, but not obviously because they have less merit. In 1969, James Forman demanded that various religious institutions owed \$500 million to African-Americans for their role in slavery.<sup>3</sup> More recently, Representative John Conyers has argued for the establishment of a committee to explore reparations for slavery.<sup>4</sup> Conyers has pushed for such a committee every year since 1989 to no avail. Hundreds of African-Americans rallied in Washington D.C. on August 17, 2002 to demand reparations for slavery.<sup>5</sup> Such demands should not be dismissed out of hand. In light of familiar difficulties plaguing existing approaches, I propose an unorthodox alternative account. On the proposed account, reparations are owed to the dead.

### **I. Traditional Accounts.**

Before developing the idea of duties of reparation to the dead, I briefly review some familiar problems for traditional accounts according to which reparations are owed to living descendants of the original victims. Paradigmatically, reparations are owed

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<sup>2</sup> See *U.S. v. Sioux Nation of Indians* (1980) 448 US 371.

<sup>3</sup> See Bernard Boxill, "The Morality of Reparation," *Social Theory and Practice* 2 (1972): 113-122.

<sup>4</sup> In particular, he and others have pressed for H.R. 40, the "Commission to Study Reparation Proposals for African-Americans Act."

<sup>5</sup> See "African-Americans Rally for Slave Reparations," at "<http://www.salon.com/news/wire/2002/08/17/reparations/index.html>"

when (a) one party, the "perpetrator," has wronged another party, the "victim," (b) the perpetrator has thereby harmed the victim, and (c) the perpetrator now can do something to benefit the victim. In cases of historical injustice in which the original victims are dead, traditional accounts bend this paradigm beyond all recognition. As many philosophers have argued, the descendants of original victims were not harmed by those injustices, given a plausible conception of harm. For example, the descendants of those brought to the U.S. from Africa as slaves simply would never have existed were it not for the slave trade. Apart from slavery, the relevant patterns of conceptions and births would have been radically different.<sup>6</sup> In that case, it is hard to see how actual descendants have been harmed by slavery. For the following criterion is plausible: a person is harmed by an event only if she is worse off than she would have been if the event had not happened.<sup>7</sup> In the case of slavery, the actual descendants would never have existed if not for the original injustice.<sup>8</sup> So traditional accounts abandon (b) of our paradigm.

Thinking about this problem suggests another. In addition to not having been harmed by the injustice done to their ancestors, members of the current generation were not themselves done that injustice. In the case of slavery, contemporary descendants were not enslaved. So (a) is not satisfied in these cases either. We can, of

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<sup>6</sup> Here I assume that a person's identity depends on the sperm-egg combination from which she actually came. Any person who instead resulted from a numerically distinct sperm-egg combination would have been a different person. See Derek Parfit, *Reasons and Persons* (Oxford: Oxford University Press, 1984), chapter 16. This basic point and its implications for the debate over reparations is also pressed well by Jeremy Waldron, as are a number of the other objections surveyed in this section. See Waldron's "Superseding Historical Injustice," *Ethics* 103 (1992): 4-28.

<sup>7</sup> The criterion is not completely uncontroversial, however. Some of Parfit's critics have responded to his 'Non-Identity Problem' by rejecting the criterion. This is not the place to discuss this complicated and difficult question, though. Thanks to an editor at *Ethics* for reminding me of this disagreement.

<sup>8</sup> Some argue that a person can be harmed in a more extended sense even if this condition is not met just in case that person's life is so terrible that she "would have been better off never having been born." We can imagine lives so terrible that it would not be irrational for someone leading such a life to wish she had never been born. It is not at all clear that this really means someone can literally be harmed by an event that was necessary for her existence. However, even if this much is conceded it will not do much to rescue traditional accounts. For example, the vast majority of descendants of

course, make a plausible case that those descendants are owed reparations for more recent injustices like Jim Crow laws and segregation, since many of the victims of those injustices are still alive. Moreover, the rationale for reparations for more recent injustices might gain additional support from well-known facts about earlier injustices. For example, facts about the slavery make contemporary racist injustices more profound and damaging. Well-known facts about slavery provide a context for more recent injustices that magnifies damage done to victims' self-esteem. Well-known facts about slavery allow contemporary forms of racist contempt to express the message that the moral inferiority of African Americans has not really changed since slavery. So facts about slavery magnify reparations owed for more recent injustices. However, this sort of argument does not justify reparations for slavery itself.

Given these difficulties, defenders of traditional account sometimes appeal to rights of inheritance. Here is a modified version of an example from Bernard Boxill.<sup>9</sup> Suppose your father steals my bicycle and gives it to you. You are unaware that the bicycle was stolen. I die, but my son eventually finds out about this theft. He does not particularly like bicycling (nor would he have liked it if he had inherited the bike, let us suppose) and does not plan to do anything with the bike, so he was not harmed by its theft. Nonetheless, he comes to you demanding the return of the bicycle on the grounds that I would have left it to him. His claim is plausible. Perhaps we can understand duties of reparation very roughly on this model.

Before assessing this model, we must distinguish two notions of a duty of reparation. The basic genus of reparative duties has at least two species.<sup>10</sup> First, there is the idea that one must do one's best to compensate for damage done by one's

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slavery clearly do not meet this criterion; their lives are not so terrible that they would have been better off having never been born.

<sup>9</sup> See Boxill, "The Morality of Reparation," p. 119.

<sup>10</sup> Thanks to David Miller for prompting me to discuss this important distinction.

infringement of a prima facie moral constraint.<sup>11</sup> This duty can be present even when one has wronged nobody, all things considered. For example, if I break into your uninsured car by smashing its window and hotwire it to get a dying person to the hospital, then perhaps I owe you the cost of the repairs even though my action was justified. Call this sort of duty a “duty of compensation” or “compensatory duty.” On the other hand, there is the different idea that one must, roughly speaking, try to heal the moral relationship between oneself and one’s victim. Since the aim here is to restore a damaged moral relationship, call this a “duty of restoration” or “restorative duty.” Unlike compensatory duties, restorative duties do not apply unless one’s action was wrong, all things considered. For otherwise the moral relationship as such need have been damaged. Plausibly, a restorative duty should involve an apology and a more tangible benefit. This more tangible benefit should include whatever personal gains the perpetrator acquired through her injustice. After all, a person’s keeping the fruits of her injustice suggests that she has not fully come to terms with the wrongness of her action. Even when a perpetrator did not benefit by her wrongdoing, a restorative duty goes beyond returning the person to the “status quo ante.”

