

CORRECTIVE JUSTICE, HARM, AND REPARATIONS FOR HISTORICAL
INJUSTICE

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ABSTRACT OF THE DISSERTATION

Corrective Justice, Harm, and Reparations for Historical Injustice

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Some regard harms to currently existing persons as a basis for reparations for historical injustice. By focusing on corrective justice as the basis for repairing wrongful harm, this thesis aims to clarify and strengthen the harm-based approach to reparations. I defend a version of the conformity account as the moral basis of corrective justice, critiquing various versions of this argument by Joseph Raz and John Gardner. I argue that the notion of harm relevant to corrective justice is a counterfactual comparative one and respond to various objections to that conception. I then consider two different cases in which compensation for an historical injustice might be thought appropriate. First, I examine an argument developed independently by Bernard Boxill and George Sher (which I refer to as the chain-harm argument). I analyze Andrew Cohen's critique of the argument, clarifying the problems it faces before offering some tentative solutions. Second, I examine and critique Judith Jarvis Thomson's proposal to solve the non-identity problem in the case of the *Risky Policy*. I explain why her argument fails and offer my own solution.

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Introduction

Overview:

You need not have been paying very close attention in school to realize that history is in large part a catalogue of injustices. Murder, torture, theft, exploitation, enslavement perpetrated by and against individuals, groups, and nations form a crucial and unavoidable part of our story, both as inhabitants of the United States and of the world. And even the least assiduous of students would know that the great majority of these historical wrongs were not addressed either at the time or since. At most times, and for the most part even now, this fact may have seemed unremarkable not only because, being so widely true it seemed inevitable, but also since to many it likely seemed an appropriate response.

Recent times suggest a possible shift in attitudes in this regard. We have entered what has been described as an ‘age of apology.’ On a trip to Uganda in 1998 Bill Clinton acknowledged that the United States was wrong to benefit for slavery. In 2002, Queen Elizabeth II laid a wreath at the site of a 1919 massacre at the hands of British troops in Amritsar in the Punjab¹. In 2008, the then-PM Kevin Rudd made a formal apology for the historical wrongs committed by successive governments against the Aboriginal population of Australia. In 2009, Barack Obama signed into law an apology for actions of the United States against Native Americans tribes.

¹ To clarify, she offered no apology and made rather glib remarks about focusing on the good times. However, the mere fact that it was deemed appropriate for her to recognize this incident points to an interesting shift in attitudes, if only a slight one.

But some regard an apology as not going far enough. There continue to be demands for reparations in the form of monetary compensation, or the transfer of lands or other holdings to the descendants of those who originally suffered the historical injustices. Further, those who make such demands tend to think that these reparative actions are required as a matter of moral right.

But ought we to be concerned with redressing historical injustice in the first place? Against reparations have been raised various types of concern. Some regard reparations as unwise on practical grounds. For example, it may be too hard to figure out what really happened and hence to construct an appropriate response. Or perhaps the disadvantages that may attend pursuit of reparations programs tell decisively against them, for example why risk opening closed wounds? Another such disadvantage might be that this concern diverts from more pressing matters. That idea reflects a common attitude that regards a concern with historical reparations as a failure of moral priorities: in an ideal world, we should do something about historical injustices, but surely there is enough current injustice to (pre)occupy us as it is.²

These worries share an implicit presupposition that historical reparation is an intelligible, if not a sensible, pursuit. But some wonder whether it even makes sense to think that we can repair such historical injustices. Such concerns seem quite natural when one reflects upon an important class of historical injustices, those in which both the original perpetrators and also those who were its original victims are dead, often long

² It may be that interest in historical injustice in the US and other Western Countries (both public and academic) is waning and will continue to do so in the face of the recent economic crisis and the increased concern with income inequality that is has engendered.

dead. Both facts ground some powerful challenges. If the original perpetrators of the historical injustices are no longer living, then who can be held to account? If my friend's murderer is dead, is not justice for my friend inevitably beyond our reach? Worse still our insistence on making reparations might lead us to a further injustice of holding the innocent liable for the sins of others. For that reason we do not think that the innocent murderer's wife ought to (or even can) apologize for his act, or that my friend's family ought to sue her for their loss.

On the other hand, the fact that the original victim is deceased invites the obvious question as to who exactly is the appropriate recipient of reparations. In real-world cases, the concern with reparations tends to focus not on the failure to redress the deceased victims of injustice, but on the idea that some currently living descendants or same-group members are the suitable recipients of reparations for those historical wrongs. But there are doubts that any current persons really are, or more worrisome still, even *could* be the appropriate recipients of such redress. If these doubts are valid we face again a concern that reparations programs risk adding to the injustice in the world, in this case by contributing the (admittedly weaker) injustice of mistakenly making reparations to those undeserving of them.

Although all of these objections must ultimately be faced, this last issue—that of identifying the appropriate recipient of reparations-- is a foundational one and is the one on which my thesis focuses. Until we make sense of the idea that some currently living persons can have a right to reparation, the intelligibility of such demands remains in doubt. Various defenses of the idea that some current persons have a right to reparations

have been made. On one approach, the right is to an inheritance that someone was, and continues to be, unjustifiably denied. On another, reparations are understood in terms of giving up certain advantages, benefits or riches that derive from historical injustice. On a third approach, reparations are understood as compensation for harms that some current persons suffer in virtue of the historical injustice.

In this thesis I focus narrowly on this third approach. I examine and clarify various problems that have been raised with this harm-based approach and attempt to address those problems.

The Philosophical Context:

For philosophers concerned with whether there is moral (as opposed to legal) argument in favor of reparations for historical injustice the following questions are central: Can reparations to some currently existing persons be justified in virtue of historical injustices? In particular can they be justified on backward-looking grounds? In my view, a promising approach in the philosophical literature develops the idea that reparation is a matter of, or at least involves, taking steps to repair harm that these currently living persons suffer (via compensation, broadly understood).³ This approach requires a defense of the claim that the descendants suffer harm caused by or somehow related to the historical injustice. The most notable problem facing this approach is the non-identity problem, according to which the fact that currently existing persons would

³ Compensation is usually associated with a specific mode of repair, namely monetary compensation. By compensation in the broad sense I indicate that I understand compensation to refer to whatever steps may be appropriate in order to repair harm.

not exist but for an historical injustice is taken to undermine the possibility that those persons are, or even could be, harmed by that injustice. Another problem in this context, the attribution problem, is to explain why it is important to focus on historical injustices, as opposed to other injustices that took place in-between then and now.

Those who have developed arguments within this harm-based approach have not paid sufficient attention to the moral principle that is explicitly or implicitly invoked in order to justify compensation for harm. The relevant principle is the principle of corrective justice, according to which P has a duty to compensate Q for wrongful harm P causes Q. I understand this as a moral duty that is distinct from possible legal duties of similar structure.

The failure to focus on the moral principle presupposed by such arguments is problematic in various ways. First, it is unclear that it makes sense to apply the principle of corrective justice to wrongs (breaches of duty) that are historical. To show that corrective justice is appropriately adopted when discussing reparations for historical injustice we would need to show that the principle is defensible on backward-looking grounds, and further that this defense is consistent with applying the principle to historical contexts.

Second, it is unclear which of various competing conceptions of harm ought to be adopted. Analyzing corrective justice provides grounds for adopting one particular conception (a counterfactual comparative conception), and hence gives us reason to rule out any approach that, while attempting to justify compensation aimed at repairing harm, appeals to a different conception of harm. In particular, this blocks any response to the

non-identity worry (in this context at least) that rejects the problem as illusory based on its reliance on the counterfactual comparative conception of harm.

Third, understanding the moral basis of and the nature of the principle of corrective justice (for example, specifying the necessary conditions for its application and clarifying the counterfactual test for wrongful harm) can help us to identify previously unnoticed problems with arguments that adopt the harm-based approach. As such, these are essential steps toward evaluating and strengthening such arguments.

In the remainder of the introduction I clarify and defend the focus of my thesis and locate my project within the field of reparations for historical injustice. Before that, I clarify a few crucial points. First, I am concerned in this thesis only with whether a *moral* argument for reparations can be developed. I do not address whether a promising legal case for reparations can be developed. Second, I focus only on the issue of whether it can plausibly be argued that some current persons suffer wrongful harm in virtue of an historical injustice. In particular, I do not address a crucial further issue here, namely the problem of explaining how some currently existing agent (or entity) can intelligibly be thought to have the duty to repair such harm. For the purposes of this dissertation, I presuppose that such a duty-holder can be identified⁴.

Clarifying the Central Issue

This thesis is concerned with a possible strategy for addressing the issue of whether reparations to currently living persons can be justified in virtue of historical

⁴ In my view, a transgenerational agent is the most promising candidate for such a duty-holder. Janna Thomson defends this idea in *Taking Responsibility for the Past*. Malden: Blackwell, 2002.

injustices. We need first then to be clear how this issue is to be understood. An initial point is that I focus only on whether currently living persons may be owed reparations. I am not concerned with whether reparations ought (or can) be made to deceased persons.

An injustice is 'historical' - I will stipulate- when both the individual persons who committed those injustices and also those who were the direct victims of those injustices are no longer alive. This stipulation is at odds with some authors who mean by 'historical' in this context roughly 'not contemporary'. Although there are obviously some important overlapping issues regarding injustices that took place some years ago but where the victim and/or the injurer is still alive, and those injustices that are historical in my sense⁵, there are particularly acute problems that arise when dealing with injustices in which the original persons involved are dead, problems related to identifying and justifying the basis on which certain individuals who were not directly involved may be held morally liable or may have claims to repair grounded in those historical injustices. For this reason I think it useful to restrict the concern to 'historical' in the sense I suggest.

What counts as an injustice depends on the case under consideration. Most commonly, those interested in this topic focus on issues such as reparations for slavery or for dispossession and massacre of Native Americans in US history. In those cases, the injustices involved moral rights' violations⁶ against persons living at that time.

⁵ We may think a moral statute of limitations applies that would rule out responses to either, or one may be concerned with injustices in which institutions, groups, or nations played a large part (for example abuse of children by Roman Catholic priests; victims of the Khmer Rouge in Cambodia, or of the Nazi holocaust). These are not issues that I address however.

⁶ In this thesis I use the term rights' violation and rights' invasion interchangeably. My usage is distinct from that of Jules Coleman who regards rights' violations as a subset of rights' invasions, namely those which involve wrongful action. See *Risks and Wrongs*. Cambridge: Cambridge University Press, 1992, chapters 15 and 16. To clarify, in my view rights' invasions/violations can take place even where the right

Correlative with those rights' violations are breaches of duty, which I refer to as 'wrongs'⁷. For the remainder of this chapter I will refer only to these types of cases.

However, in chapter 4, I also address another type of case in which the apparent basis for understanding the historical act as unjust is that it appears to violate the right of some future person.

The term 'reparations' is ambiguous. As I will use the term in the remainder of this introduction, it refers to the type of action for or on behalf of currently existing persons that is considered morally appropriate in order to address historical injustices. I will refer to the set of possible actions as 'transfers,' although they need not involve literal transfers of goods or even any benefit. These actions may include monetary compensation, preferential treatment programs, or transfer of lands or holdings.

However, 'reparations' sometimes refers to the specific normative aim⁸ behind such transfers. For example, when Janna Thompson contrasts what she calls 'reparation as restoration' with 'reparation as reconciliation,' she is pointing out two possible guiding aims that transfers ought to achieve (in order to count as reparation)⁹. In addition, 'reparations' is also often used to mean compensation for wrongful harm, thereby picking out a specific transfer and a specific aim.¹⁰ Given the understanding I adopt here,

invader/violator does not commit an act that is all-things-considered wrong, nor need the actor be culpable for that right's invasion/violation.

⁷ That an act (or omission) is a wrong (qua duty breach) does not entail that it is an all-things-considered wrong or that the act is culpable. All it entails is that a duty is breached. This terminology I adopt from John Gardner.

⁸ 'Aim' here refers to the normative goal rather than to whatever motivating reason an agent or agents might have to carry out or coerce transfers.

⁹ Janna Thompson, *Taking Responsibility*, 50-51.

¹⁰ For example, that is how John Gardner uses the term in "What is Tort Law for?" and Seth Lazar in "Correct Justice and the Possibility of Rectification." John Gardner, "What is Tort Law for? Part 1: The

however (that is, reparations as a ‘transfer’ considered morally appropriate to address an historical injustice), to ask whether reparations for historical injustice can be justified is then to ask whether some transfer can be justified in virtue of an historical injustice.

Clarifying the aims that justify possible actions taken for or on behalf of currently existing persons in virtue of historical injustice is a matter of providing a full theory of reparations. On one contemporary theory¹¹, for example, the overarching aim is to achieve reconciliation between currently living victims and the party or parties morally liable for some wrong and/or harm done to them. But a subordinate aim here includes the liable party taking steps to repair harms that the victims suffer (if such harm exists). On this theory, the aim of harm-repair is subordinate since whether or not compensation is all things considered justified, and if so what form it ought to take, depends on whether or not it would promote reconciliation between the parties.

When I say that the issue is whether reparations are owed in virtue of historical injustice, I understand ‘in virtue of’ as implicitly invoking the idea that the historical injustice itself must play a key normative role in the justification of the recommended course of action. In order to play such a role, the full account of reparations *must* include what I will call a ‘backward-looking aim’.

It is common practice to classify various aims (either overarching or subordinate) in this context as forward-looking and backward-looking. Forward-looking aims are taken to include facilitation of reconciliation, deterrence of future wrongdoing, and the

Place of Corrective Justice.” *Law and Philosophy* 30 (2011): 1-50. Seth Lazar, “Corrective Justice and the Possibility of Repair.” *Ethical Theory and Moral Practice* 11 (2008): 355-368.

¹¹ To clarify, there are other theories that do not have reconciliation as an overarching goal.

promotion of a more equitable distribution of social and economic goods. Backward-looking aims are taken to include compensating persons for wrongful harms (harms suitably related to wrongs), disgorgement of unjust gains, and rectification for historical violations of property rights.

The distinction between backward-looking and forward-looking, however, is apt to confuse. Besides deterrence, all of these aims are forward-looking in the sense that they recommend bringing about some future state of affairs in which the aim is achieved. For example, to say that P owes Q compensation for wrongful harm implicitly picks out as an ideal a future time in which an unjust state of affairs (that Q suffers or did suffer wrongful harm caused by P) is repaired (an aim achieved once Q has been successfully compensated). It will not help this classification to distinguish the aims according to whether the point is to avoid some morally objectionable state of affairs that exists only in the future since the only forward-looking aim of which that is true is deterrence. In the case of the others, including reconciliation and promotion of a more equitable distribution, the morally objectionable states of affairs exist already in the present. It is the fact that there is something wrong with the relationship between P and Q in the present that grounds the moral concern with reconciliation. And it is the fact that there is inequitable distribution *now* that explains why justice requires some redistribution.

The important distinction here depends on whether the justification of the repair of the morally objectionable state of affairs (in the present) involves essential reference to an injustice in the past. This condition is satisfied in the case of the backward-looking aims I note above. Those who impose wrongful harm on others have a duty to repair that

harm precisely because of something they did (or failed to do) in the past. Those who enjoy unjust gains ought to disgorge those gains precisely because those gains were made in virtue of some unjust interaction in the past. If it could be shown that there was no injustice suitably related to a harm someone currently suffers, or to a gain someone currently enjoys, there would no longer be grounds for the relevant form of repair, that is, for compensation or disgorgement respectively¹².

While there is a well-recognized disagreement about which aims are important and which aims ought to be overarching, there is less-acknowledged agreement that any satisfactory account of reparations has to include a backward-looking aim. In particular, the backward-looking aim must, directly or indirectly, connect a morally objectionable state of affairs in the present with the historical injustice itself.¹³ If no such connection can be made, then no normative role in the justification of reparations is being afforded to the historical injustice. In other words, if no backward-looking aim is defensible, then we would be unable to support the idea that it may be necessary to look back in order to identify and address what doing justice now involves. For this reason, I regard examining the possibility that a backward-looking aim is capable of justifying transfers as a crucial task facing those interested in this topic.

¹² This condition similarly rules out as backward-looking aims cases in which it is either useful or necessary to look back in order to determine what ought to be done, but where that fact plays no justificatory role.

¹³ Indeed, it is often necessary to look to the past in order to identify which current states of affairs are in fact morally objectionable.

Harm-repair as a backward-looking aim

One possible backward-looking aim of this sort is that reparations aim to repair harm that current persons suffer, harm that is suitably connected to an historical injustice. The reason for repairing the harm is a backward-looking one. In particular, it is because P committed the injustice that caused (or was suitably related to) harm to Q that P is taken to have a duty to repair Q's harm. This duty is agent-relative, meaning that this is a duty that only P – and no other non-injurer—has. In this case, the object of repair is not harm *simpliciter*, but wrongful harm, that is, harm suitably related to a wrong.

Notice that this contrasts with a possible alternative account. On an alternate view, citizens of a state (or perhaps persons in general) have shared (agent-neutral) duties to repair certain serious harms suffered by co-citizens (or co-persons), regardless of how those harms came about¹⁴. If harms related to historical injustice were harms of this sort, then there would be a distinct (and additional) possible rationale for repairing them. This concern is not backward-looking however since the fact that the historical injustice was suitably related to the harm plays no normative role in the alternative account of why the harm ought to be repaired. Even though this would constitute wrongful harm, the object of repair is harm *simpliciter*—the fact that it is wrongful would be normatively irrelevant on this approach. From now on, when I refer to harm-repair I mean harm-repair as a backward-looking aim.

¹⁴ A similar contrast between two distinct grounds for harm repair is made both by Jules Coleman in “Corrective Justice and Property Rights.” *Social Philosophy and Policy* 11 (1994): 124-38, and Bernard Boxill in “The Morality of Reparations. *Social Theory and Practice* 2 (1972): 113-122.

Many prominent philosophical arguments in favor of reparations appeal to harm-repair. First, it is explicitly central to one prominent approach to defending reparations for historical injustice, according to which making reparations is equivalent to compensating other currently existing agents in order to repair harms imposed either directly or indirectly by an historical injustice. Let me refer to this as the harm-based approach¹⁵.

Second, it is instrumentally important, though not always (self-consciously) centrally so, for another prominent approach to the issue, according to which some agents now have duties to do certain things on behalf of or for others, actions whose primary goal is to facilitate reconciliation between the two sets of parties. A subset of these actions are (or may be) aimed at repairing harm (in one way or another) suffered by presently existing persons, but repairing harm is viewed as important only as a means to promoting reconciliation. Let me refer to this as the reconciliation-based approach¹⁶.

Any approach that affords harm-repair a role in its account of reparations relies on the claim that some currently living persons suffer harms that are suitably related to the relevant historical injustice. However, supporting the truth of this claim raises two potential problems.

¹⁵ Examples of this approach include Bernard Boxill, "A Lockean Argument for Black Reparations" *Journal of Ethics* 7, (2003): 63-91, George Sher, "Transgenerational Compensation," *Philosophy and Public Affairs* 33 (2005): 181-200, Lukas Meyer, "Past and Future. The Case for a Threshold Conception of Harm", in *Rights, Culture, and the Law*. In *Themes from the Legal and Political Philosophy of Joseph Raz*, edited by Lukas H. Meyer, Stanley L. Paulson and Thomas W. Pogge, 143-59. Oxford: Oxford University Press, 2003. 143-59.

¹⁶ Adherents include Janna Thompson, *Taking Responsibility, Roy Brooks Atonement and Forgiveness*. Berkeley: UC Press, 2004, and Margaret Walker, "Restorative Justice and Reparations," *Journal of Social Philosophy*, 37 (2006): 377-395.

Non-identity Problem:

The non-identity problem may be characterized as a problem with attributing harm to persons on the basis of actions that are conditions of the affected person's existence¹⁷. The problem relies on the idea that harm is understood in counterfactual comparative terms. On this view, a necessary condition for an action to harm a person P is that P is made worse off than she would have been had that action not taken place. The problem arises for actions that are a condition of a person's existence: in those cases, absent the action (call it A) the person would not exist; if so, then no comparison can be made between how well off the person is now and how well off the person would have been (since she would not have existed in that further case); and hence we cannot say that the person was worse off than she would have been but for A. We cannot, in other words, say that P was harmed by A.

The Attribution Problem

As a number of authors have pointed out, the farther a particular injustice recedes in time, the harder it is to demonstrate that current effects – in particular, current harms—are attributable to that injustice. In particular, if there has been a legacy of injustice then it

¹⁷ There are various versions of the problem, but in the context of historical injustice the one I sketch is the main concern. This version was identified originally by George Sher in "Compensation and Transworld Personal Identity." *Monist* 62 (1979): 378-91. Some authors focus on a distinct concern in which the fact that the historical act apparently benefits the affected person is taken to undermine the idea that this person is harmed. This version was developed by Derek Parfit, *Reasons and Persons*. Oxford: Clarendon Press, 1984. One of the few who have addressed this version of the problem in the context of historical injustices is Ori Herstein "Historical Injustice and the Non-Identity Problem," *Law and Philosophy*, 27 (2008): 505-530.

is plausibly more appropriate to attribute the current injustice to recent episodes of injustice than to more ancient ones¹⁸.

Addressing these problems, especially the first, is a task central for many of those who take the harm-based approach. Various solutions to the non-identity worry have been offered. One approach focuses on the idea that the relevant subject of harm is not an individual at all. For example, Janna Thomson argues that slavery harmed family lines¹⁹. Others have suggested that the object of harm is a group or a nation²⁰. A serious problem with all these approaches is to make sense of ‘harm’ in this context. I will focus from now on only on whether we can make sense of the idea that individual persons can be harmed.