Return now to Boxill’s bicycle example. In this sort of case the distinction between two conceptions of duties of reparation is relevant.<sup>12</sup> For even though the innocent third party who inherits the bicycle may have wronged nobody by accepting the bicycle, she arguably still has a compensatory duty to return the bicycle. For keeping it would infringe a prima facie duty corresponding to the original victim’s

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<sup>11</sup> Theorists sometimes characterize such duties in terms of “making the victim whole again” or “returning to the status quo ante.” For the latter, see Robert G. Goodin, “Theories of Compensation,” *Oxford Journal of Legal Studies*, vol. 9, 1989, pp. 56-75, p. 59. For the former, see Loren Lomasky, “Compensation and the Bounds of Rights,” in John Chapman, ed. *Compensatory Justice, Nomos XXXIII* (New York: NYU Press, 1991), pp. 13-44. Whether doing so would return the “status quo ante” or “make the victim whole again,” I am assuming that if we can benefit the victim in some way that there is a prima facie duty to do so.

<sup>12</sup> Thanks to David Miller for drawing my attention to this point.

right of bequest. Clearly, such a duty will be compensatory rather than restorative. So insofar as we are after an account of restorative duties we still need a further account.

The idea that there is a moral (and not merely a legal) right of bequest is itself controversial. In particular, the idea of such a right is incompatible with plausible contractualist theories of justice. Suppose, for example, that we accept a broadly Rawlsian theory of justice.<sup>13</sup> It is hard to see why the parties in the original position would choose a principle underwriting a right of bequest. If Rawls is right in supposing that the parties would choose the difference principle, then it is very plausible to suppose that this would rule out a right of bequest or would that any such right is highly restricted and qualified. For rights of bequest famously lead to massive accumulations of wealth that do not work to the maximal advantage of the least advantaged.<sup>14</sup> However, even if rights of bequest are morally dubious the fact that they are now legally recognized does mean that considerations of equal treatment would speak heavily in favor of following out the implications of such rights in the case of slavery as well. I make the point that such rights are dubious only to indicate that the account developed here could make sense of duties of reparation even in an arguably more ideal world in which such rights are non-existent or more limited.

More troubling for strategies that appeal to rights of bequest is the fact that many of the worst historical injustices were not thefts of inheritable material goods. Africans who were enslaved were robbed of material goods, but this was hardly the worst of the injustices they suffered. The outright denial of their most basic human rights and liberties, the fact that they were treated as the property of another, the heinous cruelty and social invisibility they suffered, the incalculable damage to their

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<sup>13</sup> See John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971).

<sup>14</sup> Here, see D.W. Haslett, "Is Inheritance Justified?" *Philosophy and Public Affairs* 15 (1986): 122-155. For Rawls's own discussion of these matters, see *A Theory of Justice*, pp. 277-278.

self-esteem and self-respect, the destruction of their culture, the rapes, beatings and forced labor - these are more serious than the theft of material goods.

Traditional accounts face serious and by now familiar problems. I do not mean to have shown in this brief discussion that these problems are insuperable. The point is that simply these problems are serious enough to motivate consideration of more unorthodox conceptions. The account developed here, whatever its other vices, is not vulnerable to the preceding problems.

## **II. Duties to the Dead.**

One of the central problems with traditional accounts is that they try to make sense of duties of reparations as owed to descendants who were neither the victims of the injustice nor harmed by it. An obvious solution is to maintain instead that the duties are owed to the original victims. This solution has not been taken seriously only because those victims are now dead. However, a rich philosophical tradition maintains that it is possible to benefit the dead. Assuming we can benefit the dead, we can make good sense of contemporary reparations as owed to the original victims. Moreover, such a strategy might vindicate the very policies defenders of more traditional accounts have advocated – affirmative action, financial settlements, etc. For on the account developed here, one of the most salient ways of making reparations to the dead is by benefiting the descendants of the original victims. The main ideas here are (i) that duties of reparation require us to benefit the victims of our injustices, (ii) we can benefit the dead by promoting the satisfaction of their desires and (iii) most people strongly desire that their descendants flourish. So if a collective agent (like the U.S.) owes a duty of reparation to the dead victims of a historical injustice (like slavery) then the collective could provide reparations by benefiting the descendants (through programs like affirmative action).

The very idea of duties to the dead may seem bizarre to some but common sense recognizes such duties. The hackneyed case of a deathbed promise is thought to generate a duty to the deceased. It would not be odd for someone to maintain that a son "owed it to his deceased father" to provide a decent funeral. It is not uncommon for people to erect monuments to honour those who died in military service out of a sense of duty. Similar remarks might be made about the observation of Memorial Day. The idea that one can wrong the dead by defaming them also has an impressive legal and philosophical pedigree. Kant, for example, argues that spreading falsehoods about someone after the person's death is morally dubious.<sup>15</sup> The idea is even legally recognized in some contexts. In Germany, Holocaust denial is criminal because it involves the "defamation of the memory of the dead."<sup>16</sup> Interestingly, the more specific idea of reparations to the dead fits also surprisingly well with certain elements of existing legal practice. For example, in some jurisdictions wrongful death torts operate under the assumption that someone can be posthumously compensated:

In *Sears v. Nissan*, the New Mexico Supreme Court held that the non-pecuniary value of a decedent's life is compensable under the New Mexico Wrongful Death Act...a plaintiff representing the decedent's estate may recover any damages that the decedent could have recovered if he or she had lived, such as medical expenses and pain and suffering between the date of injury and the date of death (ante-mortem damages)...The court reasoned, 'just as the jury in a personal injury case must determine the monetary worth of nonpecuniary losses, *so too must the jury in a wrongful death action determine fair and just compensation for the reasonably expected nonpecuniary rewards the deceased would have reaped from life*'...Unlike survival statutes, wrongful death statutes create a new cause of action that arises upon the death of the victim. *Thus, wrongful death statutes allow recovery for any damages resulting from death itself (post-mortem damages)*. Some wrongful death statutes measure damages in terms of loss to the decedent's beneficiaries, while others measure loss to the decedent's estate. Loss of enjoyment of life is an injury to the decedent, rather than to the decedent's beneficiaries.

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<sup>15</sup> See Immanuel Kant, *The Metaphysics of Morals*, translated by Mary Gregor, Cambridge University Press, New York, p. 111 (Academy 295). Thanks to an editor for *Ethics* for bringing this passage to my attention.

<sup>16</sup> See, e.g., Frank Miele, "Giving the Devil His Due: Holocaust Revisionism as a Test Case for Free Speech and the Skeptical Ethic," *Skeptic*, vol. 2, no. 4, 1994, p. 58 (also on the web at [www.skeptic.com/02.4.miele-holocaust.html#criminal](http://www.skeptic.com/02.4.miele-holocaust.html#criminal)).

Therefore, 'loss to the beneficiaries' statutes theoretically preclude hedonic damages for wrongful death. 'Loss to estate' statutes, on the other hand, do not appear to bar post-mortem hedonic damages. *Presumably, injury to the decedent's estate could include the post-mortem loss of the decedent's ability to enjoy life.*<sup>17</sup>

Note that it is the value that the deceased would have reaped from life, and not the suffering of his nearest and dearest, that on this account could be compensated.

One obvious reason to be skeptical about the possibility of duties to the dead is the idea that it is impossible to harm or benefit them. Again, this hardly falls out of common sense. For example, ordinary thought allows that slander can posthumously harm someone. Nor has this element of common sense gone without philosophical defense or relied on the idea of "life after death." Many philosophers have argued that people can be harmed or benefited after they are dead even if death is non-existence. George Pitcher, for example, has provided this doctrine with substantial defense, and he is by no means a philosophical maverick here.<sup>18</sup> Neither has this doctrine suffered from a shortage of critics.<sup>19</sup> Although discussions of the welfare of the dead usually focus on the possibility of posthumous harm, it is clear enough that the arguments support the possibility of posthumous benefit too. Pitcher is explicit on this point: "I think the dead can also be benefited, but I shall concentrate on the gloomy side of things."<sup>20</sup> This debate is complex and difficult, and I shall not try to adjudicate it here. Rather, my aim is the more modest one of exploring the implications of the reasonable but controversial view that we can benefit the dead.

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<sup>17</sup> Cindy Dominique-Hendrikson, "Trends in New Mexico Law: 1993-1994," *New Mexico Law Review* 25, 385, Lexis-Nexis, emphasis mine.

<sup>18</sup> See George Pitcher, "The Misfortunes of the Dead," *American Philosophical Quarterly* 21 (1984): 183-188. See also Joel Feinberg, *Harm to Others: The Moral Limits of the Criminal Law* (Oxford: Oxford University Press, 1984), D. Goldstick, "The Welfare of the Dead," *Philosophy* 63 (1988), Thomas Nagel, "Death," *Nous* 4 (1970): 73-80. Robert Solomon, "Is there Happiness After Death?" *Philosophy* 51 (1976): 180-184,

<sup>19</sup> See, for example, Joan Callahan, "On Harming the Dead," *Ethics* 97 (1987): 341-352, Ernest Partridge, "Posthumous Interests and Posthumous Respect," *Ethics* 91 (1981): 243-264, W.J. Waluchow, "Feinberg's Theory of 'Preposthumous' Harm," *Dialogue* 25 (1986): 727-734.

<sup>20</sup> Pitcher, previously cited, p. 183.

Given that we can benefit the dead, a strong case can be made for the thesis that there are duties of reparation to the dead. Consider again the case of slavery in the American South. The U.S. is at least partly responsible for the injustice of slavery, which harmed its victims (the slaves), so (a) and (b) are met. For the U.S. not only made slavery legally permissible and enforceable, it even relied on slave labor itself.<sup>21</sup> Once we allow that it is possible to benefit the dead, it is hard to see why the U.S. would be unable to benefit any of the dead victims of slavery. For one of the ways we can benefit the dead, if we can benefit them at all, is by promoting certain of their deeply held concerns. Most slaves probably cared very much about the welfare of their descendants, so the U.S. could provide reparations to the slaves by promoting the welfare of their descendants. Insofar as policies like affirmative action, direct financial assistance to poverty-stricken descendants of slaves, and other such programs promote the welfare of their intended beneficiaries, such policies provide plausible ways of discharging such duties.

Moreover, the most plausible theories of posthumous harm and benefit maintain that we can posthumously harm or benefit people by thwarting or satisfying their desires. This is George Pitcher's view, for example:

...we all have desires and interests that can be thwarted (or satisfied) after we have died. Consider Mrs. White, for instance. Mrs. White, remember, was very proud of the business that she had established. We may assume that she had a strong desire that it should survive for a long time after her death, as a kind of monument to her industry and skill. The desire is defeated when the business collapses soon after her death. I maintain that the wrecking of her business thus harms Mrs. White...even though it occurs when she is dead.<sup>22</sup>

This sort of account nicely explains why post-mortem slander, one of the most intuitively powerful examples of a post-mortem harm typically is a harm – most people care a great deal about their posthumous reputation. Of course, a particular

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<sup>21</sup> A point eloquently made by Randall Robinson in his book on reparations. See Randall Robinson, *The Debt: What America Owes to Blacks* (Plume Books, New York, 2001), Introduction (pp. 1-12).

person might not mind posthumous slander but in that case it is less plausible that slander is a harm. However, for present purposes I do not need to defend the ambitious thesis that someone suffers a post-mortem harm (or receives a post-mortem benefit) if *and only if* one of her desires is thwarted (or satisfied) after she has died. I rely only on the more modest supposition that if post-mortem harms or benefits are possible then a sufficient condition for such harms (or benefits) is the thwarting (or satisfying) of certain of the person's desires. Since every defender of posthumous benefits endorses something along these lines, this supposition is reasonable.

### **III. Collective Moral Agents and Collective Moral Patients.**

The account offered here presupposes that there are collective moral agents that can appropriately be held accountable for their actions. The present account can get off the ground only if we assume that nation-states like the U.S., or smaller political entities like the state of North Carolina, or non-governmental collectives like churches can rightly be held responsible for their actions. Collective agents are important in cases of historical injustice because the original individual perpetrators are dead, so apart from the relevant collectives there is nobody to whom a reparative duty could be ascribed. So any plausible account of reparative duties for historical injustice will presuppose the legitimacy of holding collective moral agents accountable.