Another strategy involves appealing to a non-comparative conception of harm, on which to harm someone is to cause her to be in a state that is non-comparatively bad. This avoids the non-identity worry since there is no need to make a comparison between how well off the person is and how well off she would have been²¹. A third recent approach offers a promising solution to both problems. On this argument, developed by Bernard

¹⁸ This point has been highlighted by a number of authors in the context of slavery, its legacy and present harms. In *The Case for Black Reparations* (1973) Boris Bittker argues that blacks would have recovered from the effects of slavery if it were not for post-civil war actions of governments, most notably Jim Crow laws. More recently, Robert Fullinwider argues that it was the failure of the US government after 1865 “to vindicate the rights to full and equal citizenship the Civil War Amendments extended to blacks” that is responsible for the fact that subsequent generations did not. See Fullinwider, “The Case for Reparations.” *Institute for Philosophy and Public Policy* 20 (2000): 4.

¹⁹ Thomson, *Taking Responsibility*, chapter 9.

²⁰ See for example, Bernard Boxill, *Blacks and Social Justice*. Totowa, N.J.: Rowman and Littlefield, 1984,

²¹ Seana Schiffrin defends a non-comparative conception of harm in “Wrongful life, Procreative Responsibility, and the Significance of Harm” *Legal Theory* 5 (1999): 117–148. She applies her view to my topic in “Reparations for U.S. Slavery and Justice Over Time.” In *Harming Future People*, edited by Melinda A. Roberts and David T. Wasserman, 137-154. New York: Springer, 2009. Lukas Meyer also employs such a strategy in “Past and Future. The Case for a Threshold Conception of Harm”, in *Rights, Culture, and the Law*. In *Themes from the Legal and Political Philosophy of Joseph Raz*, edited by Lukas H. Meyer, Stanley L. Paulson and Thomas W. Pogge, 143-59. Oxford: Oxford University Press, 2003. 143-59

Boxill and George Sher, an historical injustice does not harm a current person directly, but rather it is connected to a harm to a currently existing agent by way of a chain of new and distinct harms that occur within each generation following the original injustice²².

The Principle of Corrective Justice

A key point that is generally overlooked by those who make harm-based arguments is that what needs to be demonstrated is that some current persons suffer *wrongful* harm, that is harm related to a wrong (breach of duty) committed by P in such a way that it is appropriate to hold that P agent-relative duty to repair the harm. While it is natural to think that a necessary condition for a harm being wrongful is that the harm is caused²³ by the wrong, this is not clearly a sufficient condition. For example, if Q is on his way to provide some medicine to a sick person R, but P steals the medicine from Q and so R fails to recover from her illness, then it is intuitively clear both that P harms R and that R's harm was caused by a wrong (the wrong being P's breach of his duty toward Q). Yet, it is not at all clear that P has any agent-relative duty to repair the harm he causes R.

In order to identify the conditions that must be met in order to attribute a wrongful harm we need to examine the relevant moral principle in virtue of which repair of wrongful harm is justified. In turn, in order to fully understand the relevant moral principle we need to understand the moral basis for this principle. Specifying the relevant

²² Boxill, "A Lockean Argument," and Sher, "Transgenerational Compensation."

²³ I suppose here, as I do throughout this thesis that omissions can be causes. For a contemporary defense of this assumption see Jonathan Schaffer, "Disconnection and Responsibility: On Moore's Causation and Responsibility." Forthcoming in *Legal Theory*.

moral principle and analyzing its moral basis are therefore crucial tasks if we are to be in a position to provide a full defense of the claim that current persons suffer wrongful harm, and hence to support any view that relies on harm-repair as a backward-looking aim.

The relevant moral principle may be put as follows: those who impose wrongful harm upon others have an (agent-relative) duty to repair those harms. This secondary duty may be understood as a duty to compensate, so long as we understand compensation more broadly than monetary compensation to include whatever steps are required in order to repair harm. I understand this is a moral principle and not a legal one. This principle grounds our moral intuitions about who ought to repair wrongful harms in everyday contexts. I refer to this as the moral principle of corrective justice, or the principle of corrective justice for short.

Specifying the principle requires making clear what constitutes wrongful harm. Among other things, this involves explaining what the relevant conception of ‘harm’ is in this context. This suggests an important limitation on what can count as a satisfactory argument in favor of reparations to repair (wrongful) harm: An account that purports to show that a harm someone currently suffers is caused by, or otherwise suitably related to, an historical injustice, would have to employ the relevant sense of harm. If it does not, then the account will not have shown that the harm is wrongful and hence will not be relevant to a defense of reparations.

This task is particularly important to undertake considering the different approaches in the literature to addressing the non-identity problem (in the historical

context). As I note above, some of those who examine reparations for historical injustice deny that the non-identity problem is relevant to showing that reparations can be owed to currently living people because they defend the claim that those persons are harmed in a non-comparative sense. To defend this approach, it would not be enough to show that this claim is true (that is, to show that there is a non-comparative sense of harm and that some current persons suffer it in virtue of historical injustice). In addition, a defense of this type would need to show that this non-comparative sense of harm is consistent with the notion presupposed by the moral principle of corrective justice.

Reflecting on the moral basis of the principle of corrective justice is important not only to help clarify the principle itself, but also in order to ensure that it is appropriate to adopt the principle in the historical context. This is so for two reasons. First, it is useful to support the intuitive idea that the moral principle specifies a backward-looking aim. Suppose P negligently bumps into Q, breaking Q's nose. We intuitively think not only that P has an agent-relative moral duty to repair the harm (perhaps by compensation or actively fixing the nose if P happens to be a medical doctor) but also that P has this duty because of something he did in the past (negligently breaking Q's nose). Further, it seems that this fact is important not only as relevant to stating a necessary condition for P having a duty to repair, but as *normatively* relevant to the justification of why P has that secondary duty. It is conceivable, however, that the reason why P and no one else has a duty to repair the harm is that P's making repair (rather than someone else) achieves some forward-looking goal. Providing a backward-looking moral justification for the

principle would vindicate our intuitive idea that the moral principle is in fact backward-looking in the relevant sense.

Second, examining the moral basis of corrective justice is useful in order to be clear that it does in fact make sense to apply the principle in the historical context relevant to the reparations inquiry. For example, we need to be clear that the justification of the principle does not involve essential reference to elements that limit its usage to the contemporary context.

Various authors regard the moral principle of corrective justice as potentially relevant to the justification (and perhaps an effective critique) of various features of tort law. This last issue is not my concern here. However it is in this context that most recent work on the moral basis of the principle of corrective justice has been carried out²⁴. It seems to me sensible, then, to draw on these discussions when searching for the appropriate moral basis of corrective justice.

The conformity Account

One recent and prominent view developed by legal philosophers is what I call ‘the conformity view’ of corrective justice²⁵. The basic idea is that, when P breaches a duty

²⁴ Stephen Perry helpfully discusses many views, some of which regard the moral principle to be justified independently of legal concerns, in “The Moral Foundations of Tort Law.” *Iowa Law Review* 77 (1992): 450-523. The conformity view, which I discuss below, is also a view of this type. For a discussion outside this context see Judith Jarvis Thomson, “Remarks on Causation and Liability.” *Philosophy and Public Affairs* 13 (1984), 101-133. Thomson focuses on why not hold non-injurers liable, but does not explicitly explain (as far as I can tell) why we ought to regard the injurer as liable.

²⁵ To my knowledge, the view derives from Joseph Raz. See especially “Numbers, With and Without Contractualism”, *Ratio*, 16 (2003): 346-367 and “Personal Practical Conflicts.” In *Practical Conflicts: New Philosophical Essays*, edited by P. Baumann & M. Betzler, 172-196. NY: Cambridge University Press, 2004. A recent version comes from John Gardner, “What is Tort Law For?”

not to harm Q and thereby imposes harm on Q, the reason that P has to compensate Q is the same reason that P had not to harm Q in the first place. The secondary duty to compensate is, on this view, nothing but a primary duty not to cause wrongful harm under conditions where the primary duty has been breached.

An advantage of this view is its explanatory economy, since it makes no appeal to any further moral principles in order to explain the existence of the duty to compensate. From my perspective, another advantage is that it offers an account of the moral principle that makes its deployment in the historical context easily intelligible. If the conformity account is correct, a duty to compensate arises just in case a duty not to cause wrongful harm is breached. So long as moral duties existed in the historical setting and so long as these duties were in fact breached, then duties to compensate would apply to whoever breached the duty. Given that these assumptions are generally reasonable ones to make, there is no worry that the moral principle of corrective justice cannot in principle be invoked to justify reparations in this context²⁶.

Most of those who adopt the harm-based approach have failed to address these important concerns. One exception, however, is Bernard Boxill, who grounds his theory on a reading of Locke's account of reparation. On my view, if we wish to develop the most powerful possible argument we would do better to appeal to more recent theories that attempt to explain the moral principle. In addition, reliance on Locke commits him to

²⁶ Stephen Perry, "Moral Foundations of Tort," offers good reasons to reject many alternative views. I think that his own view is also problematic but do not have space here to explain why.

a libertarian principle that is itself more controversial than the moral principle of corrective justice itself²⁷.

So far I have argued that *if* we wish to develop an argument that appeals to the idea that descendants suffer wrongful harm in virtue of an historical injustice, *then* we ought to focus on the principle of corrective justice. I now indicate some other reasons why the focus on harm repair is ought to be of interest to those who do not regard this as a central concern.

Reconciliation and Harm

First, I suggest that this project is relevant to those who favor the reconciliation approach. As I noted above, those who take this approach do grant some role to harm-repair, although only an instrumental one. Interestingly they tend not to worry about justifying the claim that current persons are harmed by historical injustices²⁸. One reason for this may be that they regard harm-repair as only of secondary importance. A second possible reason however is that they may regard the goal of promoting reconciliation as itself providing sufficient reason to justify harm-repair by injuries (at least where it does in fact promote that goal). Given this, they might regard justifying an agent-relative duty to repair harm as unnecessary.

This, however, would be a mistake. To see this it is useful to consider a specific version of the reconciliation approach. Margaret Walker argues that reparations for

²⁷ The idea that property rights can ground corrective justice is effectively criticized by Stephen Perry in "Moral Foundations of Tort." One central worry is that it is implausible to construe duties not to cause personal injury as correlative with property rights. But such duties, naturally, are subject to corrective justice.

²⁸ Thompson, *Taking Responsibility*, is an exception.

historical injustices ought to be undertaken within a model she derives from restorative justice practices. She identifies six core values which “serve the ultimate aim and guiding norm of restorative justice, “restoring relationships.” In restorative justice, what demands repair is a state of relationship between the victim and the wrongdoer, and among each and his or her community, that has been distorted, damaged, or destroyed.”²⁹ The first of these values is that “Restorative justice aims above all to repair the harm caused by wrong, crime, and violence.”³⁰ In particular, it is the wrongdoers who are required to take steps to repair the harm their wrong causes, at least where this is conducive to achieving the end of ‘restoring relationships.’

But an obvious issue she does not address is this: in cases where repairing harm is conducive to restoring relationships, why think that the injurer ought to be the one to make the repair? One answer would be that the victim believes that the injurer ought to do so, and for this reason his restoring it is likely to promote reconciliation. But that psychological explanation cannot be what she has in mind. Rather, the point must be that it is reasonable for the victim to regard the injurer, as opposed to someone else, as the morally appropriate agent to enact harm-repair precisely because of what the injurer did. In other words, it presupposes that there is some moral basis for holding injurers to have at least a (prima facie) agent-relative duty to repair wrongful harms they impose on others. But this is precisely what the moral principle of corrective justice proposes.

²⁹ Margaret Urban Walker, “Restorative Justice and Reparations”, *Journal of Social Philosophy*, 37 (2006): 381.

³⁰ Walker, “Restorative Justice,” 381.

Walker contrasts her approach to a corrective justice one³¹. Many of her criticisms are aimed at the possible practical dangers of addressing historical injustices according to a legalistic model that emphasizes monetary compensation as the crucial mode of repair. That may be so. I take no position on what is the appropriate practical framework within which to undertake reparations. My point, rather, is that if we regard harm-repair as playing *any* role in such a framework, then we naturally invoke a moral principle of corrective justice. Given this, my discussion ought to be of interest to those who favor a reconciliation approach.

Although the prominent advocates of the reconciliation approach grant an important, if instrumental, role to repairing harm, it is worth noting that it is conceivable that harm-repair need play no role at all on this view. I am not referring here to the possibility that circumstances may render repairing harm instrumentally damaging to the goal of reconciling present parties (which would be then be a reason not to do it), but rather to the possibility that the rupture in relations between the relevant parties might be the result of harmless wrongs³². While this is a possibility, it is not one that, to my knowledge, has been explored in this context. That fact itself is perhaps revealing. After all, if all that is at stake are harmless wrongs, or problematic relationships created by harmless wrongs, then it would be hard to explain why it is so important from a moral point of view to focus on reparations for historical injustice.

³¹ When Walker refers to corrective justice, however, it is not clear if she is separating the moral principle from the (potentially) associated institutional form that some argue is embodied in tort law.

³² A commonly cited example of a harmless wrong is trespass that does not damage to the land. See for example Feinberg, *Harm to Others*, 35.

Harm-repair and other backward-looking aims

As I argue above, a crucial task in this field is to identify a backward-looking aim that connects some morally objectionable state of affairs in the present with the historical injustice. But other backward-looking aims could and have been appealed to. For instance, besides compensation for wrongful harm, we could appeal to disgorgement of unjust gains and return of unjustly held property to its rightful owner³³. To clarify, in what follows I am not arguing that relying on other backward-looking aims *cannot* provide good arguments in favor of reparations. Rather, I tentatively suggest some possible advantages to focusing on repair of wrongful harm.

One or both of these concerns are naturally invoked when thinking about a third major approach in the field. On this approach, reparation involves returning wealth or property that the currently existing person would likely have inherited from her ancestors, going back to the original victim of the historical injustice³⁴. Let us refer to whatever it is that the currently living person would have inherited as ‘goods’. The moral principle that justifies that person’s claim to the goods might be that those who enjoy gains at the wrongful expense of another ought to disgorge those gains to the other. The current possessor of the goods enjoys a gain that is suitably related to a wrong (to the original

³³ Unjust gains in this context are gains at the expense of another. What this amounts to however is a difficult question that I do not go into here. Dennis Klimchuk, “Unjust Enrichment and Reparations for Slavery,” *Boston University Law Review* (2004) is one of the few who defend a reparations argument by appeal to this principle. He draws on a distinction between disgorgement, which requires that the gain be made via a culpable right’s violation, and restitution, which requires only that current possessor not have sufficient reason to hold on to her gains.

³⁴ The inheritance approach, as we may call it, is defended by Bernard Boxill in “Morality of Reparations” and “A Lockean Argument.” It also gets a partial defense from Stephen Kershnar “The Inheritance Based Claim to Reparations.” *Legal Theory* 8 (2002):243-267.

victim), and their enjoying those gains is at the expense of the descendants³⁵, so the goods ought to be disgorged to the descendants.

Alternatively, we might appeal to a principle of rectification that addresses unjust transfers of property³⁶. The inheritance argument might be thought to show that some currently living persons have a property right to certain goods that others now possess. If this can be shown, then presumably the current possessor ought to return the property to the rightful owner and do so to restore her right to the property.

First, there is reason to prefer an approach that relies on corrective justice than one relying on unjust enrichment. I will put this in terms of a dilemma. The principle of disgorgement (as I will call it) requires disgorgement of unjust gains that are materially sometimes equivalent (partly, or in full) to wrongful harms, but need not be. For example, if you steal my bike, then my loss is your gain. But if you steal my idea for a great song that I immediately forget about and you thereby get rich, your gain is not equivalent to my loss—indeed it may seem that I suffer no loss at all.

Suppose the unjust gain is *not* equivalent to a wrongful harm to the victim. What is objectionable about the possessor having what he does is that his gain is unjust. But that morally objectionable state of affairs could be remedied by his disgorging the gain to *anyone*. And since the victim has suffered no harm in virtue of the wrong (as we are

³⁵ It is not clear how they are enjoying it at the expense of the descendants unless the descendants have a property right. But I put this concern aside for now.

³⁶ An obvious choice would be Robert Nozick's principle of justice in rectification. See *Anarchy, State and Utopia*. New York: Basic Books, 1974, chapter 4.

supposing) it is not clear to me why he ought to disgorge it to the victim at all³⁷. The goal could equally well be met by his disgorging it to a stranger or the state.

The same problem does not arise where there is an equivalent harm. But in that case there is a harm and the harm is wrongful. If the harm is wrongful, then we can of course appeal to corrective justice to explain why he ought to repair it. Here, where the harm and gain are equivalent, such repair would naturally require returning those gains to the victim: after all, that would, by supposition, be equivalent to the harm and so would compensate him for it.

A concern with rectification of violations of property rights is a natural one. But there are a few reasons to prefer a corrective justice approach. A first point here is that corrective justice is in a sense broader than rectification of property rights violations. Corrective justice is concerned not only with breaches in duties not to cause physical injury but also with duties to respect property. As such, it can provide an alternative approach within which to explain the need to return unjustly held property (but *qua* harm as opposed to *qua* unjustly held good). Second, a rectification principle of this sort relies on an historical entitlement theory of justice. Such theories are controversial, at least among philosophers. They are certainly more controversial than the moral principle of corrective justice³⁸.

³⁷ One explanation could appeal to property rights: perhaps the victim owns whatever gains the other makes. In that case, however, unjust enrichment would appear to collapse into a concern with rectification disruptions in property rights.

³⁸ In addition, powerful critiques of the possibility of applying Nozick's principle of rectification to the historical context would have to be overcome. Such critiques include those made in Jeremy Waldron, "Superseding Historical Injustice", *Ethics* 103 (1992): 4-28, and Robert Litan, "On Rectification in Nozick's Minimal State." *Political Theory* 5 (1977): 233-245.

Structure of the Thesis

In chapter 1 I examine and defend the conformity account as a possible basis for the moral principle of corrective justice. This is important in order to shed light on the principle of corrective justice and also allows us to see that the principle is intelligibly applied in the historical context. I contrast Joseph Raz's conformity account with a more recent proposal by John Gardner³⁹. I argue that Gardner's account cannot explain the agent-relative character of the principle of corrective justice, while Raz's version can. However, I suggest that Raz's version is in need of further support, and so I offer several arguments in favor of it.

In chapter 2, I examine the principle of corrective justice. I explain the conditions under which a harm is wrongful, and clarify how I understand harm, wrong, causation, and the relevant notion of compensation. I defend the view that the test for (wrongful) harm involves a particular interpretation of a counterfactual comparative conception of harming⁴⁰, one that (usually) involves comparing what happens to a victim given the duty breach with what would have happened had the injurer minimally complied with his duty. By doing this, I cast doubt on the relevance of arguments that invoke a distinct conception of harm in their discussion of historical injustice.

In chapter 3, I analyze and attempt to support Bernard Boxill and George Sher's style of harm-based argument, which I refer to as the chain-harm argument. Having explained why I regard this as a promising approach I examine a critique an attempted fix

³⁹ See Raz, "Personal Practical Conflicts," and John Gardner, "What is Tort Law for?"

⁴⁰ The label 'counterfactual comparative conception of harm' comes from Judith J. Thomson in "More on the Metaphysics of Harm." *Philosophy and Phenomenological Research*, 82 (2011): 436-458. The idea that minimal compliance with duty specifies the relevant alternative to the actual act (or omission) is Jonathan Schaffer's, from "Contrastive Causation in the Law." *Legal Theory* 16 (2010): 259-297.

of their version of the argument by Andrew Cohen⁴¹. I argue that Cohen misinterprets the original argument in important ways and criticize his fix. However, Cohen's discussion points to a potential flaw in the argument. Focusing on the conditions necessary for the application of the principle of corrective justice I identify various problems with the original chain-harm argument. I then propose some solutions.

In chapter 4, I consider a case not normally discussed in the context of historical injustice, but in which the non-identity problem casts doubt on the idea that a currently existing person can be harmed by an historical act. This case is Derek Parfit's *Risky Policy*⁴². On the version I discuss (from Judith Jarvis Thomson⁴³) a government implements a risky policy of burying radioactive waste in an earthquake prone region. A child who was born as a result of this decision gets lung cancer after an earthquake releases the radiation. The problem is to explain how the child can be harmed by the original decision. I interpret and reject Judith Jarvis Thomson's solution to this problem. Focusing on the question of whether the government has a duty to compensate the child for the lung cancer, I offer a novel argument in favor of the claim that it does owe compensation.

⁴¹ Andrew Cohen, "Compensation for Historic Injustices: Completing the Boxill and Sher Argument". *Philosophy and Public Affairs* 37 (2009): 81-102.

⁴² Derek Parfit, *Reasons and Persons*. Oxford: Clarendon Press, 1984.

⁴³ Thomson, "More on Metaphysics"

Chapter 1: The Moral Basis of Corrective Justice

Introduction:

In this chapter I analyze and defend the conformity account, a promising recent proposal concerning the moral basis of corrective justice. As I argue above, this account entails that the principle of corrective justice is a backward-looking principle that may intelligibly be applied in the historical context. Defending this account therefore helps bolster harm-based arguments for reparations. Understanding the moral basis of corrective justice also helps to clarify the conditions that must be met for the principle to apply in particular cases and hence examining the view is important if we wish to evaluate and construct harm-based arguments.

Joseph Raz and John Gardner have argued that to explain the existence of the duty to compensate (for wrongful harm one causes) we need only focus on the original duty not to cause wrongful harm⁴⁴. Although the accounts vary, the basic idea is that paying compensation for harm wrongfully imposed counts as partially conforming with the reason or reasons that one had not to cause wrongful harm in the first place. I will refer to this idea as the conformity account. This account has the advantage of explanatory economy, not needing to invoke other moral considerations such as those related to comparative fairness, redressing of wrongdoing, or deterrence.

⁴⁴ See Joseph Raz, “Numbers, With and Without Contractualism”, “Personal Practical Conflicts”, and “Responsibility and the Negligence Standard”, and John Gardner, “What is Tort Law For?” and “Wrongs and Faults.”

A summary of Raz's version conveys the key ideas. Duties are to be understood as reasons for action. Part of what it means to have a reason is that one ought to conform fully with that reason and, if one cannot, then one ought to come as close to complete conformity with the reason as possible. If P has breached the duty not to cause wrongful harm, then P can no longer conform fully with that reason (the reason being the duty itself). Under those circumstances, P's compensating his victim is nothing but P's conforming as closely as he can with the duty not to cause wrongful harm in the first place⁴⁵.

In this chapter I analyze and ultimately endorse a version of the conformity account as the basis of duties to compensate for wrongful harm one causes. I consider the distinct versions of the account offered by Raz and Gardner. I criticize various aspects of Gardner's recent presentation of his account, including how he interprets partial conformity with reason as well as his application of this idea to the case of compensation. I argue that Raz's account is more promising but that it does not provide sufficient support for the idea that compensation can count as partially conforming with the duty not to cause wrongful harm. Next, I develop an account that explains how to determine what counts as partially conforming with a reason, and show how to extend it to defend Raz's version of the conformity account. I conclude by sketching one further argument in support of that idea.

⁴⁵ Wrongful harm is harm that is suitably related to a breach of duty (a wrong). A wrong qua duty breach need not be the all things considered wrong act (although it often is): that is, an act can breach a duty yet still all things considered be the right thing to do. Further, whether P commits a wrong is a distinct issue from whether P is at fault in doing so. Finally, to commit a wrong does not require that another person be wronged: impersonal duties, for example, can be breached without wronging anyone.

The focus here is on the moral basis of the pre-legal, *prima facie* duties to compensate that we intuitively believe apply to those who cause wrongful harm. Whether or not those pre-legal duties play a role in justifying an institutional arrangement that holds injurers liable for wrongful harms they cause (as tort law in many instances does) is not my topic here.

The conformity account

Reasons for action, evaluative and nonevaluative facts

For Raz, reasons for action are facts that provide considerations in favor of an action. They include evaluative facts and non-evaluative facts. Two types of evaluative facts may count as reasons for action. First, a reason for action A may be a fact that A has a particular evaluative property. This property Raz refers to as the proximate reason. Second, a reason for action A may be an evaluative fact not about A itself, but one that helps explain why an evaluative property of A is itself a reason for A. This is a root reason. Third, some nonevaluative facts are reasons for action.

For example, suppose that a mother buys some new clothes for her child. The evaluative fact that this action has the property ‘is buying needed clothes for one’s child’ is the proximate reason for the action. The evaluative fact that the mother has a duty to tend to the needs of her children is a root reason for this act: a reason that explains why the act’s being an act of buying needed clothes for the child is a reason for her to buy the clothes (if she had no such duty, the fact that the child needs clothes would not entail that she had reason to buy them). The nonevaluative fact that the child does not have enough

clothes that fit her is a reason for this act since, in virtue of that fact, it is true that the child really does need clothes.

Conformity with a reason, reasons or reason

For Raz, doing what one has reason to do involves conforming fully with all the reasons that one has (which is conforming with reason itself). He argues, however, that in many cases it is possible to conform partially with reason. Partial conformity with reason may take various forms. Suppose that at a particular time more than one reason applies to one. One may fail to conform fully with reason by conforming fully with some of these reasons, but not conforming fully with the rest. For any particular reason, one may conform fully, partially or not at all. If one conforms partially with one particular reason, then it follows that one conforms only partially with reason. How close one gets to conformity with reason depends on three things: how many reasons one has, how close to complete conformity one gets with each reason that one has; and the relative weight of the reasons.

The Conformity Principle:

The conformity principle is presented by Raz as characterizing what it means to have a reason. We may identify two versions. On one version⁴⁶, for any particular reason for action, R, there may be, in addition to an ideal act A1, a next-best act, A2, and possibly a third-best act, A3, and so on (some acts of course will not conform at all with

⁴⁶ Raz, "Personal Practical Conflicts", 26.

R); the principle says that the closer one gets to full conformity the better (that is, it is better to do A1 than A2, and better to do A2 than A3 etc.) In a second presentation, Raz writes that “one ought (has reason) to conform completely with reason, insofar as one can; if not, then one ought (one has reason) to conform as closely as possible with reason.”⁴⁷

Raz conflates the two interpretations though they are distinct. They ground two distinct ways that one can evaluate an action. On the first version, one’s action does not conform fully with reason just in case one fails to do the ideal act, A1; to do anything else (for example A2) is to do something that one does not, in that first sense, have most reason to do (this involves a comparative judgment, where the ideal act is the relevant object of comparison: one does not have reason to do A2 rather than A1). On the second version, an act that does not fully conform with reason in the former sense can still be an act that one has most reason to do so long as, of the available acts, one does the best act that is open to one. Suppose that one cannot do A1, but one can do A2. In that case, one has reason to do A2; to do anything else (for example A3) would be to do something that one does not have, in this sense, most reason to do (this involves a distinct comparative judgment, where the best act open to one is the relevant object of comparison: one does not have reason to do A3 rather than A2). Corresponding with these two sense of ‘having a reason’ or perhaps ‘having most reason’ are two types of failure: failure to do the ideal act and failure to do the best act that was open to one.

⁴⁷ “Personal Practical Conflict,” 34.

For example, at one point Raz offers as an implication of the conformity principle that “There may be ‘a next-best possibility’: I should (meaning *I have a reason to*) send my child to the best school, but I cannot. So I should (i.e. *have reason to*) send him to the next best school.”⁴⁸ The first ‘should’ refers to what I have most reason to do in the first sense (the ideal act whether or not I can do it); the second ‘should’ refers to what I have most reason to do in the second sense (the best act I can do in the circumstances)⁴⁹.

Examples:

Raz and Gardner offer various examples that both illustrate and, it seems, offer support for the conformity principle. These examples all involve conformity with reason in the case of positive duties, and they focus only on one reason that applies at the time (that is, the relevant duty). They include the following:

LOAN: P promised to repay Q a \$100 loan by Friday. If, come Friday, P can only pay \$60, then P has reason to pay Q \$60, and the reason for this, says Raz, is the same as the

⁴⁸ “Personal Practical Conflict,” 28.

⁴⁹ Alternatively, we might interpret the passage as only involving this second sense of ‘reason’, that is as having reason to do the best that one can do. On this reading, the passage should be read as: I have reason to send my child to the best school if I can.; but I cannot, hence I have reason to send my child to the next-best school. An advantage of this reading is that it accords with the common view that ‘ought implies can’, from which it seems to follow that if I cannot send my child to the best school, I cannot have reason to do so. However, Raz does not appear to accept this implication. For example, in ‘Personal Practical Conflicts’ he writes “Assume that... I choose the wrong pair [of shoes]. I still have a reason to buy the better pair, since the one I did buy is not entirely satisfactory. But I can no longer do so. It has gone, or I lack the money, etc. I made a bad decision and bought the wrong shoes. As a result the reason I failed to act for is not cancelled. But I can no longer follow it.” [p. 24] This passage suggests that having failed to buy the more suitably pair of shoes I still have reason to buy them even though, it is supposed, I *cannot* now buy them. More generally, it is hard to make sense of Raz’s notion of partial conformity with reason if we accept that one cannot have reason to do what one cannot do: for Raz it is possible to do the best one can (at that time) and yet still only conform partially with reasons that one has.

reason he had to pay \$100. Paying \$60 is the next-best act; it counts as the closest possible conformity with P's duty to pay \$100.

BEACH: A father promised to take his children to the beach on Saturday. If he fails to do so, Gardner claims he has a duty to take them to the beach on Sunday or the next available opportunity. (Although Gardner suggests that what is second best, and indeed whether anything is, may vary depending on the circumstances).

BUS FARE: A passenger stays on a bus longer than intended and so travels further than he had originally paid to go. He has breached his duty to pay the full fare in advance and so, according to Gardner, he has a duty to pay the full fare in arrears.

A difference between Raz and Gardner:

While Raz argues that the next-best act partially conforms with the original duty itself, Gardner denies that this is possible. For Gardner, the duty can only be conformed with by doing the very act that the duty says one ought to do. On Gardner's view, however, the next-best act is in partial conformity with the rationale behind the duty.

To illustrate, consider BEACH. Suppose that the next-best act is to take the children to the beach on Sunday. For Raz, doing this would count as partially conforming with the original reason that the father had to take them on Saturday- that is, the duty to take them on Saturday. Suppose Saturday midnight arrives and he still has not taken them to the beach. At that time, the best he can do is to take them on Sunday. If he does take them on Sunday, then he comes as close as he can to complete conformity with the

original duty, but he has only conformed partially with it (the ideal act of taking them on Saturday no longer being possible)⁵⁰.

Gardner on the other hand denies that taking the children to the beach on Sunday *can* partially conform with the original duty. Once Saturday is over it is, he thinks, too late. Nonetheless, he argues that the rationale behind the duty (rather than the duty itself) may allow for a next-best act. If, as he suggests at one point, the point of the duty was to provide the children with a treat, then one may still be able to conform with *that* reason by taking them to the beach on Sunday. The rationale which grounded the original duty (to take them Saturday) can thus ground a secondary duty (to take them on Sunday).

Two ways in which Gardner's discussion of the beach case goes wrong:

In 'What is Tort Law For?' Gardner offers a misguided analysis of the beach case⁵¹. His discussion suggests two ways to understand how the father's taking the kids on Sunday counts as partially conforming with reason, each of which is implausible. The first interpretation is suggested when Gardner proposes that one reason for keeping one's original promise to take ones children to the beach on Saturday is to avoid one's children's disappointment. He then argues that avoidance of disappointment is a reason that can be partially conformed with by taking the children on Sunday.

This explanation fails. Avoidance of disappointment may be a reason to take one's children to the beach on Saturday assuming that one has already promised (just in

⁵⁰ Partial conformity in this context means doing the best act that is open to one at the time, where the best act open to one is not the ideal act.

⁵¹ See particularly Gardner "What is Tort Law?" 28-30.

case, as may not in fact happen, they would be disappointed if the expectation created by the promise is not met), but it neither explains nor is relevant to the fact that one has a *duty* to take them to the beach on Saturday. Put another way, it is an independent reason: one has two reasons to take them to the beach on Saturday: one reason in virtue of promising to take the children, and another to avoid disappointing them.

In saying this I am of course denying that the basis of the duty created by the promise here is explained (even in part) in terms of the avoidance of disappointment. The beach case itself suggests one reason why such an account is implausible. After all, it is intuitively clear the duty to take the children to the beach on Sunday (having failed to take them Saturday) exists whether or not the children are or would be disappointed not to go the beach on Saturday, Sunday or any other day.

Suppose that one fails to take the children on Saturday and that (as Gardner believes) one can no longer conform with the original duty. It may be true that one continues to have *some* reason to take them to the beach on Sunday based on the fact that this can partially help to avoid their disappointment. However, since that reason cannot explain the fact that one had a duty to take them on Saturday, it also cannot explain why one has a duty (as opposed to a weaker reason) to take them on Sunday. In brief, while this interpretation could explain why one has some reason to take them on Sunday and why this would count as partially conforming with the reasons that one originally had to

take them on Saturday, it cannot explain why one has a duty to take them on Sunday (we are assuming of course that one does have a duty)⁵².

A second suggestion Gardner makes is that we might determine what is second best here by focusing on the intention behind the initial promise to take the children to the beach on Saturday. If the intention was to give the children a treat, it may be that some other action that counts as a treat is second best (for example, taking them to a movie). But it is implausible to think that the actual reason why the promise was made is relevant to determining what is second-best. Suppose that a father estranged from the children's mother promises to take them to the beach because he secretly hopes this will help win back their mother. Having made this promise to the kids he discovers that there is no way the mother will go back to him. Unable to achieve his goal, he doesn't bother to take the kids after all. Come Sunday morning, when he has failed to take them and is trying to determine what the next-best act is, it is irrelevant what his reason was for making the promise. If it were relevant, that would suggest that there is no next-best act, since by hypothesis there is no way he can act in conformity with the reason to win back their mother.

⁵² Gardner writes that "the avoidance of my children's disappointment *may* figure in the rationale of an obligation that I owe them." ["What is Tort?" 33, my italics], suggesting that he may only be committed to the hypothetical claim that *if* avoidance of disappointment does figure in the rationale for the obligation to take them to the beach on Saturday, *then* avoidance of disappointment could explain why the father has a duty to take the children to the beach on Sunday. But this move will not help Gardner. If the antecedent is false, as I argued it was, then the claim in fact does nothing to illuminate why the father in fact has a duty to take the children on Sunday. Furthermore, in order to defend this counterfactual Gardner must commit to the idea that the father would have no such duty were the children not to be disappointed by their failure to go the beach (on Saturday or afterwards). But as I argue above that assumption is inconsistent with our intuitions about the case.

The *Conformity account applied to compensation*:

Both Raz and Gardner develop their accounts of partial conformity by reference to examples that involve positive duties, in particular voluntary positive duties. We are now in a position to understand how they understand compensation as the next-best act in the context of having breached a duty not to cause wrongful harm.

For Raz, where the duty not to cause wrongful harm has been breached, compensation is the act in second-best conformity with the original duty itself. Or, put another way, compensation counts as conforming as closely as possible with the reason that consists of the evaluative fact that one has a duty not to wrongfully harm, in the context where one can no longer conform perfectly because one has already caused wrongful harm. Raz does not offer any explicit argument for the idea that compensation counts as such. Rather he appears to rely on it being intuitively plausible to think that it is. He writes:

In one of its senses compensation is a reaction to failure fully to conform to reason, when the failure compromised the rights or interests of another person, a reaction aimed at mitigating the consequences of that failure... The principle of conformity points out that when we fail to conform fully to reason we have reason to come as close to full compliance as we can, call it reason to do the next-best act. It is the very same reason which we did not conform to which is, or becomes, reason for the next best thing. The first point above claims that in some cases compensation to others for harm inflicted or for rights violated is just a special case of the conformity principle, or a natural extension of the reason to take the second best course of action, having failed fully to conform to reason. So if I have reason not to damage your property, and I do damage your fence, I have reason to compensate you, that is to mitigate the consequences of failure, and this reason is the very same reason I had initially (the reason not to trespass or not to disturb your peace). There is no need for an independent principle of compensation to establish the case for it.⁵³

⁵³ Raz, "Personal Practical Conflict," 21-22.

For Gardner, where the duty not to cause wrongful harm has been breached, compensation is the act in second-best conformity with the set of reasons (or reason) in virtue of which the original duty exists. That is, the same set of reasons grounds both the original duty and the secondary duty to compensate. Unlike Raz, Gardner denies that it is appropriate to say that compensation counts as closest possible conformity with the original duty itself: on Gardner's view, once wrongful harm has been imposed, the duty not to cause wrongful harm cannot be conformed with at all. On his view:

The normal reason why one has an obligation to pay for the losses that one wrongfully occasioned (i.e. that one occasioned in breach of obligation) is that this constitutes the best still-available conformity with, or satisfaction of, the reasons why one had that obligation. Or to put it more tersely, the reasons why one must pay for the losses that one occasions are the very same reasons why one must not occasion those losses in the first place, when it is true that one must not occasion them. One's reparative act is in at least partial conformity with the original reasons, and if one was bound to conform to the original reason then *ceteris paribus* one is now bound, in turn, to engage in the reparative act.⁵⁴

Although Gardner never explains in detail which original reasons ground the duty not to cause wrongful harm, he offers a sketch of an account in the following passage in which he is discussing the tort of negligence:

Suppose that our injuring people [negligently] is regulated by the law, in part, because injuries, or what the law classifies as injuries, reduce people's quality of life. Then (all else being equal) the less the reduction in quality of life that an injurer leaves behind, the closer she comes to doing what her obligation existed to have her do. By way of reparation she should pay such things as medical bills (to expedite return of quality of life) and loss of earnings (to limit further consequential slippage in quality of life). Such reparative payment is not the same as not injuring, or injuring less, but in one salient respect – according to one possible reason for the norm against injuring – it might well be the next best thing.⁵⁵

⁵⁴ Gardner, John, "What is Tort Law for?" 40.

⁵⁵ Gardner "What is Tort Law for?" 44.

Gardner's account centers on the idea that injuries reduce people's quality of life. Somehow, this fact explains (or plays a central role in the explanation of) the existence of the primary and secondary duties here. But how exactly? The following seems a plausible way to flesh out the details (in the legal context).

First, reductions in the quality of people's lives are objectionable, from a moral point of view. The fact that injuries reduce people's quality of life thus provides one reason for a norm against injuring, that is, for imposing duties on agents not to cause injuries in the first place. It does so, presumably, because imposing (and enforcing) legal duties on agents not to cause injuries is an effective way to reduce the number of injuries that occur (in that society), and hence to lower the total reduction in quality of life in that society⁵⁶.

On Gardner's view, there can be no partial conformity with the duty itself: the only way to conform with the duty not to cause injuries is not to cause injuries in the first place. Compensating someone for her injury does not conform with this duty in any way. However, Gardner thinks that it may be possible to conform partially with the rationale for the duty, even if not with the duty itself. In this case, recall, the rationale for the (primary) duty is that reductions in the quality of life are objectionable. While paying compensation does not undo or even reduce the severity of injuries already caused it can reduce the severity of the injury in the future (if quicker recovery from the injury can be

⁵⁶ As this sentence illustrates, I interpret Gardner here as offering a consequentialist defense of these duties here. This style of argument may be at odds with Gardner's overall philosophical outlook, but a consequentialist reading seems to me the natural one to take here. Notice that I suppose here, and I am attributing to Gardner the supposition, that the concern with limiting or minimizing reductions in quality of life does not generate or support duties to prevent others from causing harm. I do not defend this supposition since I do not attempt to defend Gardner's account.

facilitated) or prevent or reduce other objectionable reductions in quality of life that likely result from the injury (for example, reductions caused by earnings the victim loses due to her injury). In these ways, paying compensation can itself be justified in terms of limiting (society-wide) reductions in people's quality of life.

Notice that while the rationale behind the primary duty (to limit reductions in quality of life society-wide) can possibly explain why injured parties ought to be compensated, Gardner supposes that it also explains why injurers themselves have an agent-relative duty to compensate their victims. But it is not at all clear why that should be so. It seems perfectly consistent with the rationale that the compensation be provided in some other way. It might after all be that the best way to limit reductions in quality of life associated with injuries (already caused) would be to create some alternative institutional plan, such as having the government bear the costs, or holding all those who commit negligent acts of this type jointly liable for compensating all victims, or holding the most efficient cost-avoider liable. Indeed, given the fact that many injurers are in no position to pay appropriate compensation even if they wanted to, it seems likely that some alternative institutional arrangement would promote the goal of minimizing reductions in quality of life more effectively than a scheme that holds injurers liable to compensate their victims.

If what I say is correct, then the purported justification would fail as an attempt to defend tort law since institutional enforcement of the duties of individual injurers would be less desirable than alternative institutional forms that do not tie the injurer and victim together in the way that corrective justice demands. The focus of this thesis, however, is

not on legal duties to compensate, but rather on pre-legal duties to compensate. It would be useful, then, to consider whether an account of these pre-legal duties could be developed along similar lines

Minimization of reductions in the quality of life is I suppose of great moral importance apart from legal concerns. Perhaps morality then holds persons to be under primary duties not to harm negligently and secondary duties to compensate for negligent harm that one causes⁵⁷, and it does so because of the fact that these are effective ways to minimize reductions in people's quality of life.

This account would, however, be subject to a similar problem to that identified for Gardner's account of legal duties to compensate. If, as seems plausible, this important moral goal of minimizing total reductions in quality of life would be better served by assigning moral duties in some other way (for example, assigning each person a moral duty to contribute to a general fund that addresses all compensation for wrongful harm) then those alternative duties would be justified rather than the secondary pre-legal duties of corrective justice⁵⁸. Notice that, on this consequentialist approach, it is not that there would be *some* justification for thinking that agents have duties of corrective justice, yet *more* justification for holding them to be under some other duties. Rather, if it would be better if everyone shared the burden of compensating victims of wrongful harm, duties to

⁵⁷ I focus on negligence and negligent harm here only because Gardner's discussion was limited to legal duties not to harm negligently. The point, however, extends to other duties not to harm as well (e.g. duties not to harm intentionally, recklessly and so on).

⁵⁸ By duties of corrective justice, recall, I refer to the injurer's agent-relative duties to compensate those to whom they cause wrongful harm. The duty here is agent-relative since an agent who has such a duty has a reason to compensate that no other agent has.

contribute to the fund would be the only duties relevant to repairing harm. There would be no moral basis for duties of corrective justice.

This approach would also fail to account for our intuitive sense that the existence of P's duty to compensate Q derives from the fact that P was the one who wrongly injured Q. The problem with this approach is that even if in certain circumstances it may be justified (on consequentialist grounds) to hold actual injurers under moral duties to compensate as opposed to some other set of persons (for example, this may be so in a state of nature) the fact that such duties exist would be a merely contingent fact; in different circumstances such duties would not exist.

One way we might be able to avoid this problem is to abandon Gardner's insistence that the primary and secondary merely share a common rationale and return to Raz's idea that compensation counts as partial conformity with the primary duty itself (under circumstances where that duty has been breached)⁵⁹. This seems promising for the following reason. On Raz's view, what the duty not to cause wrongful harm gives a person reason to do depends on whether the duty-holder herself is in full conformity with it. Only one who breaches the duty not to cause wrongful harm comes to have a reason to compensate for the wrongful harm she causes. Put another way, what reason applies to R (in virtue of the duty) depends only on what R does, and not on what others do. The fact

⁵⁹ It may be possible to defend Gardner's approach by interpreting the rationale he discusses in a slightly different manner. An alternative reading could hold that the rationale for the duty is that persons ought not to injure because *each individual* has reason not to cause reductions in other people's quality of life (a reason not grounded in the fact that reductions in quality of life are bad per se, but rather in the fact that it is in some way objectionable for individuals to cause them). This interpretation might allow us to avoid the problem I identify above since it presupposes that the reason is already relative to each individual; such a rationale would not provide any reason to impose shared duties to compensate for all injuries caused, for instance.

that P breaches P's duty not to cause wrongful harm gives R no reason to address that wrongful harm (since R did not breach that duty). Raz's approach then seems capable of explaining why duties of compensation are agent-relative, that is to explain why it is that one who causes wrongful harm has a reason to compensate for that harm that non-injurers do not have.