Ordinary practice holds that nation-states have a moral responsibility to live up to their commitments in treaties. We hold corporations morally and legally responsible for their actions even in cases in which the blameworthy individuals have left the company. We could give a deflationary account of such practices but it is not obvious that we should. After all, one interesting feature of such collective agents is that they typically have sophisticated procedures for making decisions and acting on

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<sup>22</sup> Pitcher, previously cited, p. 184.

the basis of those decisions. Moreover, these procedures can be responsive to reasons. The U.S. was able to deliberate carefully about whether to embark on the Marshall Plan. Having made that decision it was also capable of carrying it out in ways that were sensitive to further information and reasons. Insofar as we have entities that make decisions for reasons and guide their actions by those decisions it is very tempting simply to take ordinary talk and practice at face value.

Of course, holding such collectives responsible for their actions typically involves imposing burdens on individuals who constitute them. These individuals might be innocent of the wrong of which the collective is guilty. For example, I might be asked to contribute funds in the form of taxation for reparations on behalf of the U.S. for some crime committed by the U.S. in which I played no part and took no benefit. The objection is sometimes raised that requiring such individuals to contribute tax revenues assumes that they inherited the sins of their ancestors. This objection rests on a confusion. Indeed, the current generation might be made up entirely of recent immigrants for all that has been said so far. Nothing like the idea of inherited sin does any work in the present argument. What the account does suppose is that if you are a member of a reasonably just and mutually advantageous collective agent then you have a duty to do your fair share in ensuring that the collective performs its moral duties, and the collective's duties may supervene on the history of the collective extending back before your membership. Explaining why individuals have such a duty is not trivial.<sup>23</sup> However, unless one takes the starkly revisionist view that a citizen has no reason to support her reasonably just and mutually

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<sup>23</sup> For useful discussion of some of the problems in this area, A.J. Simmons' work is the best place to start. See, e.g., his *On the Edge of Anarchy : Locke, Consent, and the Limits of Society* (Princeton, N.J. : Princeton University Press, 1993).

advantageous government, this is not a problem. For present purposes I simply assume this plausible and widely held view.

Consider some other examples. Suppose the U.S. has a duty to provide foreign aid to alleviate starvation. The U.S. passes an effective foreign aid bill in light of this duty and funds this effort with a fair tax scheme. In such a scenario, assuming the U.S. is reasonably just and mutually advantageous, a U.S. citizen should contribute her fair share of support in taxes for this foreign aid. To take another example, suppose the U.S. is reasonably just and owes reparations to families in Vietnam for war-time atrocities. Suppose these atrocities happened before I was born. Nonetheless, I have a duty to pay my fair share of taxes to subsidize these reparations. Similarly, if the U.S. signed an international treaty before my birth then if the treaty is itself just then I have a duty to pay my fair share of taxes to raise funds to support U.S. commitments under the treaty. These examples show that the general principle invoked by the present account does not rely on the idea of "inherited sin." The basic idea is that in some cases a presently existing collective is one and the same moral agent as the collective who committed the original injustice, and that a collective's duty can "trickle down" to its members without impugning their character at all.<sup>24</sup>

The flip side of worries about the present account's reliance on collective moral agents is the initially puzzling fact that no appeal is made here to the collective moral *patients*, where a moral patient is an entity to whom a moral duty can be owed. This might seem like a strange asymmetry. However, the account of collective moral agents towards which I have gestured does not allow that just any group of individuals counts as a collective agent. The individuals must constitute themselves in such a

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<sup>24</sup> Sometimes, the demands made on contemporary members of a collective would be too much to ask, and the collective's duty will simply have to remain unfulfilled. However, from the fact that such burdens sometimes would be so great that the duty should not be fulfilled it does not follow that this always is the case. It just depends on how great the burdens would be.

way as to make collective decisions on the basis of reasons and act on those decisions. Similarly, we should not allow that just any group of individuals counts as a collective moral patient. They too must be organized in the right way so as to have a collective point of view; otherwise talking of what is good or bad for them as a group makes no sense. An angry mob is a group of individuals that in some sense does things for reasons but we would not speak of what is "good for this angry mob" in the same way in which we would talk about what is "good for the U.S." or "good for General Motors." This is important because in some cases of historical injustice the victims were not organized as collectives and do not have a unified point of view. In the case of slavery, the feature uniting all the victims was the color of their skin and it is absurd to suppose that they were thereby members of a collective patient. Of course, many slaves were members of tribes that perhaps are collective patients. However, these tribes were sometimes complicit in slavery themselves which makes it hard to see how they are owed reparations. In other cases, the tribes no longer exist.

In any event, collective perpetrators of historical injustices might well owe duties of reparation both to collective patients and dead individuals; to assume otherwise is simply to assume a false dichotomy. Moreover, this would not even make the appeal to duties to the dead extensionally redundant in cases involving collective moral patients. Very often those collectives will not include all the descendants of the original victims; most contemporary African-Americans do not belong to an African tribe. Even if the collectives did include all descendants of the original victims, the present account provides a further reason to benefit those individuals and those reasons may have implications for what reparations are most fitting.

#### **IV. Objections.**

An advocate of a traditional account might concede that certain collectives do owe reparations to the dead, but complain that this just changes the subject. For the intuitive idea of most defenders of reparations is that those duties are owed to the descendants of the victims. The complaint finds an analogue in a standard objection to Kant's account of the morality of our treatment of nonhuman animals. Notoriously, on Kant's account, one's duty not to be cruel to nonhuman animals is not a duty *to* those animals, but is merely regarding them. Most people find it more intuitive to suppose such duties are owed to the animals. Similarly, defenders of more traditional accounts of reparations might argue that our intuition is that the descendants are owed reparations. Once we shift to duties to the dead, we have simply changed the subject.

I suspect that most people's intuitions about reparations are less theory-laden than this objection assumes. What is intuitive to many is that there is something wrong with letting a historical injustice go without reparations when we are in a position to benefit the descendants. Of course, this intuition itself is not universally shared, but those who share it are not thereby committed to thinking such duties are owed *to* the victims' descendants. In any event, problems with traditional accounts may show that in finding a reflective equilibrium between our intuitions and principles those intuitions must be abandoned. The arguments of section I suggest that those intuitions are hopelessly confused. Finally, even if the idea of duties to the dead would not vindicate our pre-theoretical intuitions about reparations, they remain important in their own right. Simply changing the subject is not always a bad thing. Here it is worth noting the present account's plausibility even in cases in which there are no descendants. For example, if a group of colonists wiped out the native population of an island then it is plausible to suppose that the colony now owes reparations to the dead victims if they really can benefit them. The colonists might

discharge their duty by erecting monuments and museums honoring the natives and condemning the original colonists' atrocities.