To be clear, it is consistent with this interpretation to hold that R can pay compensation on P's behalf. But if R does pay compensation that P owes, that is not a case of R acting on *her* own reason to compensate – that is, R's duty not to cause wrongful harm in the first place. In my view, R's paying compensation on P's behalf is simply a more efficient way of carrying out a transfer that involves R making a gift to P, and P using that gift to pay the compensation he owes. Notice that it is also consistent with this account to hold that there may be reasons that everyone has to help repair wrongful harms (or harms in general). But those would be distinct reasons.

Making Sense of Raz's Approach

An important task remains, however, and that is to provide an argument in favor of the idea that paying compensation does in fact count as second-best conformity with the original duty not to cause wrongful harm. As I noted above, Raz does not provide any such argument but relies only on the intuitive plausibility of the idea. But surely we need more than this before we accept the account.

How to determine what counts as partial conformity

An argument to this effect, and indeed the fact that such an argument is necessary, may be derived by focusing more generally on how what counts as partial conformity is to be determined. Recall that both Raz and Gardner present a series of cases in order to illustrate but also support the idea that, in some cases at least, partial conformity with reasons (or reason) is possible. It would be sensible then to examine whether we can uncover the basis upon which what counts as partial conformity – if anything – can be discerned.

Raz points us in the right direction in brief remarks he makes about a case we can call AUSTRALIA:

Suppose you promised a friend a ticket from London to his brother's wedding in Australia, and instead you give him a bus ticket to Dover. Dover is closer to Australia and a pleasant town. But getting there will not help him in getting to the wedding at all, and the pleasantness of spending time there has nothing to do with the original promise, and cannot count as partial compliance with it. Such cases, far from undermining the general point that partial compliance is better than none, reinforce it. They show how what constitutes partial compliance is sensitive to an understanding of the reason, and is partial compliance only if it is required by that reason.⁶⁰

Surprisingly, perhaps, this last sentence- that “what constitutes partial compliance is sensitive to an understanding of the reason, and is partial compliance only if it is required by that reason”- offers as much guidance as Raz anywhere provides. In AUSTRALIA, buying a ticket to Dover does not partially conform with the promise-based reason (to buy the ticket to Australia) at all, though it does provide some pleasant experience in its place. We can imagine that some other act might count as partial

⁶⁰ Raz, “Numbers, With or Without Contractualism”, 349.

conformity, such as buying a ticket that enables the man to arrive late to his brother's wedding⁶¹. What we need then is some way to distinguish between buying the late air ticket to Australia and buying the Dover ticket, between acts that conform partially and those that conform not at all with the original reason.

This is particularly important because it is not intuitively clear that an injurer's paying compensation to his victim counts as partially conforming *to any degree* with the reason not to cause wrongful harm. Gardner, for one, argued that it does not. On his view, recall, compensation is not required by the duty not to cause wrongful harm itself; rather, it is required by some set of reasons that explains the existence of that duty. In short, we require an argument to show that compensation counts as partial conformation—an appeal to intuition will not suffice.

Almost all the examples Raz and Gardner provide have two features in common. First, they involve positive duties that involve doing something for another specific person. Second, they are voluntary duties- duties that arise from some prior voluntary action, such as making a promise or stepping onto a bus, that signifies consent to undertake the relevant positive action. It is worth contrasting this with the duty not to cause wrongful harm. It is normally interpreted as a negative duty- a duty to avoid certain

⁶¹ I suppose that providing a ticket to Australia that gets my friend to the wedding late (but not before its end) might count as partially conforming with this reason since I understood the promise (as Raz appears to do) as a promise to get him to the wedding. On this interpretation, getting my friend closer to Australia does not partially conform with this reason if it does not facilitate in some way his getting to the wedding. Thus, a ticket to Dover would not partially conform with this reason (it is supposed). Giving him a ticket to Australia would perhaps count as partially conforming with the reason if he had the money to get himself from Hawaii to Australia (supposing that this is cheaper than flying directly from London), but not if he lacked that money.

types of action- and as a nonvoluntary duty- a duty that applies regardless of whether any action conferring consent has previously occurred.

The cases all share a third feature, which is that they are time-sensitive. In each of the three cases described above, there is some point at which the required action is due. Furthermore, the proposed next-best action involves either some partial performance of the same type of act at the appropriate time or doing the same type of action at some later point (or a combination of both). In LOAN, when P cannot repay all of the \$100 on Friday he ought to pay as much as he can on Friday, and the rest as soon as he can. In BEACH, if the father cannot take the kids on Saturday, he ought to take them on Sunday. In BUS FARE, if the passenger can no longer pay his full fare in advance, then he ought to pay it in arrears.

It seems correct to say that in each of these cases, the duty was a duty to provide a particular object for the right-holder. The nature of the object varies: it might be a physical thing (money or property) or an experience (that P provides a day at the beach) or possibly a service or even a state of affairs. In each case, once the deadline is reached the right-holder has a claim against the duty-holder that the duty-holder provide this particular object.

A natural way to understand this is by way of analogy with property. On this approach, we might hold that, once the deadline comes, the right-holder at that point comes to have a property right in the particular object, whatever it is. But if the right-holder owns the object at that point, then of course he can continue to demand that the object be given to him. The bus company on this view has a property right to the money

that the man failed to pay; so of course they can demand that he pay it and they can do so up until such time as he pays it.

Besides the fact that it seems odd to suppose that one could have a property right in an object such as a day at the beach, this view is not very plausible even in cases involving holdings. That is, it is not at all clear that having a right that P transfer a watch on Saturday, say, entails that one in fact has a property right to the watch were it not to be transferred on Saturday⁶².

A more plausible view holds that, when the deadline has passed, the right-holder has a right not to the object itself, but rather a right that the duty-holder perform the action conferring the object that he was originally obliged to provide (some might regard this as a property right but I do not need to go that far; I need only regard it as a claim-right). On this view, then, if you promise to give me a watch on Saturday and then fail to do so, then I have a claim-right that you perform the act of transferring me that watch, and I continue to have that right until such time as you do in fact carry out that act⁶³.

How does this help make sense of partial conformity? Suppose that the deadline for the performance of the relevant act is now past. In that case, perfect conformity is no longer possible. If one had performed part of the required object-conferring act before the deadline, then one has partially conformed, but part of the required act remains to be performed in the future. If one does not perform any of the required object-conferring act

⁶² This is not to deny that in some cases one might also have a property right to the watch. If I have paid a store for the watch to be delivered on Saturday, then it seems that I do have a right to the watch if they fail to deliver it at that time. But in other cases it is less clear that I have a property right. For example, if you promise to give me this watch on Saturday, then it seems to me that I have a right that you transfer it to me on Saturday even though I have no property right in the watch if you fail to do so.

by the deadline, then the very act that was originally required by the deadline continues to be required until it is performed (though it too might be performed in parts⁶⁴). These are simply different ways of providing the originally owed object in some less than optimal manner. On this approach, whether or not partial conformity is possible depends on whether or not performance of the act conveying the appropriate object is in fact possible at that particular point.

These ideas are not *ad hoc*. They fall out of the view that, once the deadline arrives, the right-holder has a right to the performance of the object-conferring act that he was originally owed, together with the idea that he continues to have that right until such time as that performance is carried out in full. Furthermore, it is plausible on this view to suppose that the right over the performance of the relevant act provides the right-holder some, limited discretion over what counts as next-best performance. This is I think correct, but is often overlooked because the focus is usually placed on imagining what the duty-holder ought to do in the default case where he does not know or cannot consult the right-holder. Indeed, that is on my view how we should understand the ordering of acts in terms of second-best, third-best, and so on: as judgments about what a rational right-holder would prefer as means of conferring what he has a right to under circumstances in which his actual preferences are unknown⁶⁵.

⁶⁴ Here I assume that it makes sense to say that the same act I ought to have performed now can be performed at a later date. I therefore suppose that acts are not individuated by the time at which they take place. Even if acts are individuated partly in virtue of their timing, however, my account could be reframed in terms of similarity between the acts at different times.

⁶⁵ Obviously, Q's discretion is limited in various ways. In particular, I suppose that there are objective limitations on what counts as late transfer of the relevant object. It is not simply a matter of what Q believes or prefers to have instead. If you fail to give me \$100 on time I cannot demand a pound of your flesh in its

To illustrate, consider LOAN. P cannot pay the full \$100 to Q by the deadline on Friday. On my interpretation, at this time Q has a right that P perform –either in one go or more- an act of (or acts amounting to) transferring \$100 to Q. Suppose that P offers Q two options: P can pay \$60 now and \$40 on Sunday. Or P can pay \$100 on Wednesday. Not knowing what Q would prefer, we try to imagine what most people would prefer under normal circumstances: so we suppose, I take it, that the former conforms more closely than the latter. But suppose that Q, for whatever reason, prefers the second option and makes this clear to P. My intuition is that P has to accede to Q’s request. Q’s decision, I take it, determines what P’s next-best act is in this case. That is, in my view P cannot say to Q: “I have reason to do what is second best here and that is to give you \$60 now and \$40 tomorrow; what you prefer is irrelevant in that regard.”

This not only illustrates how partial conformity is determined, but also offers evidence that my view provides a plausible account that makes best sense of the idea of partial conformity. If, as I have suggested, Q’s continued right explains what, if anything, counts as P’s partial conformity with his original duty, then we should expect Q to have important discretion over what counts as partial conformity; it seems intuitively that Q does have such discretion; hence, this counts as evidence in favor of the account.

Compensation as Partially Conforming with the Original Duty

Having identified a plausible account of what counts as partial conformity with a particular duty, consider now whether this account allows us to explain the idea that compensation can count as partial conformity with the duty not to cause wrongful harm.

place: transferring a pound of your flesh does not count as providing me with the object (\$100) at all, in full or in part.

A plausible way to understand the point of P's duty not to impose wrongful harm on Q is that it exists in order to protect Q from wrongful-harm attributable to P; more accurately, Q has a right against P that P act in such a way that Q is free of wrongful harm imposed by P. Duties not to cause wrongful harm are usually understood to include duties not to cause harm by way of negligence, recklessness or acts that purposefully seek to injure. For illustrative purposes, suppose we focus on negligence here. P breaches a duty not to cause negligent harm to Q just in case P breaches a duty not to act negligently and this, in turn, causes Q to suffer harm.

As I understand harm, P's act or omission A harms Q at t1 iff A causes Q to be in some way worse off at t2 than Q would have been at t2 had P not done A. Important here however is to understand what constitutes *wrongful* harm. On my view, P's negligent act A at t1 causes wrongful harm to Q iff A causes Q to be worse off at t2 than Q would have been (at t2) had P not acted negligently. Further conditions must be met in order that the harm be suitably related to the wrong, but I put that aside here. Suppose those conditions are met, whatever they are.

Often, the wrongful harm that Q is subject to persists for some time after P's negligent act. Thus, suppose P's negligent act at t1 breaks Q's arm at t2, and it then takes until t10 for the arm to heal fully and so get back to the condition that the arm would have been in but for the negligent act (I suppose that the arm would not otherwise have been injured during this period of time). During that period from t2 to t10, Q is subject to wrongful harm caused by P (which I will refer to as wrongful harm-P). The wrongful

harm continues, one might say, until the episode of wrongful harm-P has come to a permanent close.

Given that the point of P's duty not to cause wrongful harm is to ensure that Q is free of wrongful harm-P we can make sense of the idea that this same duty gives P reason to do something even after P has *initially* caused wrongful harm to Q. After all, compensation – supposing it is possible- would restore Q to the position equivalent to that which he would have been in but for P's wrongful behavior. By compensating Q, P places Q in a state that is free of wrongful harm-P.

For example, suppose that Q's arm is broken at t2 and, without intervention, will not heal fully until t10. Suppose it is t4. If full compensation is possible at t4, then compensating Q (at that time) can make it the case that Q is as well off at t4 as he would have been (at t4) had P not injured him. Compensation at t4 can then avoid wrongful harm that Q would otherwise suffer at t4 (and at t5 and so on until t10). In other words, in this case compensation at t4 can make it that Q is once again free of wrongful harm-P.

On this interpretation P's duty not to cause wrongful harm to Q as well as P's duty to compensate Q for wrongful harm-P both involve P providing Q with the same object⁶⁶ – namely, Q's being free of wrongful-harm-P. Prior to P's imposing wrongful harm on Q, Q was free of this wrongful harm. If P imposes wrongful harm on Q, then compensating Q can, if the compensation is full and successful, remove wrongful-harm-P from Q and thereby leave Q once again free of such wrongful harm. Both before and after the duty breach, Q has a right that P perform an act (or omission) that confers (or ensures)

⁶⁶ As I noted above, 'object' here is used in an expansive sense.

the same object on Q (that is, freedom from wrongful harm-P). We can therefore see how P's act of compensating Q can count as partially conforming with P's duty not to cause wrongful harm⁶⁷.

As I noted above, the examples used to motivate the idea of partial conformity are all based on positive, voluntary duties, whereas the duty not to cause wrongful harm is non-voluntary and, in most instances, imposes upon us a negative duty. For one thing, as the caveat in the last sentence notes, the distinction is not clear cut. There are cases in which it is plausible to regard the duty not to cause wrongful harm as breached by way of an omission. For example, if my child electrocutes herself in my house after I fail to childproof all the electric outlets, I would be taken to have breached a duty of care (displaying negligence in failing to cover all the outlets to which she has access). And many would agree with Joel Feinberg that my failure to carry out an easy rescue of a drowning swimmer constitutes a case of my harming her (contrary to a duty of easy rescue)⁶⁸.

Conversely, while promises usually involve positive actions, they do not always do so. For example, if Bob promises not to date Gary's ex-partner Sheeba, this would normally be interpreted in terms of a duty to refrain from certain actions⁶⁹. Regardless,

⁶⁷ On my account it appears that P's compensating Q at t4 would count as *fully* conforming *at t4* with the duty not to cause wrongful harm. We might say that P partially conforms with the duty not to cause wrongful harm as it applies to him between t1 and t4: had he conformed fully with that duty at each moment during this time, he would not have imposed wrongful harm in the first place.

⁶⁸ See Joel Feinberg, *Harm to Others*, chapter 3. Feinberg's position is distinct from that developed by Peter Singer in his famous drowning child (see "Famine, Affluence, and Morality,") case since Singer makes no claim that a passing stranger who allows a small child to drown has breached a duty toward the child; he claims only that the stranger would thereby have acted in a morally impermissible manner.

⁶⁹ John Gardner addresses a related concern in "What is Tort Law For?", although the objection he responds to worries that it is hard to see how a positive obligation can arise from breach of a negative obligation. His response reasserts the plausibility of the idea that conferring a benefit having injured

one might think that this makes a difference. Perhaps, if Bob does start dating Sheeba, then there is—at that point—no way that he can partially conform with the duty not to date Sheeba. However, that strikes me as intuitively implausible. If Gary discovers that Bob is dating Sheeba, then Gary does not need to secure a new promise in order to give Bob reason to stop dating Sheeba. The fact that Bob promised not to date Sheeba just is a reason to stop dating her if he has in fact started⁷⁰.

It also makes no difference that the examples involve voluntary duties. How the duty is incurred may affect the force of the duty, but it has no bearing on whether partial conformity with duty is possible. For example, suppose one has a duty to buy new clothes for a child. Whether or not that duty can be partially conformed with does not depend on whether the duty was incurred in virtue of a promise or is a nonvoluntary parental duty.

Compensation for Pain and Suffering:

The law accepts that compensation is sometimes appropriate for pain and suffering. Many would agree that, whether this makes legal sense (in terms of whatever justifies tort law or other relevant legal practices), there are moral obligations to compensate for pain and suffering. On my interpretation of the conformity account, we can make sense of compensation as owed in order to *remove* pain and suffering that is currently being experienced (supposing it constitutes wrongful harm). This compensation

someone (paying compensation) may be justified by the same reason that one had not to injure them in the first place.

⁷⁰ The object of the promise seems to be that (a) Bob not date Sheeba, as opposed to (b) Bob not begin dating Sheeba. It is the objectionableness of (a) that explains why (b) is relevant and not vice versa. By stopping dating Sheeba Bob can conform with (a), but not (b). Certainly, it is *possible* for Bob to make a promise with object (b). But that possibility does not undermine my point here since I am not committed to the idea that, in the case of every promise, partial conformity is possible after an initial breach.

addresses the costs associated with removing this pain and suffering (medical bills, psychologist bills and so on) and also prevents pain and suffering that would otherwise have occurred (had such pain and suffering not been removed). But it does not compensate the victim for his being subject to pain and suffering endured in the past.

Raz and Gardner both acknowledge that the conformity account does not address compensation for pain and suffering. Raz suggests that there may be other moral principles (independent of the duty not to cause wrongful harm) that can justify such compensation, while Gardner proposes that such compensation can be understood as quasi-reparative⁷¹. Rather than pursue either of these suggestions I suggest how the conformity account may be able to explain compensation for pain and suffering⁷². This explanation could also be extended to include compensation for other setbacks to interests that are now fully in the past (that is, cases where an interest had previously been harmed, but is no longer.)⁷³

My argument relies on a distinction between what I will call momentary harm and episodic harm. The usual definition of harm is concerned with whether a person (or more accurately her interest) is subject to harm at a particular time, t_n (that is, whether, at t_n ,

⁷¹ Raz, 'Personal Practical Conflicts', 23; Gardner, 'What Is Tort Law For?' p. 48.

⁷² An alternative view is this. Compensation for pain and suffering is possible when it is still occurring. Further, whenever the pain occurs, there is at that moment a moral duty to compensate the victim. We might think it appropriate to fix the amount of the debt at this time. From then on we could regard the victim as having a right to the compensation until such time as the debt is paid.

⁷³ It is sometimes hard to know whether an impact is fully in the past or not. Some cases are clear: if you break my arm and it has fully recovered, then the relevant interest (with respect to the arm alone) is no longer harmed although it was before it had fully recovered. On the other hand, if I spend \$500 fixing the arm and you never pay me for those expenses, then it is likely that this monetary setback still leaves traces in setbacks to my monetary interest or some other interest. That is, I am likely either worse off financially than I would have been or I am worse off in virtue of things that I could have purchased with that money. It is possible that I end up better off financially having spent that \$500. If that were in fact so, then this would be a case in which there is no longer wrongful harm attributable to that earlier expense.

her interest is worse off than it otherwise would have been). This is momentary harm- it captures whether or not someone is suffering from harm at a particular moment. Another possible way to understand harm, however, would be in terms of the effect of an act on another's interest over a period of time. In this sense, P's act at t_1 harms Q's interest over the course of an episode t_1 - t_n iff Q's interest, between t_1 and t_n , is overall worse than it would otherwise have been but for P's act.

Useful here is Feinberg's idea of an interest graph. Feinberg suggests that we can understand how actions affect interests in the following way:

The ordinary idea of an interest is vaguer than that of a business ledger or bank account, but in theory it too could be charted on graph paper in a curve that moves along the X and Y axes in a positive (upward) or negative (downward) way, with upward progress representing gain or improved condition, and downward plunges representing loss, or becoming "worse off."⁷⁴

When considering episodic harm we might understand overall harm as quantified by referring to the area on the graph that is captured between two lines, the first of which represents how Q's interest fares between t_1 and t_n , the second of which represents how Q's interest would have fared between t_1 and t_n but for P's act. I refer to this as episodic harm, since it refers the overall harm that Q suffers over some stretch of time.

I rely here, of course, on the intuitive plausibility of the idea that we can- at least in theory- produce one number to represent an ongoing effect on an interest or set of interests. We appeal to this idea in other contexts, most notably when we attempt to evaluate how well an agent's life has gone so far or how well an agent's life went over a particular period of her life (or how well an overall life went, for one now deceased). It is

⁷⁴ Feinberg, *Harm to Others*, 53.

not unreasonable to suppose, as a rule of thumb at least, that episodic harm has a negative effect on to how well one's life has gone so far: one's life will have gone overall worse to the extent that one suffers this harm (worse than it would have gone had one not been subject to this episodic harm).⁷⁵

One potential problem here is that it is hard to know when exactly an individual is subject to an episodic harm. That problem arises in making sense of the idea that one can place a value on the wellbeing of a life. I will suppose that the fact that R's total wellbeing (from conception to t_n) is captured by a figure W is true at each moment (it is an atemporal truth). A fortiori, this fact is true at each moment after t_n .

Given all this, we might understand compensation for wrongful episodic harm as providing a counterbalance to this negative effect on one's overall wellbeing over that episode. Compensation for wrongful episodic harm would require providing some benefit that cancels out the earlier wellbeing deficit. That is, such compensation, if successful, would make it true that some longer episode (say from t_a - t_p) which includes the earlier one (t_c - t_n) has the same overall wellbeing figure (say W_2) as it would have had but for the imposition of the wrongful episodic harm.

We can now explain why pain and suffering may be compensable. First, even when pain and suffering is in the past, they will leave a trace in the overall wellbeing of the victim considered over a stretch of time since they will be captured in the episodic

⁷⁵ Now it may be that this harmful episode is crucial to a life that is overall better than it would have been. Because of this possibility I did not claim that the generalization was invariably true. In the context of corrective justice, it may in fact be reasonable to make this assumption given knowledge constraints. That is, given how hard it is to know whether or not this harmful episode will redound to the person's benefit in the end (not only because we cannot know the future but also because even if we could see the future it would not be clear that future goods would not have been enjoyed despite the harmful episode).

harm that the victim suffers to the relevant protected interest. If uncompensated for, this setback to the victim's well-being will persist. From each moment on, it will (in general at least) be true that her wellbeing is lower than it would have been but for the episodic harm (which includes the pain and suffering). Compensation for this episodic harm would provide some counterbalancing benefit that would make it true that, at some future time, t_n , the wellbeing of the victim from t_1 - t_n will be the same as it would have been but for the act causing the episodic harm.