The preceding worry in effect was that the present proposal is fine in practice, but inadequate in theory, charging that it gets the right results for the wrong reasons.<sup>25</sup> An opposite worry is that while the account is fine in theory it has no practical significance. For the account generates at most a defeasible case for reparations. The practical significance of reparative reasons in actual cases, in which a multitude of moral considerations are relevant, depends on the comparative weight of reparative reasons. The worry is that on any sensible view these reasons will be pitifully weak. One might grant that it is possible to benefit the dead but maintain that their interests have far less moral significance than the interests of the living. After all, it would be perverse to suppose that present generations must make themselves miserable for the greater good of the dead. Here is Janna Thompson:

If in some sense they [the dead] can be harmed, that does not mean that their interests count very much when compared with the interests of the living.<sup>26</sup>

However, even if the main premise of this objection is sound, the conclusion does not follow. The overall consequences for the living of a given policy will sometimes be unclear even when it is agreed that the policy would benefit the dead. If the interests of the dead are given any weight then this may tip the scales in favor of the policy.

Furthermore, the thesis that while we can benefit the dead their interests *always* are less weighty than the interests of the living is untenable. The only apparent reason to think this would be the more general thesis that experiential interests always morally "trump" non-experiential interests, but it is not plausible to give experiential interests such priority. Given our working assumption that there can

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<sup>25</sup> The philosopher's motto: "I know it works in practice, but does it work in theory?!?" This nice joke is borrowed from Daniel Dennett; its ultimate origins are unknown to me.

be non-experiential harms, it seems that damage to one's reputation that would not negatively affect one's experiences can be significantly worse than, e.g., stubbing one's toe. Moreover, a duty of reparation is a duty of justice rather than a duty of beneficence. The weight of duties of justice generally is not directly proportional to the amount of possible benefit. Consider two cases involving only the living. In the first case I have very seriously wronged Andy but for various reasons now can provide Andy only with a small (though non-trivial) benefit. In the second case I have committed a fairly minor injustice against Beverly but I can provide Beverly with a considerably greater benefit. Intuitively my duty of reparation to Andy is stronger than my duty of reparation to Beverly even though I can benefit Beverly much more. The stringency of duties of reparation is proportional to the seriousness of the moral infraction rather than the amount of possible benefit. So even if the posthumous interests are in some sense less significant than the interests of the living, it does not follow that duties of reparation to the dead are any weaker. Duties of justice are not duties of beneficence.

However, one might try to blunt the practical significance of duties to the dead in a more indirect and subtle way. One might argue that the legal or political recognition of duties to the dead is incompatible with familiar doctrines of liberal neutrality. In particular, it might be objected that the account developed here runs afoul of the doctrine that the state must be neutral with respect to competing metaphysical and religious world-views, as well as conceptions of the good.<sup>27</sup> For regardless of whether we can benefit the dead, it is a controversial matter about which reasonable people reasonably disagree. So political liberals will insist that it is not something we should assume in political debates about matters of justice.

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<sup>26</sup> Janna Thompson, "Inherited Obligations and Generational Continuity," *Canadian Journal of Philosophy*, 29, 1999, pp. 493-516, p. 506.

This objection is an important one, although even if sound it would not rob the proposed account of practical significance. For on the proposed account nation-states would not have a monopoly on duties of reparation to the dead. Various non-governmental organizations (e.g., churches, banks, corporations) are also plausibly thought of as having such duties in many cases. Since such non-governmental organizations are not bound by liberal neutrality constraints on anyone's account, duties to the dead would still have interesting implications even if we accept liberal neutrality. However, the objection should not be conceded so quickly even in the case of liberal political regimes. For the objection suggests a problem for the tenability of liberal neutrality rather than the present account. Admittedly, the question of whether we can benefit the dead is controversial. The problem is that it is impossible to arrive at a principled answer to questions of justice that does not implicitly presuppose an answer to this question. In that case the sort of neutrality on offer is impossible.<sup>28</sup> Liberals hold that every person is to be given equal consideration. The question is how the scope of 'every person' is fixed. The liberal cannot avoid this question. Liberalism is, after all, a tradition which has served precisely to widen the scope of 'every person', moving from propertied, upper-class, white men to include people who held no property, were not white, upper class or men. Imagine the absurdity of a theory of justice trying to remain neutral as to the moral standing of women or the poor. The dispute over the status of the dead in a liberal theory is a dispute of just this sort. Crucially, this is a question of the scope of the theory rather than its content, and this makes it a difficult question for the advocate of neutrality. When faced with controversial questions of content, defenders of neutrality typically try to arrange

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<sup>27</sup> See John Rawls, *Political Liberalism* (New York: Columbia University Press, (1993).

<sup>28</sup> Here I simply follow Timothy Mulgan's excellent discussion of this problem for the liberal in his "The Place of the Dead in Liberal Political Philosophy," *The Journal of Political Philosophy* 7 (1999): 52-70.

society so that everyone has a fair opportunity to live according to the content of their own beliefs. By contrast, this strategy is a non-starter when facing the prior question of the theory's scope. For it is impossible to construct just institutions giving equal consideration to everyone's beliefs and interests without determining the scope of 'everyone'. As Timothy Mulgan puts it,

...the decisions we make regarding scope are written into the foundations of our liberal constitution, whereas decisions regarding content only affect the structure of institutions built on those foundations. (In Rawlsian terms, a dispute over scope concerns who will be represented in the Original Position, whereas a dispute over content concerns what will be chosen in that position).<sup>29</sup>

So the problem here is a problem for liberal neutrality rather than the present account.

A related objection is that once we allow the dead legal and political standing we will be committed to other implausible conclusions. For example, this might force us to allow that the dead have a right to vote. The particular case of the right to vote can be dealt with in the same way that we deal with the case of young children. Presumably we do not allow young children to vote because they typically are not well informed enough to increase the chances that the best policies or persons are adopted or elected. This argument applies even more forcefully to the dead, since there is no way for the dead to update their beliefs and preferences. More generally, in allowing that the dead can be benefited we have not yet opened any problematic floodgates. Consider an analogy. Almost everyone allows that nonhuman animals can be benefited and have certain kinds of moral standing (we must not be cruel to them) but it simply does not follow from this that they have a right to vote, a right to free speech, etc.

Finally, one might object that recognizing the legitimacy of duties of reparation to the dead would have absurd consequences simply because there are so

many dead victims of injustice to whom such duties would be owed. It might seem problematic if the present account implied that we now have duties of reparation owed to descendants of those living in Britain in 1066 because of the injustices of the Normans or to Jewish descendants of those enslaved in Ancient Egypt. Moreover, the further back in time one goes, the more ancestors one has. So if there were not some principled grounds for restricting duties of reparations to fairly recent injustices then there would be such an explosion of duties of reparation that just about everyone could claim that they should be benefited in some way to satisfy a duty of reparation to their ancestor(s). Fortunately there are at least two principled grounds for a statute of limitations on reparative claims. First, the force of reparative duties to the dead diminishes over time because our ability to benefit them by benefiting their descendants diminishes over time. While people care a great deal about their direct descendants, they generally care less about descendants three and four generations down the line. Indeed, after a certain number of generations people usually do not care much more about their descendants than they do about people in general. Second, in many of these cases the collective agents who performed the original injustices no longer exist, which provides another check on the potential “explosion” of reparative duties. For when the perpetrator of an injustice no longer exists there is nobody to whom a debt of reparations can be attributed.

## **V. Applications.**

What specific implications would the present account have for the case of slavery in the U.S.? Of course, in the case of slavery, many of the original victims’ desires have been met. Most notably, slavery has ended. However, this hardly is sufficient as a reparation since ending slavery was required by the demands of justice anyway. As I

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<sup>29</sup> Mulgan, "The Place of the Dead," p. 56.

have already noted, most probably cared a great deal about the welfare of their descendants. Admittedly, not all of them did, but here we have a reasonable generalization good enough for policy-making. So perhaps we could benefit the dead slaves by promoting the welfare of their descendants. To get a better idea of just which policies would be most fitting, we should try to get a more detailed understanding of the slaves' concerns. Reliable evidence is limited because the slaves were silenced by forced illiteracy while testimony of their white contemporaries is infused with racist ideology. Still, there is some evidence here worth reviewing. For example, the Federal Writers Project of the Works Progress Administration (WPA) interviewed over 2,000 former slaves between 1936 and 1938 about their experiences.

Since people generally care a great deal about their children, the default assumption should be that slaves shared these natural human affections. One might worry that slave parents were so often forcibly separated from their children at a young age that these affections were often short-circuited. Although this did happen, it was the exception rather than the rule. Many states had laws retarding such sales, and this had some effect. Some studies suggest that in the upper South fewer than 1 percent of children under the age of eight were sold separately from their parents in the antebellum years; other studies suggest the figures are closer to 5-7%.<sup>30</sup> Apart from legal constraints, many slaveholders were keen to silence abolitionists who eloquently emphasized the injustice of children being stolen from their parents. Some slave owners apparently thought that young children should be raised by their parents, both for moral and self-interested reasons.<sup>31</sup> Other masters did not want to increase the risk that the slaves they kept for themselves would try to escape to reunite with their families. Most slave parents were not separated from their children so quickly

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<sup>30</sup> Marie Jenkins Schwartz, *Born In Bondage* (Cambridge, MA: Harvard University Press, 2000), p. 89.

<sup>31</sup> Schwartz, p. 89.

that no long-lasting affective bonds could be formed. So it is reasonable to suppose as a working hypothesis that slaves loved their children as much as most human parents.

This hypothesis is verified by further evidence. Indeed, the available evidence suggests that slaves often cared about their descendants more than anything else. In a way, this is not surprising. Slaves spent most of their time doing forced labor and what little time remained was generally reserved for meeting their own basic needs. Child-rearing must have been one of the few semi-autonomous projects a slave could pursue. Moreover, there are West African roots for a strong concern for family. Some evidence suggests that these ideas survived in slave cultures, as anthropologists Sidney Mintz and Richard Price explain:

What, if anything, might have constituted a set of broadly shared ideas brought from Africa in the realm of kinship? Tentatively and provisionally, we would suggest that there may have been certain widespread fundamental ideas and assumptions about kinship in West Africa. Among these, we might single out the sheer importance of kinship in structuring interpersonal relations and in defining a person's place in his society...and the importance to each individual of the resulting lines of kinsmen, living or dead, stretching backward and forward through time.<sup>32</sup>

West African cultures held that immortality comes only through one's descendants, and some scholars suggest that this idea may have played a role in slave culture.<sup>33</sup>

Slaves often made great sacrifices for their children. For example, they would protest if their masters did not provide them with enough time to spend with their children, risking the master's wrath.<sup>34</sup> The love of their children also inspired some slaves to take great risks in trying to escape to reunite with them. Leon Litwack contends that a desire to reunite with sold loved ones explains the flight of more

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<sup>32</sup> W. Mintz and Richard Price, "An Anthropological Approach to the Study of Afro-American History," unpublished paper, February, 1974, as quoted in Herbert Gutman, *The Black Family In Slavery and Freedom, 1750-1925* (Oxford: Basil Blackwell, 1976), p. 196.

<sup>33</sup> See Gutman, 1976, p. 198.

<sup>34</sup> See Schwartz, 2000, p. 3.

runaway slaves than any other factor apart from the desire to avoid punishment.<sup>35</sup> At the same time, evidence also suggests that many other slaves were kept from resorting to flight by a desire to remain with families.<sup>36</sup> Those who did escape sometimes took great risks to remain near their family and felt guilty about having left them.<sup>37</sup>

So slaves cared deeply about the welfare of their descendants. Interestingly, they also wanted their children to develop a sense of self-esteem and adopt the values of their fellow-slaves rather than the servile values preached by their masters.