For this explanation to be valid on the conformity account, it would have to be true that an appropriate primary duty exists (since on that account, the duty to compensate derives from breach of a primary duty; hence, if there is no relevant primary duty, there is no duty to compensate). In particular, there would have to be some duty not to cause wrongful setbacks to the overall wellbeing of others.

It seems intuitively plausible to think that we have such a duty. Indeed, it may be that such a duty is entailed by the duties we have not to cause specific forms of momentary harm. Suppose Q suffers wrongful momentary harm between t_2 and t_4 and it remains uncompensated for. At t_6 , for example, Q is thereby the subject of wrongful episodic harm. Given this, in virtue of Q's right to be free of wrongful harm at each moment, it seems that whoever caused this wrongful episodic harm has, at t_6 , a duty to remove it. But I leave aside this issue for now, since whether compensation for pain and suffering is justifiable is not a key issue in the context of my thesis.

Compensation as bringing an action causing wrongful harm to a close

In this section I offer a further argument for the claim that the duty to compensate derives from the duty not to cause wrongful harm. I focus first on cases in which it seems intuitively clear that one is conforming partially with the duty not to cause wrongful harm – that is, that the duty itself is guiding one’s action even after it is no longer possible to avoid breaching it. I then argue that the principle that underlies this extension also justifies compensation.

First, I suppose that there are at least some cases where it is intuitively clear that the duty not to cause wrongful harm *itself* gives one reason to do something even when it is impossible to avoid breaching it. For example, if I have just unjustifiably thrown a punch and there is no way that I can avoid it striking you, then I still have reason to pull my punch in order to lessen the harm it does you. Or suppose that I have been negligently texting while driving. I look up to discover that, whatever I do, I will hit you with my car. I take it that I still have reason to take whatever measures I still can to minimize the severity of the impact. Finally, suppose that I have you hooked up to electrodes against your will. How much of a shock you get will depend on how long I press the button but the shock will arrive only when I let go. The longer I press, the greater a shock you will get when I stop pushing. Suppose there is no way to prevent some shock once I have initially pressed the button. After I have pressed it there is no way for me to prevent you suffering some shock, yet it seems that I still have reason to stop pressing as soon as possible.

I assume that most people share the intuition that we ought to take such measures and further that we do not need to appeal to any further duty in order to explain the fact that I ought to pull my punch, to slow my car down, and to stop pushing the button. The principle here might be put as follows: the reason not to cause wrongful harm is also a reason to modify one's action to minimize any wrongful harm one will unavoidably cause.

One thing the payment of compensation does is to minimize the wrongful harm that one imposes on the victim. Full compensation, if it is possible, places the victim in a state no worse than the state she would have been in but for the wrong (the duty breach)⁷⁶ - it thereby removes wrongful harm that would have existed had that compensation not been paid. In that sense it minimizes the wrongful harm that the victim suffers.

Given this fact, the principle might be thought to support the existence of the duty to compensate. If the reason not to cause wrongful harm is also a reason to modify one's action in order to minimize the wrongful harm one does, and if compensation minimizes wrongful harm, then the reason not to cause wrongful harm might be a reason to compensate the victim. For that to follow, however, it would have to be the case that paying compensation counts as modifying one's action. I will now argue that it does in fact make sense to regard paying compensation as doing this. I consider a number of possible ways in which one might think that paying compensation differs from the

⁷⁶ This is an oversimplification since not all harm caused by a wrong need be wrongful harm. However, that complication does not affect my overall point here.

examples above and explain why I think that these differences do not undermine the argument.

A first objection is that the cases of punching, driving, and shocking all involve taking measures prior to the onset of *any* wrongful harm, even though it was impossible by that time to avoid imposing some future wrongful harm. Perhaps, the objection suggests, the duty can guide one's action only prior to the actual onset of wrongful harm. Since compensation is usually thought to be appropriate *after* some wrongful harm has been imposed, the duty would therefore be unable to give one reason to compensate.

In reply, however, I suggest that our intuitions remain just as strong when we consider modified versions of the cases in which the wrongful harm has begun to be imposed. Consider modified versions of the above cases. Intuitively, I ought to pull my punch even if I have already made contact with your chin. Or if I have just struck you and you are on my bonnet it seems just as clear that I have reason to slow down. Or if the shock that you suffer from my pressing the button begins before I have stopped pressing it, I still have reason to stop pressing it as soon as possible in order to minimize the overall shock you get.

A second objection is that these three cases involve modifying an action that is still in progress. They therefore cannot show that the duty applies to actions that have already been completed. Yet it seems clear that the payment of compensation is something that takes place *after* the relevant act has been completed.

In response, I suggest that the action of causing wrongful harm is ongoing until such time as the victim is no longer in a state of wrongful harm. If the time comes when

the victim is no longer in a state of wrongful harm (either because compensation has been paid or because the victim has otherwise gotten back to a state that is not worse for her than the state she would have been in had she not been wronged) then compensation is no longer owed. If that is correct, then the duty to compensate will only be appropriate when the action is ongoing, and so the objection does not apply.

The claim that the action is ongoing until wrongful harm no longer persists is, at first glance, rather dubious. One reason for this is that one might think that the relevant action here is to be identified with the cause of the wrongful harm (for example, my fist striking your chin, my car colliding with you, my finger pushing the button) and not with the wrongful harm that is caused. But this is a mistake. As Raz suggests⁷⁷, the duty not to cause wrongful harm is a duty not to cause harm by way of a breach of duty. Thus, a duty not to harm negligently is nothing but a duty not to harm by way of breaching a duty of care. That is, there are two duties, one which proscribes the acts that risk harm (the duty of care) and one that proscribes acts of bringing about outcomes by acting so as to place someone at risk of harm (the duty not to harm by way of negligence). While the act that breaches the duty of care (for example, texting while driving) need not make reference to the outcome, the act that breaches the duty not to wrongfully harm is constituted both by the initial cause and by its outcome, that is, the wrongful harm suffered by the victim.

This point holds even when the initiating cause occurs long before the harmful outcome. Suppose a madman plants a bomb set to go off a year afterwards. Suppose it does explode a year later, and someone is killed in the explosion. Admittedly, the act of

⁷⁷ Raz, "Responsibility and the Negligence Standard," 10.

planting the bomb does not include the explosion or death it later causes. From the perspective of corrective justice, however, we are concerned with actions qua wrongfully harming acts. We are thus concerned with the act of intentionally (and unjustifiably) killing the victim, an act whose length depends upon when the victim dies. We can thus regard the explosion and death as part of an ongoing action.

Of course, it is true that one could *identify* that an act of bringing about wrongful harm exists just so long as one can point to an initial cause (the hand striking) and some initial harm (the wrongful harm the victim suffers immediately from the punch). But that doesn't entail that the act has been completed at that point. In fact, any wrongful harm that ensues, however temporally remote from the initial cause, contributes to a (further) breach of the duty. Indeed, we implicitly recognize that fact when we accept that compensation seems appropriate so long as wrongful harm remains, and also when we acknowledge that temporally remote wrongful harm can alter our evaluation of the moral seriousness of the breach of duty⁷⁸.

In this section, I have sketched an independent argument in favor of the idea that the duty to compensate does in fact derive from the duty not to cause wrongful harm. To summarize:

(1) Principle: the reason not to cause wrongful harm (the original duty) is also a reason to modify one's action in order to minimize the wrongful harm that one does.

⁷⁸ For example, the fact that the victim of a shooting dies after 10 years in a coma intuitively makes the action one of murder, thereby renders the act intuitively morally (if not legally) worse than it would have been had the victim not died.

(2) Compensation involves modifying an action that imposes wrongful harm (an action that is ongoing until such time as the victim no longer suffers wrongful harm).

(3) Compensation, where possible, can minimize the wrongful harm that one does.

Hence, from 1,2, and 3,

(4) The reason not to cause wrongful harm is also a reason to compensate the victims for wrongful harm one imposes on them.

Ongoing breaches of the duty not to cause wrongful harm:

On the conformity account, a duty to compensate derives from an initial breach of a duty not to cause wrongful harm. Until such time as compensation is paid in full (assuming monetary compensation is appropriate; in some cases, the ideal form of harm repair may not involve a monetary transfer), we may understand the agent to be in breach of the duty not to cause wrongful harm⁷⁹. After all, on this account, conforming fully with the duty to compensate just is conforming as best one can (partially) with the duty not to cause wrongful harm. Once the wrongful harm no longer exists, it is no longer possible to conform at all with the duty not to cause wrongful harm (the duty no longer applies with regards to that prior breach); and so, the injurer is no longer in breach of the duty.

⁷⁹ I distinguish being in breach of a duty from breaching a duty. Normally, when we say that P breached his duty not to cause wrongful harm, we are referring to the episode in which P's action causes the initial setback to Q's protected interest (that is, the moment of transition of Q's interest from being free of wrongful harm-P to being subject to wrongful-harm P). But after P has breached his duty, he remains in breach of his duty insofar as, and for as long as, the original duty still applies to him (that is, so long as partial conformity with the duty remains possible).

As I noted above, where compensation is owed but not paid, the breach of the duty not to cause wrongful harm is ongoing. It is particularly important to keep this in mind when asking in virtue of what an injurer is to be held liable to compensate for wrongful harm to interests that are not those protected against the initial setback⁸⁰. P's negligence causes Q's broken arm. Q's broken arm results in Q having related medical bills. Suppose Q has paid those bills. Both the broken arm and the monetary expenses count as wrongful harm, but the medical bills are consequential losses. If we ask why P owes Q money for the medical bills, we would naturally cite the fact that P broke Q's arm. But, to be more precise, we could cite two facts: the fact that P broke Q's arm together with the fact that P subsequently failed to compensate Q by paying those medical bills upfront (we can of course cite a larger collection of related facts: the fact that at t1 P initially breached the duty; the fact that at t2 P was in breach of the duty since P had failed fully to repair the harm by t2, and so on). The first fact points to the initial duty breach. The second fact points to the ongoing breach of the same duty at a later time (the failure to compensate Q)⁸¹. It is not redundant to cite the second fact since, had P paid those bills upfront, Q would not now suffer the monetary setback (had P paid Q's medical bills upfront, Q's financial interest would never have been harmed). The fact that P owes the money to Q (after Q has paid the bills) depends on P's failure to pay the bill at

⁸⁰ It is also important to keep this in mind when asking about an ongoing setback to the interest initially set back.

⁸¹ I am assuming here that it makes sense to interpret the ongoing act of wrongfully harming Q, (understood as one ongoing act that runs say between t1 and t10) into various act-parts including the arm-breaking (at t1) and the subsequent failure to fix the broken arm (at t2, t3 and so on to t10). I am not entirely clear, however, if this is a defensible move.

the time it was owed. Since P had a duty to pay that bill, this failure counts as an omission (as opposed to a mere not-doing).⁸²

One reason we do not tend to cite these further facts is that we are often concerned with determining the degree of P's culpability for having imposed wrongful harm on Q. The degree of culpability is largely (if not fully) explained by the culpability of P for the initial breach, regardless of what subsequently happens to Q. Hence, we tend to focus on that moment alone. In the most likely scenarios, P would lack a clear opportunity to pay Q's costs upfront⁸³ (Q might not want P present at the hospital, Q may be rushed to a hospital before P can get there, P does not have the money at hand, and so on). P's failure to do those things then would do little (if anything) to compound his culpability. In that context, it is of little use to cite the subsequent failures to compensate as contributing causes to later wrongful harms (that is, we likely need only focus on his role qua initial cause in order to evaluate his culpability).

It may be that P is to some small degree culpable for his failure to do these things. Perhaps he really could have made it to the hospital if he had tried harder. Or he could have got the money together if he had called in some favors. While this may not make *much* difference to determining the degree of P's culpability⁸⁴, it could go at least

⁸² I follow Joel Feinberg in distinguishing not-doings from omissions. See *Harm to Others*, chapter 3. The relevant point here is that an omission is something that can be understood as a cause, while a not-doing cannot. Hence, it is appropriate to cite both the initial duty breach (a positive action) and the second duty breach (an omission) as causes of the setback to the monetary interest.

⁸³ Citing the idea that 'ought implies can' one might infer that, if P cannot pay, then P cannot have a duty to pay. But P's duty to compensate is, like a duty to repay a loan, absolute (see chapter 2). Except under very special circumstances that do not apply here P's inability to pay at tn does not imply that he has no duty to pay tn, just as T's inability to repay \$50 to U by Friday does not imply that T has no duty to repay that loan by Friday.

⁸⁴ I am concerned here with P's culpability for the ongoing act of wrongfully harming Q (for the cumulative culpability attributable to P for the episode of wrongfully harming Q that includes his initiating the

some way towards explaining the otherwise puzzling intuition that the degree of P's culpability can be affected by how much wrongful harm ensues. If P is even slightly culpable for failing to prevent these wrongful harms coming about (from failing to prevent Q incurring these medical costs) then P is (overall) more culpable than he would have been had he prevented that harm from arising. In general, the more wrongful harm that is caused by a particular duty breach (the more downstream wrongful effects there are), the greater the culpability of the injurer. On this analysis, of course, the agent's culpability is not to be attributed to the agent solely in virtue of the initial duty breach. Rather, the culpability of the agent for the wrongful harm depends on his culpability for the initial breach together with his (likely lesser) culpability for subsequent related ongoing breaches (in failing to compensate)⁸⁵.

Conclusion:

In this chapter, I have defended the idea that the duty to compensate derives from the duty not to cause wrongful harm. First, I distinguished Raz and Gardner's versions of the conformity account. I then argued that Raz's interpretation of the account is better able to explain the agent-relative nature of duties to compensate than Gardner's, but noted that Raz's own view relies too heavily on the intuitive plausibility of the idea that an injurer's compensating his victim is the closest that the injurer can come to conforming with his duty not to cause wrongful harm to the victim in the first place.

wrongful harm and his subsequent failures to remove it). It seems to me it is this we are judging even if we often regard ourselves as judging P's culpability simply for his initiating the episode of wrongful harm.

⁸⁵ I am not committed to the claim that P is to be held more culpable even if there is absolutely nothing he can do to remove the wrongful harm. In such a scenario P would continue to be in breach of his duty (assuming he is alive) but P would not be culpable in virtue of that fact.

In an attempt to bolster this approach I offered two arguments. First, I argued that the duty not to cause wrongful harm and the duty to compensate both involve ensuring that the injurer provides the victim with an ‘object’ (in an expansive sense) to which he has a right. I proposed that the victim has a right (against the injurer) to be free of wrongful harm (imposed by that injurer). By avoiding an initial breach of the duty not to cause wrongful harm, P ensures that Q remains free of wrongful harm-P. By fully compensating Q for wrongful harm P has imposed on Q, P makes it such that Q is free of wrongful harm-P again.

Second, in a different vein, I argued that the duty not to cause wrongful harm intuitively provides an injurer with reason to modify an action of his that is already imposing wrongful harm. I then proposed that an injurer’s compensating his victim could also be understood as a way of modifying an ongoing action, namely the injurer’s ongoing action of wrongfully harming the victim. Finally, I considered how the culpability of an injurer might vary depending on the injurer’s culpability for the various parts of this ongoing act (or ongoing breach), which includes both the initial imposition of wrongful harm and the subsequent failures to compensate.

In the next chapter I consider the nature of the principle of corrective justice itself and, in particular, I examine the notion of harm that is appropriate in that context.

Chapter 2: The Principle of Corrective Justice

Introduction

In this chapter I provide a detailed analysis of the principle of corrective justice, the principle that ascribes injurers a duty to compensate their victims for wrongful harm. More precisely, if P causes Q to be subject to wrongful harm, then P has a duty to compensate Q for that harm. First, I explain what is meant by ‘harm’, what makes a harm wrongful, the relevant notion of causation, and the relevant conception of compensation. I then defend a closely related conception of compensation against some objections by Rodney Roberts. Finally, I defend the relevance of a counterfactual comparative sense of harm to the principle corrective justice.

Wrongful Harm

Following Joel Feinberg⁸⁶, I understand harm as a setback to interest. The sense of ‘setback’ relevant to the principle of corrective justice is a setback to a person’s particular interest or set of interests (in this context, protected interests) and not, as may be appropriate in other contexts, a setback to that person’s overall self-interest⁸⁷.

⁸⁶ Joel Feinberg, (1984) *Harm to Others: The Moral Limits of the Criminal Law*, Volume 1, New York: Oxford University Press. In chapter 1, Feinberg contrasts this sense of harm with a derivative sense of harm that applies to objects e.g. harm to property, and also with harm as a right’s violation (what he calls a wrong to the victim). In addition, his discussion suggests that we may also define ‘harm’ in the sense relevant to the harm principle. In this last sense, a setback to interest must be suitably related to a right’s violation. One thing to notice is that if we understand the counterfactual comparative test of harming to involve a contrast between a wrong action (what happens) and some alternative non-wrongful action (the relevant contrast), then we find that the test itself will generally (if not always) pick out only harms suitably related to wrongs i.e. harm in this latter sense.

⁸⁷ In his famous river rescue case, where P breaks Q’s arm in order to save Q from drowning, Feinberg (‘Wrongful Life and the Counterfactual Element in Harming,’ in *Freedom and Fulfillment*, 1992), regards P as not harming Q since P’s act is in Q’s overall self-interest. Seana Shiffrin (‘Wrongful Life’) objects that this is better understood as a case of a lesser harm (the breaking of the arm) that prevents a greater

Setback here is understood in a counterfactual comparative sense. P's act (or omission)⁸⁸ A at t1 harms Q at t2 iff A causes an interest of Q's to be in a worse condition that it would have been but for A. Further, Q suffers harm at t2 iff Q's interest is in a worse condition than it would have been in but for A⁸⁹. On this interpretation, harming is the more fundamental notion: that whether Q suffers harm *in this sense* depends only on the way in which P's act (comparatively) *impacts* Q's interests. This sense of harm is relevant to corrective justice since its concern is to isolate the extent (if any) to which one agent wrongfully disrupts the ongoing life of another agent. It is not concerned (or only indirectly so) with the absolute condition of Q's interest after the impact⁹⁰.

The counterfactual comparative test for harming is typically contrasted with two others⁹¹. First, on a temporal comparative account, P's act or omission A harms Q iff A causes B to be worse off in some respect than she was just prior to A. Second, on a non-

harm. I follow Shiffrin here although, since I do not share her non-comparative account of harms, my reasoning is somewhat different. In the counterfactual comparative account I endorse, there would be a setback to Q's interest in bodily integrity *just after* the arm is broken (since that interest would be worse off than it would otherwise be at that time), although arguably the interest in bodily integrity ceases to be harmed (by the agent) at the time at which the agent would have drowned (but for the arm break required for the rescue). I say arguably here because death is a hard case.

⁸⁸ From now on I use act to include both positive acts and omissions.

⁸⁹ In this explanation I assume that 'to harm' means roughly 'to cause to suffer harm.'

⁹⁰ A concern with how Q's interest is faring at a specific time would more naturally appeal to a non-comparative sense of harm: where for Q's interest to suffer harm is to be in a state that is non-comparatively bad. The terminology of counterfactual comparative and non-comparative sense of harm is taken from Matthew Hanser, 'The Metaphysics of Harm,' and Judith Jarvis Thompson, 'More on the Metaphysics of Harm,' although Feinberg distinguished these tests in 'Harm to Others.'

⁹¹ For brevity's sake, I omit the associated temporal comparative and non-comparative accounts of suffering harm. I associate idea of non-comparative harm with Feinberg's suggestion that, in addition to the counterfactual comparative sense of harm, "... another, nonrelativistic, concept waits in the wings, always ready to replace the main performer. In that conception, one is harmed only when one's interest is brought below the centerline, and thus put into a 'harmed condition.'" [*Harm to Others*, p. 54] Confusingly, however, Feinberg later abandons this terminology. In 'Harmless Wrongdoing' Feinberg defines a 'harmed condition' in a distinct manner, while this nonrelativistic sense is closer to (but not identical with) what he calls there a 'harmful condition.'

comparative account, P's act or omission A harms Q if A causes Q to be non-comparatively badly off (in some respect). As I argue below, while the non-comparative sense of harm is indirectly relevant to corrective justice, the counterfactual comparative sense specifies the key test in this context.

The characterization of counterfactual comparative harm offered above is indeterminate since the relevant contrast to A is unspecified: there are various ways for P not to do A and whether or not we judge there to be harm (and if so how much) will depend on which contrast is relevant. In order to discover what the relevant contrast is in this context we need to consider what makes a harm wrongful.

As I define it, a 'wrong' is a breach of duty (an act or omission that breaches a duty)⁹². Following Joseph Raz and John Gardner, I regard a duty as a categorical and protected (or mandatory) reason for action. A categorical reason is one whose existence does not depend on the goals or desires of the agent.⁹³ A protected (or mandatory) reason is a reason not only in favor of an action but also a reason not to act on certain countervailing reasons⁹⁴. In the context of corrective justice, the duty correlates with the right of the victim⁹⁵.

⁹² Duties may be owed to particular persons (personal duties) or not owed to particular persons (impersonal duties). Duties not to cause wrongful harm are personal duties (duties not to harm particular persons). The duty not to act negligently (or to care with due care), however, might be construed as an impersonal duty. If I drop a glass in an empty public square and leave the mess where it lies, then intuitively this act breaches a duty of care even if no one is ever placed at *risk* of harm (if, just after I leave and before anyone is close to the square, for example, a tornado picks up the glass and deposits somewhere else where it can pose no risk).

⁹³ See Joseph Raz, 'Personal Practical Conflicts,' Categorical reasons are – as often defined – reasons whose application and stringency does not depend on the agent's desires, inclinations, goals, at the time of action.

⁹⁴ See John Gardner and Timothy Macklem, 'Reasons,' in Jules Coleman and Scott Shapiro, Eds. *The Oxford Handbook of Jurisprudence and Philosophy of Law*, 465.

⁹⁵ Corrective justice is not, then, concerned with impersonal duties.

I take ‘P wrongs Q’ to mean that ‘P invades a right of Q’ and so, (at least in this context) a wrong (duty breach) itself wrongs Q (invades Q’s right)⁹⁶. On my view, P may commit a wrong without acting wrongly- that is, without doing something morally impermissible. Furthermore, P may commit a wrong without being culpable. For example, a plausible analysis of necessity cases regards them as involving morally permissible breaches of duty. Suppose that P breaks into Q’s remote cabin in order to escape a dangerous unforeseeable storm, breaking a window and eating Q’s provisions⁹⁷. We might regard this as a case of P’s breaching a duty that correlates with Q’s property rights over the hut and the food, yet think that P has acted permissibly in doing what he did. Furthermore, barring P taking an inappropriate attitude to the situation (such as excessively enjoying the fact that he gets to break his enemy Q’s window without fear of criminal sanction), this also exemplifies a case where P’s breach of duty does not involve P being culpable.

A harm is wrongful if it is suitably related to a wrong. But what is meant by ‘suitably related to’? First, the wrong must cause the harm. I adopt Jonathan Schaffer’s account of contrastive causation⁹⁸, according to which causation involves four relata: C rather than C’ causes E rather than E’, where C is the act (or omission) performed, E is the effect, C’ is the causal contrast, and E’ is the effectual contrast, where E’ is what would have happened had C’ been performed. The counterfactual is understood in terms

⁹⁶ Since we are concerned only with cases where duty breaches correlated with right’s violations there is no danger here of using ‘a wrong’ to refer both to an act that breaches a duty and/or an act that violates a right.

⁹⁷ This often repeated example of necessity cases comes from Joel Feinberg, Feinberg himself regarded this as a permissible invasion of right, as do many other authors including Jules Coleman in *Risks and Wrongs*, and John Gardner in ‘Wrongs and Faults’ discussing the classic legal case taken to exemplify necessity cases, *Lake Erie vs. Vincent*).

⁹⁸ See Jonathan Schaffer, “Contrastive Causation in the Law,” *Legal Theory* (2010): 259-297.

of David Lewis' analysis of the truth of counterfactual statements⁹⁹. On Schaffer's view, context alone determines the causal contrast (C') and hence the effectual contrast (E').

Although Schaffer applies his account to an analysis of harming in the law, it has obvious intuitive appeal when applied to a moral principle of corrective justice as well. On Schaffer's analysis, C is a wrong committed by P against Q and C' is an act or omission (of P) that would have been in minimal compliance with P's (moral) duty toward Q. E is the absolute level of Q's interest after P's wrong, and E' is the level that Q's interest would have been at had P minimally complied with this duty. As Schaffer highlights, this ties in neatly with the counterfactual comparative conception of harming: if the interest level in E is lower than that at E' then the wrong has caused Q's interest harm¹⁰⁰.

Schaffer's test, however, is too broad¹⁰¹. The test fails to take into account two further conditions that must be met in order for a harm to be suitably related to a wrong: that the wrong must be the proximate cause of the harm; and the agent must have taken reasonable steps not to exacerbate harm caused by the wrong.

One way in which a wrong may fail to be a proximate cause of the harm is where the harm is, to use a phrase common in tort, 'not within the risk'. Here is an example:

...if I carelessly toss my scalding hot coffee out my car window as I drive by you and, witnessing my littering, you get so angry that you burst a blood vessel in your neck, it is true that I breached a duty to you and actually caused you an injury, but the injury that you suffered is not the kind of injury that made my conduct careless – suffering burns from my hot coffee would be – and so my careless conduct was not the proximate cause of your injury.¹⁰²

⁹⁹ David Lewis, *Counterfactuals*. Oxford: Blackwell, 1973.

¹⁰⁰ Schaffer, "Contrastive Causation in the Law."

¹⁰¹ This is not a criticism of Schaffer since he only suggests that his test offers a good rule of thumb.

¹⁰² John Oberdiek, "Philosophy and Tort Law," *Philosophy Compass* (2008): 734-748.

Schaffer's test is unable to rule out cases of this sort. Suppose that I would minimally comply with my duty of care toward you by not throwing anything out the window as I pass you, and that had I done that instead (not thrown anything) you would not have become angry and burst your blood vessel. His test suggests that I cause this harm: my throwing coffee rather than my throwing nothing causes you to have a burst blood vessel rather than suffer no physical effects whatsoever. Since, you are better off without the burst vessel than with it, I harm you (I cause you a counterfactual comparatively setback your welfare interest). Nonetheless, this harm is not wrongful.

A first additional condition for the harm to be wrongful is that the wrong must be the proximate cause of the harm. I will follow a standard approach of supposing that a wrong is the proximate cause of a harm where the harm-type was foreseeable by a reasonable agent in the circumstances¹⁰³.

We might think that even though Schaffer's test does not accommodate this idea of proximate cause, it nonetheless provides a good test of whether the wrong is 'the actual cause' of the harm. However, there are some cases where it picks out the wrong as the cause inappropriately. To provide a variant on the above case, suppose that I throw my coffee carelessly from the window (careless because it risks scolding you) and it really does scold you. You are so angry at being scolded that you punch a wall behind you, breaking your middle finger. Intuitively, although the scolding counts as wrongful harm the broken middle finger does not. Schaffer's test cannot rule out such cases. On the

¹⁰³ The coherence of this idea is defended by Stephen Perry in 'Responsibility for Outcomes,' 302.

test: my throwing coffee rather than not throwing coffee causes you to have a broken finger rather than no broken finger (supposing that, had I not thrown the coffee you would not have broken your finger).

To accommodate this point, we need to take into account actions of the victim (and possibly other agents as well). We generally suppose that victims ought to take reasonable steps to avoid worsening their situation still further; if they fail to do so, then the extent to which we ascribe the harm to the original injurer is reduced.

If the following conditions are met then a harm is wrongful:

- (1) (Where P has committed a wrong) Q's (protected) interest is worse off than it would have been had P acted in minimal compliance with P's duty (in brief, P's wrong harms Q).
- (2) The wrong was the proximate cause of the harm: The harm Q suffers was reasonably foreseeable.
- (3) Q took reasonable steps to avoid worsening further the harm P caused her¹⁰⁴.

Wrongful harm begins with harm to at least one (protected) interest, but it can spread to include harm to other interests as well. For example, if Bob negligently runs into Fran, breaking her arm, then he initially harms her welfare interest (in the use of her

¹⁰⁴ My definition of the principle of corrective justice refers to 'causing Q to be subject to wrongful harm.' We ought to be able to incorporate condition (3) into Schaffer's counterfactual, bringing it closer to a test for wrongful harm proper (though consideration (2) remains independent; ideally though we would incorporate that too). We can incorporate (3) altering the contrasts. To take this into account we ask how well off Q's interest would have been had Q taken all reasonable steps to avoid further worsening the harms. Thus, where Q fails to take all such steps, the relevant contrast may not be how Q's interest is in fact faring. In that case our test would involve comparing two hypothetical conditions of Q's interest (that is, neither E nor E' would refer to how Q's interest actually fares).

arm). Fixing the arm (we suppose here) requires a trip to the doctor and possible medical bills. In that way, her financial interest is also setback. Both of these setbacks count as wrongful harm to Fran. Interests that are protected (by rights) are protected against certain types of setbacks. The duty not to cause negligent harm directly protects Fran's interest in bodily integrity from negligent actions. But it indirectly protects other interests that would be set back by that initial setback. It protects Fran's monetary interest against at least some monetary expenses incurred in virtue of the initial setback (only 'at least some' because Fran could incur more expenses than she reasonably needs, for example, by needlessly visiting a specialist in Switzerland rather than her local US doctor).

Fran's payment of her medical bills (supposing she has to pay upfront) is not protected directly by a duty to respect another person's financial interest. Financial interests are protected directly against actions such as theft, fraud and so on. Fran's payment of the bill counts as a wrongful harm in virtue of its relationship to the breaking of her arm (where the wrong took place). On my view, we may regard Bob as being in breach of the duty not to cause negligent harm so long as wrongful harm persists. One may then be in breach of a duty that directly protects one interest when other interests are (consequentially) setback¹⁰⁵.

In the context of duties not to harm negligently, Joseph Raz argues that there are two duties¹⁰⁶. First, there is a duty not to act negligently. Put another way, there is a duty of care. This duty protects us against being placed at risk of being harmed by another's carelessness (or rather, protects us against certain types of setbacks to certain protected

¹⁰⁵ I explain this idea in the last two sections of chapter 1.

¹⁰⁶ Joseph Raz, "Responsibility and the Negligence Standard," 7.

interests). Second, there is a duty not to harm by way of negligence. This second duty makes reference to two duties in its content. It is a duty not to harm by way of breaching a duty of care. This is how I understand the duty not to cause negligent harm. Note that the term ‘harm’ here is in fact restricted- it does not refer to any setback but to a setback to a protected interest¹⁰⁷.

On the conformity account of corrective justice that I support, the duty to compensate is derived from the duty not to cause wrongful harm. I propose that we extend Raz’s analysis from negligence to the broader duty not to cause wrongful harm, that is, to cases where the wrong is not a breach of a duty of care. The broader duty may also be put in terms of two duties: as a duty1 not to harm by way of breach of duty2. What kinds of duties count as duty2? Besides duties correlative with rights in person it seems plausible to extend the analysis to those duties that correlate with property rights.

With respect to property rights, there is a duty1 not to harm by way of breach of a duty2 not to interfere with another’s property¹⁰⁸. Support for this idea comes from the analysis of property rights as a bundle of rights that includes, among other things, a right to compensation if the property is damaged or stolen by another person. P owes Q compensation for breaking his vase because P’s compensating Q for the vase is the closest that P can come to full compliance with P’s duty not to harm Q by way of

¹⁰⁸ Supposing that violations of property rights do not necessarily harm, then a breach of the duty2 here need not entail a breach of duty1. A harmless breach of a property right (trespass is often cited as a possible example) would interfere with the property right, but not breach the duty not to harm by way of such interference. Here I am supposing that harmless wrongs are possible, although see Seth Lazar, “The Nature and Disvalue of injury,” *Res Publica* 2009, 289-304 for an argument against this possibility.

breaching Q's property right in Q's vase (where P has already breached the duty by breaking the vase). It is qua wrongful harm that corrective justice addresses the damage to the property interest.

Notice that compensation in this sense need not be monetary compensation. If P steals Q's vase, then the closest possible compliance with the original duty may be to return the vase that was stolen (with some interest payment perhaps) rather than pay monetary compensation. Nonetheless, returning the stolen vase is understood here as required in order to repair wrongful harm as best as possible.

More controversially, I suggest that violations of some positive rights involving promises and contracts may also be plausibly interpreted on this model. To be clear, however, if this extension is unwarranted then this does not make a practical difference (as to when or how much compensation is owed). The conformity view can still explain why breach of duties to compensate in cases of breach of positive duties arise, even if these are not best regarded as duties not to cause wrongful harm.

Consider how promise-based duties may be analyzed in this way (that is, as a duty not to harm by way of breaching a duty to do what one promised to do). If P promises to repay a loan to Q by Friday, but fails to do so, then P ought to repay the loan as soon as possible with interest. But why pay interest? Is that an implicit part of the practice of taking loans- that if one is late with payments then one has to pay interest? Although that condition may often be specified in formal contexts, it seems to apply in informal contexts where no such understanding has been reached. An explanation for this would be that payment of the loan and interest compensates Q for the wrongful harm that Q

suffers when she fails to be paid on Friday. Suppose it is Sunday. We ask how well off she would have been on Sunday had she been paid on Friday. The problem is that it is hard to estimate this. But given the charitable presumption that she would likely have used that money productively, then she is lacking something more than the money itself even come Sunday. We may understand the interest owed as aimed at addressing that hard-to-quantify harm.

We may also understand breach of bilateral contracts in this way. The law recognizes that persons have an expectation interest that may be setback if one party fails to carry out his contractual obligation. Sometimes damages are awarded to place the other party in the position she would have been in but for the breach of contract (that is, to put her in a position in which she could have reasonably expected to be). We can understand this in terms of corrective justice as well. That would be so if there is a duty not to harm by way of breaching a bilateral contract. Q suffers harm if (a protected) interest of Q is worse off than it would have been had P not breached his duty toward Q i.e. honored the contract. P's payment compensates Q for that wrongful harm.

In some other cases involving breach of contract, it is only thought necessary to compensate for setbacks to Q's reliance interest: to place Q in the position she would have been had the contract never been made. This measure can also be interpreted in terms of wrongful harm. The difference here is that the wrong is not identified with the breach of contract, but rather with the making of a contract that, it turns out, is never honored. If the wrong is the making of a contract itself (qua contract that will in fact not be honored) then the wrongful harm caused by that will coincide with the measure given

by reliance interest. The relevant comparison will be between how well off Q's interest would have been had P not made the contract (had P not committed that wrong) and how well off it in fact is¹⁰⁹.

Various objections to this extension of corrective justice to cover breaches of promise-based and contractual duties might be made. A first objection suggests that the extension of duties not to harm to include these latter cases points out differences between what we typically mean by duties not to harm on the one hand and promise-based duties on the other. A duty not to harm (as we ordinarily use the term) is not a duty not to counterfactually worsen any interest, but rather a duty not to cause a setback (in certain ways) to a particularly important type of interest, most paradigmatically welfare interests. As Feinberg points out, setbacks to such interests imply setbacks to overall self-interest. In contrast, while a promise-based duty protects an interest (an expectation interest) it need not have the same type of centrality to our self-interest¹¹⁰.

Furthermore, in order that we judge a setback to a welfare interest sufficient to constitute a *breach* of a duty not to harm it might seem it is not sufficient that an act make the interest worse off in a counterfactual comparative sense; it may be thought to require either making the interest worse off over time (appealing to a temporal comparative sense of harm) or making the interest non-comparatively badly off

¹⁰⁹ Where there is a choice between quantifying compensation on the basis of either a reliance interest or an expectation interest, this may reflect the fact that there are two possible wrongs that can be identified (the making of a promise that will not be honored and the failure to carry out a promise previously made) and so there is a choice concerning which counterfactual to take as relevant (do we imagine how well off Q would be had P not made the promise, or how well off Q would be had P not breached the promise previously made?)

¹¹⁰ I say 'often' because the duty to keep a promise might, depending on the case, protect an interest important to one's self-interest. For those who do not think the contrast between expectation and welfare interests is an important one, no such potential objection needs rebutting.

(appealing to a non-comparative sense of harm). But a breach of a promise-based duty does not typically require that either further condition be met.

The first difference concerns the relative normative importance of the interests that are setback. I do not disagree that welfare interests are (at least typically) more important to human welfare than expectation interests. That fact may help explain why breach of duties not to harm (in the standard use) are considered more serious wrongs than breach of promise-based duties.¹¹¹ However, corrective justice is not concerned with addressing the wrong itself; rather it is concerned only with repairing wrongful harm. It is not implausible to think that there is wrongful harm so long as there is a wrong (a breach of duty) and harm suitably related to it. Breaches of some promise-based duties (wrongs) can harm in the counterfactual comparative sense: at a minimum, if you owe me \$50 on Friday and fail to pay, then it is plausible to think that, come Saturday my financial interest is worse off than it would have been had you minimally complied (fully) with your duty (and paid me \$50 on Friday)¹¹².

¹¹¹ Making sense of the idea of ‘more serious’ here is not easy. One way to make the point would be in terms of which duty is stronger. Given a conflict between breaching a duty not to harm and breaching a promise-based duty, it will usually be true that one ought to breach the latter. The reason for this is that the former duty is stronger: while both duties are mandatory reasons, the former excludes more countervailing reasons than the later.

¹¹² One might also put this in terms of a setback to an expectation interest. Note that I do not claim here that I have a property right in the \$50 come Saturday. Rather, I claim only that I am harmed in the relevant sense by your wrongful action. I assume also that the other conditions for a harm’s being suitably related to a wrong are met in this case.

It is conceivable that this setback could cause further setbacks, but it is hard to specify which consequential setbacks constitute wrongful harm. If, for example, due to your non-payment I end up getting knee-capped by a drug dealer who I owed \$50, then I would not think it likely that this constitutes wrongful harm. I suppose that anyone who faces such a dilemma ought (and can) take reasonable steps to ensure that they have a spare \$50 just in case you fail to come up with the cash (that is, this seems a candidate for a case where the knee-capping harm that is caused is not suitably related because I ought to have acted in a way to avoid the further harm that comes from not receiving the \$50 on time).

I do not deny that harms of this sort are typically less serious than the initial setbacks associated with (what we typically call) duties not to harm (for example, a duty not to cause physical injury). The point here is that the existence of the duty to compensate does not depend on the seriousness of the wrongful harm. That is consistent with holding, however, that the *strength* of the duty to compensate may vary according to the seriousness of the harm typically associated with the breach of the primary duty. On the Razian conformity account I defend, the strength of the secondary duty (the duty to compensate, understood broadly here as a duty to repair wrongful harm) derives from the strength of the primary duty. That is so because the secondary duty is nothing but the primary duty under conditions where full conformity is no longer possible (because the primary duty has been breached). Hence, if a duty not to cause physical injury is stronger than a promise-based duty, then the duty to repair wrongful harms associated with physical injury will be stronger than the duty to repair wrongful harms associated with the broken promise (assuming there is wrongful harm in the latter case).

The relative moral import of these types of wrongful harm may be relevant in other ways as well. For one thing, some harms to welfare interests may ground agent-neutral duties to compensate in a way that breach of promise-based harms likely do not.¹¹³ Furthermore, the relative moral import may make it easier to justify coercive state enforcement of compensation in the former case than the later¹¹⁴. Recall, however, that

¹¹³ For example, some regard serious setbacks to interests caused by natural disasters as grounding rights to compensation from co-citizens. Boxill argues that such agent-neutral duties exist in 'The Morality of Reparation.' As far as I know, no one argues that co-citizens ought to pick up the tab in cases of broken promises (or even contracts).

¹¹⁴ What this suggests is that, *if* moral duties of corrective justice play a role in justifying legal compensation in civil law, they would provide less reason to support compensation to restore harmed

my concern is not with legal duties of corrective justice (for which the issue of enforcement is clearly crucial) but rather with moral duties of corrective justice.

The second difference noted above concerned what kind of initial setback an interest had to undergo in order to constitute a breach of duty in the first place. In response to this, I note that even if it were true that some other test of harming were *also* relevant to showing that an initial setback to a protected interest constituted a breach of duty not to harm (commonly understood), that does not alter the fact that, for the purposes of determining how much wrongful harm there is, the only relevant test is the counterfactual comparative one. That is, once we know that there is a wrong (whatever tests are required to show that there is), the counterfactual comparative test alone is needed to determine how much harm relevant to corrective justice ensues.

Liability: strict, fault and absolute

Legal thinkers sometimes distinguish three standards of liability: fault, standard and absolute. I suppose that there are plausible equivalents with respect to moral duties. Fault liability requires that an agent who causes wrongful harm be at fault, that is, that the injurer is culpable for the duty breach that causes harm. Since culpability entails reasonable foreseeability, the fault standard also presupposes that the harm for which one is liable is reasonably foreseeable. Following Stephen Perry, I understand strict liability to require foreseeability of the harm caused, but not fault. Finally, absolute liability

(expectation or reliance) interests (in cases of breach of contract) than they would to support compensation to repair compensable injuries recognized by tort law. Indeed, this is consistent with holding that compensating (to address harm) in contract law is justified on other grounds entirely.

requires neither foreseeability nor fault, only that the agent causes the harm¹¹⁵. Note that absolute liability requires that a voluntary action of the agent cause the harm¹¹⁶. If Bob is picked up by an unforeseeable freak wind gust and hurled into Gary, breaking Gary's arm, then Bob does not meet the standard of absolute liability even though, in one intelligible sense, Bob caused Gary harm. In this last case, Bob does not cause Gary's harm qua agent, but rather qua physical object.

The conformity account does not, by itself, entail any particular view about which is the appropriate standard. Which standard applies depends rather on identifying the nature of the primary duty whose breach is the basis for the duties to compensate. Duties not to harm (protected interests in welfare) negligently, recklessly or intentionally are normally regarded as governed by a fault standard, while duties not to harm property interests are most often regarded as strict (but not absolute). I will assume that this is true of our moral duties.

The conformity account suggests that promise-based duties are subject to absolute liability, with rare exceptions. If I promise to wash your car by Saturday but fail to do so, then I ought to wash your car on Saturday, or sometime soon afterwards. This is true even if I was not at fault for failing to wash it on Sunday—if, for example, I had to spend Saturday in hospital with a case of food poisoning. Indeed, it seems that even if I could not reasonably foresee that I would cause the resultant harm (that is, that I could not reasonably foresee that my failure to comply with my duty would occur, thereby causing

¹¹⁵ See Stephen Perry, "Libertarianism, Entitlement and Responsibility," *Philosophy and Public Affairs*, (1995): 357. Perry notes that 'strict liability' is an ambiguous term in the context of tort law, sometimes also being used to refer to what he calls absolute liability as I (and he) define it above.

¹¹⁶ This condition would also be met if P is not at present capable of functioning as an agent because some prior action (or omission) or P reasonably foreseeably led P to be in such a state.

you wrongful harm), the duty still applies to me. In many circumstances, I suppose that I cannot reasonably foresee that I will get food poisoning. This suggests that the standard of liability may be absolute¹¹⁷. The same is also true of duties to compensate. To see this consider that, as the discussion in the last chapter suggested, failure to conform with the primary duty automatically generates such duties, and unforeseeable and nonculpable inability to compensate does not prevent a failure to compensate from constituting a breach of the duty¹¹⁸.

Compensation:

Naturally associated with the counterfactual comparative notion of harming is a particular conception of compensation. In its ideal form, the conception approximates, but is not equivalent to, that which is commonly appealed to in legal contexts: that compensation aims to place the victim in as good as position as she would have enjoyed but for the wrong. Or as Robert Nozick famously put it ““Something fully compensates a person for a loss if and only if it makes him no worse off than he otherwise would have been; it compensates person X for person 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””¹¹⁹

My view diverges from this in various ways. First, compensation aims to address wrongful setbacks to particular protected interests. A counterfactual comparative setback to an interest is wrongful if it is both the actual and proximate cause of the setback and so

¹¹⁸ That does not entail that the failure to pay is always the wrong thing to do (that is, a morally impermissible omission). A breach of duty (a wrong) may be the all-things-considered right thing to do, as necessity cases exemplify.