Tragically, slave parents had to compete with masters for their children's respect:

The situation in which owners expressed an interest in children's welfare held some benefits for individual boys and girls, but it also threatened the fragile existence of the slave family...the owner's attention to the details of child rearing curtailed the capacity of the slave family to create a cultural space where slaves could be critical of servitude and slaveholders and could teach their children standards of behavior that differed from those of the owners. Little doubt existed in the minds of these parents as to who should be in charge of their children...Parents wanted children to comply outwardly with owners' expectations concerning behavior; to do otherwise would have invited disaster upon themselves and their youngsters. But they confronted this dilemma: how could they teach the rituals that passed for racial etiquette in southern society, without imparting to their children a sense of inferiority and without diminishing their own worth in the eyes of their sons and daughters?<sup>38</sup>

Schwartz goes on to document some of the ways in which slaves managed to walk this tightrope. For example, one story circulated amongst slaves in Sumter County, Alabama that a slave woman had extracted revenge for her beating at the hands of her master by throwing his young child into a pot of lye, and Schwartz suggests that children listening to such accounts understood them as critiques of slavery.<sup>39</sup> The prayers parents taught their children sometimes helped to reinforce their parents'

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<sup>35</sup> Leon F. Litwack, *Been In the Storm So Long: The Aftermath of Slavery* (New York: Vintage Books, 1980), p. 230.

<sup>36</sup> Litwack, 1980, p. 230.

<sup>37</sup> See Gutman, 1976, pp. 265-266.

<sup>38</sup> Schwartz, 2000, pp. 77-78.

<sup>39</sup> Schwartz, 2000, p. 105.

values.<sup>40</sup> The fact that such efforts were made at all shows that slaves wanted their children to reject the master's values and internalize the values of their fellow slaves.

My discussion so far has focused on slaves' attitudes to their immediate descendants because the evidence in that case is so clear and compelling. No doubt like most people, slaves cared more about their children than their great-grandchildren. However, if we add the plausible assumption that their descendants also tended to care about their children and grand-children then a powerful case can be made for a reparative duty to benefit their more distant contemporary descendants. Consider a contemporary African American named Joe. If we make the plausible assumption that Joe's grand-parents cared a great deal about him, and that his great-great-grand-parents cared a great deal about Joe's grandparents then we can promote the welfare of Joe's great-great-grandparents by promoting Joe's welfare *even if* Joe's great-great-grandparents do not care about the welfare of their great-great grandchildren (e.g. Joe). This is because by benefiting Joe we benefit his grandparents and by benefiting his grandparents in turn we benefit his great-great-grandparents. For by hypothesis, his great-great-grandparents *do* care about the welfare of their grandchildren (Joe's grandparents), so anything that advances the welfare of Joe's grandparents thereby promotes the welfare of Joe's great-great-grandparents too, even if they do not care about Joe himself *at all or any more than they care about people in general*. Such a chain of interconnected welfare obviously could be extended further back to Joe's great-great-great-great-grandparents in the same way. Each extension plausibly reduces the amount of welfare at stake, since any given person's welfare is only partially a function of the welfare of someone else about whom they cared. For example, if my welfare contributes only 1/n of the

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<sup>40</sup> See Schwartz, 2000, p. 102.

overall welfare of my grandparents and the welfare of my grandparents in turn contributes only  $1/n$  of the overall welfare of my great-great-grandparents then my welfare contributes  $1/n^2$  to the welfare of my great-great-grandparents so far as this argument goes. So a statute of limitations on reparative duties discussed earlier is preserved, since at some stage this increase in welfare becomes negligible.

One advantage of this indirect strategy is that it relies only on the modest hypothesis that the vast majority of slaves and their descendants cared a great deal about either their children or their grandchildren. Nonetheless, we are not forced to rely on this indirect account. There is considerable evidence that slaves also cared directly about more distant descendants. The West African idea that one achieves immortality through one's descendants stretching through the ages would reinforce this more generalized concern. Slaves very often named their children after the children's grandparents,<sup>41</sup> and grandparents and great-grandparents typically played a very important role in the rearing of children. Indeed, children very often had much better relationships with grandparents than with their parents. This may stem from the West African tradition of leaving parents in charge of disciplining their children but having grandparents check this discipline and serve as a "court of appeal" when children claimed to be treated unfairly.<sup>42</sup> Finally, we find an explicit statement of a very generalized concern for all kin:

The rural descendants of slaves put it well. "If you knock de nose," according to a black South Carolina proverb, "de eye cry." That meant, "If you hurt one of the family, you hurt them all."<sup>43</sup>

The slaves' desires for their descendants' welfare seem to have been more universally, autonomously and deeply held than any of the slaves' other desires. Some first-generation slaves might have wanted their descendants to return to Africa,

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<sup>41</sup> Gutman, 1976, p. 198.

<sup>42</sup> Gutman, 1976, pp. 198-199.

but these desires would pretty clearly not be good ones on which to focus when crafting a policy of reparations. For the vast majority of descendants simply have no desire to move to Africa and often would not know their ancestor's tribe even if they did. Almost surely, most slaves would not have wanted their descendants to be forced (like slaves!) to move to another continent against their will. So slaves' desires that their descendants flourish are much better desires upon which to base reparations.

What specific policies might we adopt on the basis of those desires? An in-depth discussion of different policy options is beyond the scope of this paper. Instead, I briefly explore an array of options the tenability of which depends on empirical questions that cannot be resolved here. First and least controversially, the present argument bolsters Representative Conyers' case for the very modest step of establishing a committee to explore the issue of reparations for slavery. For the more persuasive the case for reparations is the more reason we have to explore the issue. Second, traditional defenders of duties of reparation often maintain that those duties support affirmative action. If affirmative action programs effectively promote the welfare of their intended beneficiaries then such programs would be another way of discharging our duties to the dead. Whether affirmative action does benefit minorities has been debated extensively in the literature and this is not the place to rehearse those arguments. Third, many contemporary African Americans take offense at the display of Confederate flags in public places, as in the case of the South Carolina statehouse. Legislation to remove that flag from such public places would make many of those descendants happier, thereby providing a benefit to their slave ancestors. Moreover, given the flag's history and symbolism, removing the it from public places might be particularly suitable as part of a package of measures aimed at

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<sup>43</sup> Gutman, 1976, p. 186.

providing reparations for slavery.<sup>44</sup> Fourth, the U.S. might fund museums dedicated to the history of Africans, African-Americans and the slave trade. Some of these museums might focus especially on slavery and might be modelled in some ways on Holocaust Museums. At least one such museum of this sort exists now<sup>45</sup> but it is very small and poorly funded compared with most museums. There recently was movement to establish an African-American Museum on the Mall in Washington, D.C. but this movement died for political reasons.<sup>46</sup> Perhaps this idea should be revisited. Fifth, the U.S. might commission a series of statues and monuments commemorating aspects of slaves' experiences. Sixth, following up on a proposal made by Robert Westley and further developed by Randall Robinson the U.S. might establish a trust to subsidize special K-12 schools for African-American children at risk.<sup>47</sup> These schools would be rigorous and emphasize the diverse histories and cultures of African-Americans and Africans. For African-Americans who remain in public schools, similar education could be provided by special schools funded to supplement public school offerings on the model of weekend Hebrew schools in the Jewish community. All fees for these schools would be funded by the trust. The trust would also fund the university education of qualified African-Americans in need.

The requirement that assistance be need-based might not seem well-supported by our reparative duties to the dead. For presumably slaves would have cared about the welfare of their descendants regardless of their wealth. This raises a more general objection. The present account might seem blind to morally relevant distinctions

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<sup>44</sup> For a discussion of some of the many complex issues involved in the more general debate about the Confederate flag see George Schedler, *Racist Symbols and Reparations*, 1998, Rowman and Littlefield Publishers, Lanham, Maryland; Schedler's book also has a useful bibliography on this topic.

<sup>45</sup> For example, there is a very modest but interesting Black Holocaust Museum based in Milwaukee. See <http://www.exodusnews.com/HISTORY/History008.htm> for a brief discussion. Also worth noting here is an on-line slavery museum: <http://www.slaverymuseum.org/home.htm>.

<sup>46</sup> See Robinson 2000, pp. 39-41 for useful discussion.

<sup>47</sup> See Robert Westley, "Many Billions Gone," *Boston College Law Review*, June, 1999 and Robinson 2000, esp. pp. 244-245.. I follow Robinson's account quite closely in the text.

between a wealthy African-American who has not suffered too much from the effects of racism and a very poor African-American who has suffered greatly from racism. However, it is not so implausible that we should perhaps in some ways benefit even wealthier African-Americans as well as poorer ones in order to discharge a duty to their dead ancestors. For example, wealthy African-Americans might well benefit more than poorer African-Americans from the museums discussed above, but this does not seem to weaken the rationale for their establishment.

Still, the case of museums is intuitively different from other forms of reparations, and it would be implausible if the present argument supported full scholarships for wealthy African-Americans simply because of their parentage. Pretty clearly, we can to some degree block this result on independent grounds and hold that other goods (focusing scarce social resources on the more needy, most notably) outweigh the value of this form of reparation, but that would not be entirely satisfying. Fortunately, the account developed here can distinguish these cases in its own terms. The slaves themselves almost certainly would not have wanted their very wealthy and successful descendants to be given resources that could instead usefully be given to their much poorer descendants. This seems likely not only because any decent person would distinguish helping poor victims of injustice who are in need from making the rich and powerful even more rich and powerful. There is also the fact that the experiences of the slaves themselves as both poor and victims of virulent racism would make them especially sensitive to the needs of the most vulnerable and oppressed. The diminishing marginal utility of such assistance also means that resources would be more efficiently spent helping poor African-Americans. So we would better promote the welfare of the descendants of the slaves, and hence better promote the satisfaction of slaves' desires by focusing resources on those in need.

However, this objection can be met in a different way. Our theory of welfare might hold that the satisfaction (or thwarting) of a desire constitutes a benefit (or harm) only if that desire is both for a state of affairs that is worthwhile and not constitutive of a moral vice. The requirement that the objects of one's desires be worthwhile if their satisfaction constitutes a benefit is independently plausible. For example, it explains why Rawls's famous case of a person who most wants to count blades of grass is not benefited by the satisfaction of this desire *per se*.<sup>48</sup> This is admittedly a high-minded conception of a person's welfare, but one that is not without plausibility.<sup>49</sup> The account developed here is not committed to such a high-minded account but it is worth exploring its implications here. In particular, a slave's preference for the promotion of the welfare of wealthy descendants over poorer descendants seems like a plausible case of a desire constitutive of a moral vice. So on a high-minded theory of welfare we would not promote the welfare of a dead slave with such a preference by satisfying that preference. For similar reasons, any of the slaves' preferences that descendants of masters be harmed to punish the masters themselves can be put to one side. For even if such measures would posthumously punish slave-owners, it is independently wrong to harm the innocent to punish the guilty. After all, we would not incarcerate the loved ones of living criminals in order to punish those criminals even though doing so would harm the criminal.

Finally, at least some of the options discussed would provide benefits to some people who are not actually descendants of slaves. For example, traditional forms of affirmative action simply do not require a detailed account of the person's family history sufficient to establish slave parentage and I am not proposing that affirmative

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<sup>48</sup> See John Rawls, *A Theory of Justice* (Boston: Harvard University Press), 1971.

<sup>49</sup> On a related note, I suspect that most people with utilitarian sympathies would prefer Mill on the higher pleasures to Bentham's position on the relative merits of pushpin and poetry, though this is not the context for a discussion of whether this compromised Mill's commitment to hedonism.

action programs should be modified in this respect. African Americans who have recently emigrated or whose parents emigrated recently to America will continue to benefit from these programs. In this case there arguably are other good reasons having nothing to do with reparations to extend affirmative action to such cases, and there is also the matter of reparations for the more recent injustices like segregation. Furthermore, policy-making even with respect to questions of reparative justice must make compromises with unavoidable practical considerations. Actually tracing candidates' family histories would often be impossible and prohibitively expensive. These considerations alone can serve on practical grounds to justify reliance on programs which predictably yield some 'false positives' so long as those programs use sufficiently reliable heuristics. The fact that a perfect system is impossible or too expensive does not mean we should not adopt a close approximation of it..

### **Conclusion.**

So long as we understand reparations for historical injustices as owed to descendants of the original victims we face a range of familiar and thorny difficulties. However, once we allow that we can benefit the dead an unorthodox alternative suggests itself. The alternative may not deliver all that the advocates of duties of reparation in such cases originally wanted, but it does deliver *something*, which arguably is more than traditional accounts deliver. On the other hand, if traditional accounts can overcome the problems surveyed here, duties to the dead could provide an important *further* duty of reparation. Either way, we must give the dead their due.