¹¹⁹ Nozick, *Anarchy, State and Utopia*, p. 57.

long as the victim has taken reasonable steps to mitigate the setback. If the final two conditions are met, then compensation would ideally aim to restore the interest to the level it would have been but for the wrong. If the wrong is not the proximate cause of some of this setback, then that proportion of the setback is not to be addressed. Or if the victim has failed to take reasonable steps to mitigate the harm then that too must be discounted.

Second, Nozick's characterization does not make clear whether compensation aims to address momentary harm or episodic harm. As I argued in chapter 1, the counterfactual comparative notion of harming can be understood either in terms of momentary harm or episodic harm. When we say that P's wrong causes Q to suffer harm (in a counterfactual comparative sense) we might mean that, at some particular moment of time, t_n , Q is worse off¹²⁰ than he would have been had P acted in minimal compliance with his duty. Or we might mean that P's wrong causes Q to be suffer momentary harms over the course of a particular temporal episode. If Q is now no longer in a state of (momentary) wrongful harm, then that episode is in the past. If Q remains now in a state of (momentary) wrongful harm, then the episode is ongoing.

Related to these senses of harming (harming_M and harming_E) are distinct senses of suffering harm. Q suffers harm_M when she is worse off at t_n in virtue of that wrong. Q suffers harm_E when Q is subject to an ongoing episode of harm in virtue of that wrong. Q suffered harm_E when she was subject to a completed episode of harm in virtue of that

¹²⁰ For simplicity's sake I suppose that Q is worse off overall because one or more of Q's protected interests has been setback by the wrong. This condition will usually be met since setbacks to welfare or property interests generally entail setbacks to overall self-interest. But this will not always be true.

wrong. I also argued that we might be able to make sense of the idea that an episode of harm in the past is ongoing since it plausibly continues to affect the overall wellbeing of the Q's life.

Associated with these ideas are distinct ways of understanding compensation qua harm repair. If Q is subject to momentary wrongful harm, then harm repair will ideally require making it true that Q is no longer in a state of momentary wrongful harm. And that will require quantifying how much momentary harm she suffers and raising her position accordingly.¹²¹

If Q is subject to momentary wrongful harm then she is likely in the midst of being subject to an episode of wrongful harm. Compensating Q for the momentary wrongful harm will – if successful- bring that episode of wrongful harm to a close. But that would still leave the episode of wrongful harm itself uncompensated for. That is, bringing the episode to an end does not address the fact that she has suffered an episode in which she was- over that period of time- worse off than she should have been. Compensating Q for this episodic harm would require something else, such as providing some counterbalancing benefit in virtue of which the welfare over her life so far is the same as it would have been had she not suffered that episodic harm in the past. However, since the idea of compensating for episodic harm is controversial, I limit my discussion from now on to compensation for momentary harm.

¹²¹ As I note above that may not involve placing her in the position she would have enjoyed had the injurer minimally complied with his duties since her position may reflect more than wrongful harm- it may reflect harms not proximately caused by the wrong, or harms that she caused herself that would otherwise not have occurred.

Compensation under uncertainty

The passage of time often makes calculating what compensation would be required subject to uncertainty. The longer we move from the initial wrong, the harder it often is to know whether an agent is still subject to wrongful harm and, even if we know that she is subject to some wrongful harm, it becomes harder to know how much she is subject to. This is most clearly true in the case of financial setbacks. If you steal \$500 from me now, it is very difficult to know what impact this has one year down the road. But it is also true of setbacks to health. If you wrongfully break my arm now and the arm eventually heals, we cannot be sure that I would not have broken it accidentally at some point or suffered some other setback that otherwise would not have befallen me.

Where such uncertainty exists, I propose the following strategy. Once we get to the point at which we cease to be reasonably sure about the effects appropriately ascribed to original wrong, we consolidate the loss into a settled debt. By doing this, we set the baseline at some earlier position the victim would have been in but for the wrong, possibly adding interest on the debt as time passes. Notice, then, that on this approach, compensation at t_3 for a wrong at t_1 will often involve placing the victim in the position she would have been in at some intervening time, t_2 .

This approach can be used to explain and defend Schaffer's approach to quantifying the harm caused by a duty breach. Recall that, on Schaffer's view of causation, we need to identify the causal contrast, c' (the alternative to the actual cause, c) in virtue of which we determine the effectual contrast, e' (the alternative to the actual effect, e). He writes:

... what counts as the alternative outcome must be assessed and valued at the time of the actual outcome, not later. A useful illustration of this principle may be seen in the case of *The London Corporation*. In *London Corp.*, two steamships—the *Benguela* and the *London Corporation*—collided, damaging the *Benguela*. It was agreed that both parties shared blame. The owners of the *Benguela* (the plaintiffs) sued for damages amounting to the cost of repairs, while the owners of the *London Corporation* (the defendants) argued that no such loss was suffered since no repairs were made—the owners of the *Benguela* in fact went on to sell their ship for scrap in an unrepaired state.

The finding in *London Corp.* was for the plaintiff, for the cost of repairs. The fact that the *Benguela* was later scrapped was considered an accidental circumstance not to be factored into the harm. In the contrastive framework, this amounts to the idea that the effect e is the *Benguela* being in the damaged state at the time just after the collision, while e' is the *Benguela* maintaining its previous undamaged state *at that time*. In quantifying liability, we assign values to the e and e' states and compare. We do not look at accidental circumstances beyond this time, such as whether or not any repairs were carried out later.¹²²

Notice that from this description it is unclear whether the court was applying a test of restoring the plaintiff to the *status quo ante* or of restoring the plaintiff to the position she would have enjoyed just after the collision had she not been subject to the wrong. For practical purposes this makes no difference since we assume that, but for the wrongful collision, the ship would have been undamaged at the moment just after the collision (and it was undamaged just beforehand as well).

On my interpretation, the cost of repairs provides an appropriate measure of compensation for the momentary harm that the plaintiff suffers just after the collision. From that time on, however, there is increasing uncertainty what further wrongful harms are caused by the collision. In the light of this uncertainty, it is reasonable to fix the debt according to the momentary wrongful harm suffered just after the collision. The

¹²² Schaffer, “Contrastive Causation in the Law,” p. 278.

defendant, then, continues to owe the cost of repairs until such time as those costs are paid (either by the defendant or on its behalf).

Rodney Roberts' Objections to the Counterfactual Conception of Compensation:

Rodney Roberts offers various objections to the counterfactual conception of compensation.¹²³ My conception of compensation is not identical to the counterfactual one he criticizes but it is close enough that his criticisms could be applied to my own view. And since he, like many others, regard this conception as providing an obstacle to the justification of compensation claims for historical injustices, I think it important to explain why his objections do not succeed.

Firstly, Roberts objects that there is no positive argument in favor of the counterfactual conception of compensation (CCC). He considers the possible response that the argument is based on an analogy with a legal conception of compensation, but argues that the legal conception of 'making someone whole' does not necessarily involve a counterfactual conception itself.

There is, however, a distinct and persuasive positive argument for the counterfactual conception of compensation (or a closely related conception), which is that it is directly implied by the counterfactual comparative conception of suffering harm. Corrective justice aims to repair wrongful harm. Since wrongful (momentary) harm is to be understood in these terms, then removing that (momentary) harm would- once suitable

¹²³ Rodney Roberts "The Counterfactual Conception of Compensation," *Metaphilosophy* 37 (2006): 414-428.

caveats have been included- involve placing the victim's harmed interest(s) in the position it (she) would have been in given the relevant alternative to the injurer's committing the wrong. The positive argument in favor of CCC then depends on the argument in favor of the adopting of the counterfactual comparative notion of harm as the appropriate test for wrongful harm in the context of corrective justice. I defend the use of that conception against some possible objections in the following section.

Second, Roberts objects that the CCC has absurd implications. As an example, he offers Jules Coleman's case of the taxi driver whose reckless driving leads to an automobile accident that breaks my leg but also thereby prevents me from taking a plane soon afterwards that crashes¹²⁴. Roberts point out that, according to the CCC, the taxi driver owes me nothing by way of compensation: had he not driven recklessly I would be dead, hence I am not worse off than I would be otherwise have been. This, Roberts thinks, is absurd.

In my view, however, it is not absurd to think that the driver owes me no compensation in this situation, so long that is, that we knew – or were reasonably certain- that this counterfactual was true (I would have died but for the auto accident). If I was reasonably certain that the plane would have crashed, then it is reasonable to think that, after the time at which the crash has taken place, my welfare interest is no longer subject to (momentary) wrongful harm: my welfare interest is better off if I have a broken leg (I suppose) than if I am no longer living (or so I will suppose here).

¹²⁴ Roberts, "Counterfactual Conception," 418, citing Coleman, *Risks and Wrongs*, 323.

Roberts' intuition that this is absurd itself likely depends on the fact that he accepts a distinct account of the relevant notion of harm. If, for example, one regards wrongful harm as captured by a test appealing to a temporal comparative conception, one will regard compensation as still being owed. On that conception, the wrongful harm would be measured against a baseline of how well off my welfare interest (or my leg) was just prior to the wrong (the reckless driving). Compensation, on this conception, would require placing my interest in the condition it was just prior to the crash—that is, repairing my broken leg or paying associated costs.¹²⁵ Hence, to resolve the issue we need to evaluate which of the conceptions of harm is appropriate in this context. I offer a reason to reject the temporal comparative view of harm below.

Even if we accept the counterfactual comparative conception of harm as the *ideal* basis on which to determine compensation, various practical difficulties (neatly set aside by the thought experiment) might provide grounds for thinking that the taxi driver has a duty to compensate me nonetheless. For example, in real life it would not be certain that I would have died in the plane crash had the taxi not been in an accident. Perhaps I would have missed the flight anyway. Or even if I had taken the flight, it may not even be certain that it would have crashed had I been on it (perhaps my extra weight would prevent whatever in fact causes the crash from occurring). Such doubts might block the taxi driver from raising such possibilities against a (moral) claim that he owes compensation.

¹²⁵ This conception is captured by the idea of restoring a person's position to the *status quo ante*.

Indeed, as I argued in the last section, the uncertainty involved often makes it reasonable to fix the debt according to the actual outcome of the crash, ignoring ‘accidental circumstances’ that take place later on. The debt is fixed by measuring the momentary harm just after the auto crash according to the counterfactual comparative conception of harming: we suppose that had the taxi not crashed (had the driver driven properly), then (at the moment) just after the collision I would suffer no injuries. We calculate the loss by ascribing a value to the actual effect at that time (I have a broken leg) with the effectual contrast at that time (I am alive with no broken leg). From then on the debt is fixed and the taxi driver owes me that compensation regardless of what happens later on¹²⁶.

But let us focus on the ideal form of harm repair and so grant that no compensation is owed in this case. The apparent absurdity here may arise from conflating the idea that the taxi driver’s reckless act was somehow rendered laudable by this accidental benefit with the idea that the benefit renders obsolete the need to pay compensation. Indeed, Roberts writes:

The CCC may also raise a more general moral concern in such cases. One consequence is that we might end up giving the taxi driver a moral status similar to that of someone who (for example) has rescued me from a burning building. While I am clearly better off with the broken leg than I would have been had I died in the plane crash, there is also a sense in which the taxi driver saved my life. Granted, this

¹²⁶ A distinct possible argument may be derived from the following line of thought. It may matter *when* the crash happens. Suppose that the crash happens after I have been discharged from hospital. At the moment I am discharged, suppose I have medical bills worth \$X. At that time, it seems clear that the taxi driver owes me \$X: I have incurred those medical bills because of his reckless driving causing my leg to be broken. If he fails to pay me, then there is a new wrong (or, more accurately, a continued breach of the duty not to harm me recklessly now transformed into a duty to compensate). If the driver owed me \$X at that time, it is hard to see how the future accidental benefit I enjoy (after the plane has crashed) annuls this debt. If I loan you \$5 but my lacking that \$5 somehow saves my life (perhaps I am unable to buy and hence eat a botulism infected tin of food), I take it that you cannot now appeal to that fact in order to claim that your debt has been annulled.

was purely accidental, and it is far from how we think of supererogatory acts like rescuing someone from a burning building. Still, but for the driver's actions I would be dead. So, in addition to the absurd idea that the taxi driver has already fully compensated me for my broken leg by making me miss my flight, on this account I could end up with a moral debt of something like gratitude to the driver.¹²⁷

First, the analogy with rescue from a burning building is a poor one. In that case there appears to be *no* harm the rescuer does to the rescued person *at any time* (whereas the taxi driver does cause me (momentary) harm, at least prior to the plane crash. A closer (but still not very close) analogy would be Joel Feinberg's river rescue case, where someone is trapped underwater and a passerby breaks his arm in order to prevent him from drowning¹²⁸.

Although it is not clear what Roberts means by the 'moral status of the taxi driver', I assume that he is referring to the possible culpability (or laudability) of the driver. But if that is the issue, then there is a clear difference between the river rescuer (or building rescuer) and the driver, one which explains why the former is laudable and the latter is culpable. The difference is that the rescuer intends to save my life (and this motivates an action that in fact saves my life) whereas the taxi driver had no such intention (even though he accidentally saves my life).

This difference plausibly explains why there is no debt of gratitude to the driver. Gratitude is the appropriate attitude to take toward persons who perform laudable actions that attempt to further our interest.¹²⁹ The fact that I have reason to be grateful that some

¹²⁷ Roberts, "Counterfactual Conception of Compensation," p. 418.

¹²⁸ See Feinberg, *Freedom and Fulfillment*.

¹²⁹ It may even be appropriate under some circumstances where, intending to benefit, the person accidentally sets back an interest, so long as the setback was unforeseeable.

event took place (that the taxi driver crashed his car and so I did not die) does not entail that I have reason to be grateful to the person who accidentally made it happen.

To claim that the taxi driver owes me no compensation does not entail that the taxi driver did not wrong me, or that he did not act culpably in doing so. The taxi driver breached a duty of care, even though (in the end) this duty breach led to a great net benefit for me. Furthermore, the taxi driver's breach of his duty of care toward me was not excused: he cannot retrospectively claim as a defense that, but for his action, I would otherwise have died. As such, the taxi driver may be morally deserving of punishment or whatever measures are deemed appropriate to address the fact that he culpably acted in a way that invades my right (not to be subject to reckless behavior). But addressing the fact that a person culpably wronged me and addressing the fact that she caused me wrongful harm are distinct moral concerns; on my view, only the latter is the direct concern of corrective justice¹³⁰.

Defending the Counterfactual Comparative Conception of Harm:

I adopt a particular interpretation of the counterfactual comparative conception of harm as of primary importance in the context of corrective justice. Two possible rival interpretations are what Judith Jarvis Thomson refers to as a 'non-comparative account'

¹³⁰ This is not to deny that repairing wrongful harm can (sometimes) play an indirect role in addressing culpable wrongs. For example, as Seth Lazar argues, it may be that, where the injurer can afford to compensate a victim for wrongful harm, his failing to do so would preclude his ability to make a full apology for his culpable invasion of the victim's right. On this account, however, if there is no wrongful harm in the first place, then obviously this point would not apply. See Seth Lazar, 'Corrective Justice and the Possibility of Rectification,' *Ethical Theory and Moral Practice*, (2008) 11: 355-368.

and a temporal comparative account¹³¹. Supposing that ‘to harm’ means ‘to cause to suffer harm’ she characterizes these accounts as follows:

Temporal Comparative Account of Suffering a Harm:

A's suffering a harm is A's being in a state S such that: A is worse off in a way for being in s than he was just before he came to be in s.

Temporal Comparative Account of Harming:

B harms A just in case B causes A to be in a state such that: A is worse off in a way for being in s than he was just before he came to be in s.

Non-comparative account of suffering a harm:

A's suffering a harm is A's being in a state s such that: s is non-comparatively bad for A to be in.

Non-comparative account of Harming:

B harms A just in case B causes A to be in a state such that: s is non-comparatively bad for A to be in.

Although those who defend the non-comparative account differ in how they understand non-comparative harms¹³², some typical examples of non-comparatively bad states include pain, blindness, broken limbs and so on.

On the basis of various cases Thomson argues in favor of the counterfactual comparative account of harming over the rival accounts. One such case considers a

¹³¹ Thomson, “More on the Metaphysics of Harm.”

¹³² Defenders of this idea include Elizabeth Harman in “Harm and Causing Harm,” and “Can We Harm and Benefit in Creating,” and Seana Shiffrin, “Wrongful life, Procreative Responsibility, and the Significance of Harm” Elizabeth Harman, “Can we Harm and Benefit in Creating,” *Philosophical Perspectives* 18 (2004): 89-113.

brilliant scientist whose intellect is rendered average by a stroke. Intuitively, it seems that the stroke harms the scientist even though she is not made non-comparatively badly off.

While the counterfactual comparative and temporal comparative approaches appropriately characterize the stroke as harming the scientist, the non-comparative approach does not. After all, being of average intelligence is not a non-comparative harm.

In another case, an eye doctor competently performs eye surgery that improves a patient's vision from blindness to dim-sightedness. Although this causes the patient to be in a non-comparatively bad state (dim-sightedness), intuitively it is clear that the doctor does not harm the patient¹³³. Again, this suggests a problem for the non-comparative approach that the others do not face.

The fact that the counterfactual comparative approach is preferable to the temporal comparative is suggested by the following types of case. Suppose that Tess has normal vision. Suppose further that Barry prevents Tess from taking a pill that would improve her vision. Intuitively, Barry harms Tess. The counterfactual comparative account can accommodate this: Barry's causes Tess vision to be worse than it would have been had Barry not prevented Tess from taking the pill. The temporal comparative account, however, does not classify what Barry does as harming Tess, however, since Tess is not worse off just after Barry's wrong than she was just before it.

Examples such as these are, in my view, persuasive in suggesting that the counterfactual comparative conception is appropriate when it comes to evaluating the

¹³³ We suppose here that the doctor has not failed in his duty in some way. For example, if he was incompetent and if, had he acted competently, the patient would have had her sight restored, then this would intuitively count as a case of the doctor harming the patient.

(negative) difference that acts or events make to persons. This, then, is the natural conception for corrective justice to adopt.

Thomson's discussion assumes that there is only one conception of harm.. But it is not clear why we should accept that idea. Joel Feinberg, who provided early formulations of these three rival conceptions¹³⁴, regarded the non-comparative and the counterfactual comparative accounts as capturing two distinct senses of harm. In this, I follow Feinberg¹³⁵.

However, while the non-comparative approach identifies an important sense of suffering harm (and therefore a derivative sense of harming), it is not the appropriate account to adopt in the context of corrective justice. This point is further supported by the fact that the non-comparative account of harming often provides an intuitively wrong answer when it comes to quantifying the relevant harm. Suppose, for example, that I have unusually good eyesight. You throw acid in my eyes. As a result of this I am rendered dim-sighted. The intuitively correct way to quantify the initial harm is to focus on the difference between how well off my sight would have been had you minimally complied with your duty and how well off I am after the duty breach (in both cases focusing on a time just after the breach): the relevant difference is between my having unusually good eyesight and my being dim-sighted. If possible, then, you have a duty to compensate me by placing me in a position where I have unusually good eyesight.

¹³⁴ Feinberg introduces the counterfactual test and the idea that an interest below the centerline on an interest graph is badly off in a non-comparative sense in chapter 1 of *Harm to Others*. He alludes to a temporal comparative account in chapter 4 of that work, although he explicitly presents that criterion, as well as an updated version of the counterfactual comparative on in "Wrongful life and the Counterfactual Element in Harming."

¹³⁵ As I argue above, non-comparative harm may be indirectly relevant to corrective justice.

The non-comparative approach, however, would not support this natural approach. On the non-comparative view, I would appear only able to demand that you repair my sight so that it is can no longer in a non-comparatively bad state (for example, that I have normal vision). It can provide no rationale for repair beyond that threshold. That strikes me as absurd.

Given this, it seems that non-comparative accounts of harming are inappropriately adopted in the context of corrective justice. That is unfortunate, since it would preclude some satisfyingly simple solutions to the non-identity problem in the historical context. For example, Seana Shiffrin¹³⁶, an advocate of a non-comparative account of harming, argues that historical injustices harm currently existing persons if they cause those persons to be non-comparatively badly off. No comparison with how those persons would have fared but for the injustice needs to be made here and so the nonidentity worry does not apply¹³⁷.

In the final section I respond to some criticisms that Shiffrin makes of the counterfactual comparative account of harming.¹³⁸

Shiffrin's objections

Shiffrin presents two main objections to the counterfactual comparative account of harm. To clarify: my goal here is to defend my own use of this account in the test of wrongful harm. However, since she presents her objections as aimed at comparative

¹³⁶ Seanna Shiffrin, "Reparations for US Slavery and Justice Over Time."

¹³⁷ On Schaffer's account of causation, one might infer that the historical injustice rather than some other not unjust act causes the person to be noncomparatively badly off rather than that person not to exist. But on the noncomparative approach, all that we need focus on is the effect and not the effectual contrast.

¹³⁸ Seana Shiffrin, "Wrongful Life."

accounts in general, my responses suggest that her objections fail. She describes her first objection as follows:

First, it [the comparative model] fails to accommodate, much less explain, some deep asymmetries between benefits and harms. For instance, we often consider failing to be benefited as morally and significantly less serious than both being harmed *and* not being saved from harm. This asymmetry is difficult to explain on a comparative model. For, within it, harming and failing to prevent harm do not *look* so different from failing to benefit. Variants that identify harm and benefit in terms of counterfactual comparison render them indistinguishable.¹³⁹

Shiffrin's description of the counterfactual model of harms and benefits is derived from her reading of Feinberg:

On Feinberg's natural and attractive interpretation of this symmetrical picture, harms involve the setback of one's interests, whereas benefits involve the advancement of one's interests along a sliding scale of promotion and decline. To evaluate whether an event has benefited or harmed a person, one compares, with respect to the fulfillment of his interests, either his beginning and his end points (historical models), or his end point and where he would have been otherwise (counterfactual models). If he has ascended the scale (either relative to his beginning point or alternative position), then he has been benefitted. If he moves down, then he has been harmed.¹⁴⁰

She claims that both harms and failures to prevent harms are indistinguishable from failures to benefit. How does the comparative model she describes imply that harms (and failures to prevent harms) are indistinguishable from failures to benefit? An example might help clarify. Suppose that P could easily save Q from drowning, but does not save Q and so Q drowns. We might say that P has failed to benefit Q. The reasoning for this is as follows. If P had saved Q this would have benefited Q: P's saving Q is evaluated by comparing how well off Q is (alive) with how well off he would be had P not saved Q (dead); Q's interest would have ascended the scale relative to the alternate position (his

¹³⁹ Shiffrin, "Wrongful Life," 121.

¹⁴⁰ Shiffrin, "Wrongful Life," 121.

interest is better off alive than dead, and so is higher on the scale). But P does not save Q, hence P fails to benefit Q.

On the other hand, we might also say that P harms Q. To evaluate P's not saving Q, we compare how well off Q is in that case (dead) with how well off Q would have been had P saved Q (alive). In this case, Q has moved down the scale relative to the alternative position (his interest is worse off dead than it is alive, and so lower on the scale). Notice also that we can understand P's not saving Q as a failure to prevent harm: the failure to prevent Q from harm caused by Q's drowning. In this case, then, the model suggests that P's not saving Q can be described either as failing to benefit Q, harming Q, or failing to prevent harm to Q. Harms, and failures to prevent harms thus appear indistinguishable from failures to benefit.

Unfortunately, Shiffrin's discussion overlooks Feinberg's long discussion of benefits and harms in chapter 4 of *Harm to Others* (her summary of the model she attributes to Feinberg refers only to chapter 1 of that work). In that chapter, Feinberg examines this very case, in the process presenting a more complicated picture of harms and benefits than Shiffrin describes. Feinberg points out various senses that provide parallel analyses of harm and benefit and suggests that asymmetries arise in cases involving duties. For my purposes here, the important point is that in order to compare harms and benefits we need to be clear that, when we focus on a case, we have in mind equivalent senses of harm and benefit. In particular, we have to be sure that the

baseline¹⁴¹ that is being appealed to in each case is the same. My concern here is to show that in the sense relevant to my test for (wrongful) harm, harm is in fact distinguishable from failure to benefit.

On my test for wrongful harm the baseline from which to judge whether an act or omission is a harm or a benefit depends on the right and duty of the receiver and doer. The relevant sense of harm here requires that Q's interest must be lower relative to a (potentially moving) baseline set by P's duties towards Q (that is, Q must be made worse off than he would have been had P minimally complied with his duty toward Q). The corresponding sense of benefit would require that Q be raised above the baseline set by P's duties towards Q (that is, Q must be made better off than he would have been had P complied with his duty toward Q)¹⁴².

An example may help. Suppose that Bob has a duty to pay me \$100 now. If Bob fails to give me \$100 then he harms me since, had he acted in minimal compliance with his duty, I would have \$100 more than I end up with (I am below the baseline). If Bob gives me \$100 he neither harms nor benefits me since I would end up at the relevant baseline (since in this case he minimally complies with his duty I am no better or worse off than that baseline). If Bob gives me \$200 then he benefits me since, had he acted in minimal compliance with the baseline, I would have \$100 less than I in fact possess.

¹⁴¹ By baseline, I refer to whatever line on the interest graph represents what would have happened to an interest had the relevant alternative to the actual act (or omission) taken place.

¹⁴² This contrast is close to, but not identical with, one Feinberg draws between what he calls gratuitous benefits and harms. Feinberg proposes a gift as an example of a gratuitous benefit and a theft as an example of a gratuitous harm. The fact that benefits in this sense are supererogatory and harms are wrongful is brought out by these examples. Given this association, my objection the Shiffrin here also shows how her reading of Feinberg goes wrong. See *Harm to Others* p. 141.

Consider this in the context of the easy rescue case: P fails to rescue Q when P easily could do so. Suppose first that P has no duty to rescue Q. In my sense of (wrongful) harming, P does *not* harm Q: P minimally complies with his duty toward Q and so Q is no lower than the baseline set by that P's minimal compliance with that duty. On the other hand, P does fail to benefit Q. P fails to save Q. Had P saved Q, then P would have benefited Q: Q would have been better off had he been saved than had P minimally complied with this duty (that is, done nothing).

Suppose on the other hand that P does in fact have a duty to rescue Q. In this case, if P fails to rescue Q, then P does (wrongfully) harm Q: Q is worse off than he would have been had P minimally complied with his duty. On the other hand, this failure to rescue Q is not, in this context, a failure to benefit Q. After all, had P rescued Q, this would *not* be a case of P benefitting Q: Q would be no better off than he would have been had P minimally complied with his duty. P's saving Q here neither harms nor benefits Q—it merely leaves Q at the relevant baseline (set by the duty).

To recap: in the first case, P does not harm Q, but P does fail to benefit Q. In the second case, P does harm Q, but P does not fail to benefit Q. This shows that, at least in some cases, the comparative model does not entail that a harm is always equivalent to a failure to benefit. In other words, it shows that Shiffrin is wrong to claim that “Variants that identify harm and benefit in terms of counterfactual comparison render them indistinguishable.”

This discussion suggests that harms and failures to benefit are, in some cases at least, distinguishable in the sense that one does not always entail the other (that is, a harm

is not always equivalent to a failure to benefit). Given this, it is hard to see how, in these cases, we might understand Shiffrin's idea that the comparative model has a hard time distinguishing the *moral significance* of harms from failures to benefit. After all, if harms and failures to benefit are not equivalent, what cases are we supposed to compare with respect to their moral significance?

One possibility would be to compare cases in which, as a result of a failure to benefit or a harm the person ends up in the same condition. For example, we might compare two scenarios in which Q ends up dead because P does not rescue Q. In one scenario, P has a duty to rescue Q and so P harms Q. In the other, P has no duty to rescue Q, and so P merely fails to benefit Q. But if we compare these cases then it seems that there is an obvious way to distinguish the moral significance of P's behavior in each case. Where P harms Q, P's act breached a duty toward Q. Where P merely fails to benefit Q, P's omission breaches no duty toward Q. We can therefore explain in this case (on this interpretation of the model) the intuitively attractive idea that harming is morally more serious than failing to benefit¹⁴³.

Finally, I briefly address Shiffrin's second objection:

Second, even if the beginning points (or the available alternatives) are morally arbitrary and not deserved, such views nonetheless count as a person's being relegated to a particular position by an event as a harm but count that event's depositing another person in that exact same position as a benefit. Suppose A could have been or was at a higher status, $x + 2$, and is lowered to x , whereas B could have been or was at a lower status, $x - 2$, and is elevated to x . On comparative accounts, A will have been harmed and B benefited, even though they are identically situated. The problem becomes more pronounced if A moves from $x + 2$ to $x + 1$, but B moves from $x - 4$ to $x - 3$. On comparative accounts, A is harmed and B is benefited, even though A is better off, all-

¹⁴³ For obvious reasons, this explanation does not generalize. But I am only concerned with my use of the account, not defending a concern with the counterfactual comparative view in all contexts.

things-considered. If this were so, why should harm, per se, in this sense, be a special subject of moral concern and have greater priority than failures to be benefited?¹⁴⁴

As she rightly notes, cases such as these may arise on the comparative model, including on my variant. That is, someone who suffers wrongful harm might nonetheless be in absolute terms better off than someone else who has been benefitted (in the corresponding sense). Indeed, although she does not make the point explicitly, she seems to regard that possibility itself as a reason to reject the counterfactual comparative model. But this poses no problem for the model in the context of corrective justice. After all, on corrective justice, the rationale for repairing harm does not depend on how serious the resulting harm is in absolute terms, but rather only requires that (comparative) harm results from a wrong.

Here, however, she uses the point to suggest that the comparative model cannot explain the greater moral significance we ascribe to harms than to failures to be benefited. At least in the case of my own test, the answer is straightforward. Recall that the relevant comparison on my approach is between wrongful harming on the one hand and benefiting in the sense of being made better off than one would have been had the actor merely minimally complied with his duty. The reason to regard the former to be of greater moral significance than the latter is obvious in this case: the harms are wrongful whereas the benefits are supererogatory.

¹⁴⁴ Shiffrin, "Wrongful life," 122.

Conclusion:

In this chapter I have analyzed the principle of corrective justice. I argued that the duty not to cause wrongful harm is comprised of two duties: a duty¹ not to cause harm by breach of a duty². I suggested that the duty² may be a duty not to act negligently, recklessly, or intending harm, or that it could also involve a duty not to breach a promise or a duty to compensate.

Of particular importance, I argued that in the context of corrective justice, harm is best understood in counterfactual comparative terms. In defense of this view, I responded to criticisms by Rodney Roberts and Seanna Shiffrin¹⁴⁵. The relevance of the counterfactual comparative notion of harm to corrective justice suggests that a satisfactory account of reparations for historical injustice that regards reparations as redressing wrongful harms suffered by currently living persons *must* adopt this conception of harm. Accordingly, in the next chapter I consider a promising harm-based argument that does adopt the counterfactual comparative conception.

¹⁴⁵ Seana Shiffrin has addressed this topic again in a very recent paper, "Harm and Its Moral Significance," *Legal Theory*, September 2012. Alas, I am unable to respond to those arguments here.

Chapter 3: Reflections on The Chain-Harm Argument

Introduction

In the mid 2000s George Sher and Bernard Boxill¹⁴⁶ separately published similar arguments aimed at showing that descendants of the original victims of an historical injustice might be owed compensation for harms inflicted within the lifetime of those descendants. Rather than claiming that the historical injustice itself directly harmed descendants of the injustice, the argument proposes that each new generation suffers new and distinct yet related harms. The basic idea is as follows. Suppose the original victim of the historical injustice had a right to compensation, but was never compensated. The failure to compensate the original victim itself likely harmed the victim's child, since the parent was unable to bestow the resources on the child that she likely would have done had she been compensated. The victim's child, it is proposed, then has a distinct claim for compensation to repair the harm that she, the *child*, suffers in virtue of being worse off than she would have been had her parent been compensated. By the same mechanism, harms can be ascribed to each successive generation: failure to compensate the child grounds a new compensation claim for the grandchild and so on. I refer to his argument as the chain-harm argument.

After outlining the argument in more detail, I examine Andrew Cohen's critique¹⁴⁷. I argue that Cohen misinterprets the original argument and suggest that Cohen's 'fix' fails on its own terms. I then consider some further objections to the

¹⁴⁶ Bernard Boxill, "A Lockean Argument for Black Reparations" *Journal of Ethics* 7, 2003, 63-91. George Sher, "Transgenerational Compensation," *Philosophy and Public Affairs* 33: 181-200.

¹⁴⁷ Andrew Cohen, "Compensation for Historical Injustices: Completing the Boxill and Sher Argument," *Philosophy and Public Affairs*, 37 (2009): 81-102.

argument in the light of the principle of corrective justice, sketching some possible solutions to these problems.

*Background: why focus on the chain-harm argument?*¹⁴⁸

Both Boxill and Sher conceived the argument as a response to a version of the non-identity problem. The specific worry is that it appears not to be possible for injustices to harm someone whose very existence counterfactually depends on those injustices, that is, cases in which had the injustice not taken place this particular person would not now exist. As I described earlier, the problem relies on a counterfactual conception of harming, on which for an P's act (or omission) A to harm Q is for A to cause Q to be worse off than Q would have been but for the act (or omission)¹⁴⁹. If, as seems plausible in the context of historical injustices, the existence of the particular descendants of original victims of those injustice counterfactually depends on those injustices, then it cannot be the case that those injustices caused those persons to be worse off than they would have been but for those injustices.

The non-identity problem thus suggests that historical injustices themselves do not harm the current descendants of historical injustice, thus blocking potential claims for reparation qua compensation for harms suffered by descendants in virtue of such injustices. On the chain-harm argument, each harming act (or omission) takes place within the lifetime of the person harmed and hence the non-identity worry is avoided¹⁵⁰.

¹⁴⁸ This terminology is my own. I sometimes refer to it as Cohen does, that is, as the Boxill/Sher argument.

¹⁴⁹ This characterization is over-simplistic, but is sufficient for introductory purposes.

¹⁵⁰ In other words, they do not offer a solution to the non-identity problem; they argue that it does not apply in this context

As Boxill suggests¹⁵¹ when presenting his own (earlier published) version of the chain-harm argument, it would also allow us to address a problem particular to historical injustice contexts: even if could avoid the non-identity problem, there would still be a worry about attributing present harms to events two or more generations past. As some have proposed when considering black reparations, perhaps the harms of currently existing descendants of slaves ought to be attributed not to slavery itself but rather to subsequent injustices¹⁵². An advantage of the chain-harm argument is that it can plausibly be thought to address this worry: by proposing a mechanism by which harms are transmitted across the generations it directly addresses the challenge of relating a distant injustice to a contemporary injustice.

Boxill is also correct to point out another useful consequence of exploring this style of argument. In order to investigate the historical applicability of the chain-harm argument we would need to engage in a detailed historical investigation to flesh out the details. Such an investigation is potentially fruitful project in its own right (even if it is not one to which the philosopher is well-suited). First, it might help us understand better the impacts of the historical injustice upon subsequent generations, including the current one. Further, the undertaking of such an investigation itself (indeed the commitment to undertake such a project) would itself represent a significant acknowledgment that historical injustices are issues that are worthy of serious consideration (even if in the end it is determined that no further action should be taken).

¹⁵¹ Boxill, "A Lockean Argument," 85-87.

¹⁵² For example, see Boris Bittker 1973. *The Case For Black Reparations*, New York: Vintage Books; reprinted Boston: Beacon Press (2004), and Robert Fullinwider, "The Case for Reparations", in R. P. Salzberger (ed.), *Reparations for Slavery: A Reader*. Lanham: Roman and Littlefield (2004) 141-150.

Although Sher presents the argument as a technical solution to a non-identity problem, apparently thereby conceding that it was empirically implausible, it strikes me on the contrary as exactly the right kind of argument. We are concerned with how historical acts or omissions could be the basis for current harms. There are only two clear ways in which the an historical wrong (act or omission) could harm present persons: either it does so by way of affecting intermediary descendants or persons, or it does so in some way that skips over those intermediaries. The latter may (or could) occur in some cases. I address an example of that type, *The Risky Policy*, in chapter 4.

Most cases of historical injustice that are of contemporary concern are not (or not obviously) like this. It is not plausible to think that the institution of slavery somehow harms currently existing person via some mechanism that lay dormant until very recently. Indeed, if it could be shown that some intermediary generation was unharmed by slavery the appropriate conclusion to draw would seem to be that, if current descendants do suffer harms, this must be in virtue of something that took place subsequent to the unharmed intermediary generation. It would seem absurd, on the contrary, to invoke a generation skipping approach – as if, for example, slavery had implanted some dormant virus that could pass across the generations activating itself generations later.¹⁵³

¹⁵³ Having said that the following mechanism is at least possible. Suppose that former slaves pass on harmful character traits to their children (as Boxill suggests they might have). Notice that whether or not a character trait impacts wellbeing (i.e. whether one fares worse with that trait than with some other trait one might have had instead) is, to at least some extent, a function of what a particular society values. Given this, we can imagine that a trait that counts as a harmful condition to one generation (such that its being passed onto that generation counts as harming) might not count as a harmful condition to a later generation. Finally, we can imagine that, if social conditions change in the appropriate way again, that the trait once again constitutes a harmful condition. In that way, we see that it is conceivable that harms can skip generations

The argument has received quite a lot of attention¹⁵⁴. In one prominent contribution, Andrew Cohen claimed to identify a problem with the argument and offered his own fix. Although his discussion is flawed in various ways, identifying those flaws is useful for various reasons. It allows us to see more clearly what problems really do face the chain-harm argument. In particular, it helps us realize that in order to develop such an argument effectively we need to pay more attention to the notion of reparation upon which the argument depends.

Summary of the Chain-Harm Argument

Suppose that Xander has a duty to compensate Yogi for some prior harmful breach of Yogi's rights. That is, Xander owes compensation for harm he caused Yogi, harm caused by Xander's wrong against Yogi. Xander never pays Yogi, and this failure to compensate Yogi is a *new* wrong against Yogi. At some later time, Yogi has a child, Zena. At every moment after Zena comes into existence¹⁵⁵ Xander continues to have a duty to pay Yogi compensation, and further Xander's failure to do so breaches Yogi's rights.

Suppose now that, had Yogi been compensated at some time after Zena's conception, he would have used some of those extra resources on Zena and further that this would have led to an improvement in Zena's wellbeing. Given this, Xander's

¹⁵⁴ Ori Herstein, "Historical Injustice and the Non-Identity Problem," *Law and Philosophy*, 27 (2008): 505-530. Nanshon Perez, "On Compensation and Return: Can the 'Continuing Injustice Argument' for Compensating for Historical Injustices Justify Compensation for Such Injustices or the Return of Property," *Journal of Applied Philosophy* 28 (2011) 151-168. Andrew Cohen, "Compensation for Historical Injustices: Completing the Boxill and Sher Argument," *Philosophy and Public Affairs*, 37 (2009): 81-102.

¹⁵⁵ For simplicity's sake, I will suppose that persons come into existence at the moment of conception.

wrongful failure to compensate Yogi causes Zena to be worse off than she would have been had Yogi been compensated, that is it harms Zena. Xander, so the argument goes, now has a duty to compensate Zena for the harm he did Zena by his wrongful failure to compensate Yogi. Zena's claim against Xander is distinct from Yogi's claim against Xander: Zena has a claim for compensation to bring her up to the level of wellbeing she would have enjoyed had Yogi been compensated *after* her conception; Yogi has a claim for compensation for the original harm that was done (wrongfully) to Yogi prior to Zena's conception.

The same argument can be used to explain how a new compensation claim could arise in the next generation. Suppose that Xander fails to compensate Zena. That constitutes an ongoing wrong against Zena. Suppose that Zena has a child, Achilles, and that, had Zena been compensated after Achilles comes into existence, Achilles would have been better off than he in fact turns out to be. Achilles then has a new claim against Xander for the harm that Xander does Achilles, a harm caused by Xander's wrongful failure to compensate Zena.

The argument claims that Xander has a duty to compensate Zena in virtue of Xander's breach of Yogi's rights causing harm to Zena. The argument does not claim (though it might be consistent with the idea) that Xander's harming Zena breaches any right of Zena's. All that is *clearly* required, on the presupposed conception of compensation, is that the harm is caused by a wrong to someone, though not necessarily the victim of harm herself. This step in the argument is a controversial one and will be

explored in detail below. For now, however, it is important to notice that both Boxill and Sher present conceptions of reparation that are consistent with these facts.

Boxill briefly sketches a view of reparation he finds in even briefer comments from John Locke's *Second Treatment of Government*. As he writes:

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."¹⁵⁶

A transgressor, on this view, is one who breaches a right of someone or other. As the passage makes clear, a person who suffers harm as a result of this right-invasion can be owed compensation even if that person was not the subject of the harm-causing right's invasion.

Sher, on the other hand, appeals to his slightly amended version of Robert Nozick's principle of compensation:

Something fully compensates a person for a loss if and only if it makes him no worse off than he otherwise would have been; it compensates person X for person Y's *wrongful* 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.¹⁵⁷

Unlike Boxill, Sher doesn't explicitly state that Y's wrongful action need not invade a right of X in order that Y owe X compensation, but nothing in this passage rules

¹⁵⁶ Boxill, "A Lockean Argument," 65.

¹⁵⁷ Sher, "Transgenerational Compensation," 182. The amendment here involves Sher's adding the word 'wrongful' to Nozick's principle.

out that possibility. Indeed, Nozick's discussions of compensation and justice in rectification suggest that he regarded ideal rectification as requiring that all persons affected by an unjust action be placed where they would have been but for that act (i.e. be compensated¹⁵⁸). Given this, in order to determine if a person is due compensation for an unjust act (a breach of property rights) one need not know if P suffered an invasion of her property rights; one would only need to know that there was an unjust invasion of someone's property rights (whether P's or someone else's) and that P was worse off than she would have been but for that unjust invasion. Furthermore, given how explicit Sher is that the child of an uncompensated parent may be owed compensation for harm the child suffers caused by a wrong *against the parent* (the wrongful failure to compensate the parent) we ought to conclude that this is how Sher was interpreting the principle.

It is notable that neither Sher nor Boxill develops a satisfactory account of the conditions that must be met in order for A to be liable to compensate B for a harm (call this harm H). The most we can infer is that (common to both accounts):

(i) A must harm B (either by way of an act or an omission), where the relevant notion of harm is a counterfactual comparative one.

(ii) The harm that B suffers must be caused by a wrong (an invasion of someone's rights), but not necessarily by an invasion of B's rights.

One obvious omission here is a condition that restricts claims based on the nature of the relation between the wrong¹⁵⁹ and the harm. After all, not just any harm caused by

¹⁵⁸ Nozick, *Anarchy, State, and Utopia*, 150-153.

¹⁵⁹ For clarity's sake, I will follow Sher and Boxill's use of 'wrong' to mean a right's violation. As I note in chapter 2, corrective justice is only concerned with breaches of duty that correlate with rights invasions and so it is not misleading to allow that a 'wrong' refers both to a duty breach and a right's invasion.

a wrong is potentially one for which compensation may be owed. For example, as I argue in chapter 2, the wrong (duty breach) must also be the proximate cause of the harm; furthermore, only certain harms can be wrongful (those that affect protected interests). I take it that Sher and Boxill simply took it for granted that in the context of the chain-harm argument, it was intuitively clear that the harm was suitably related to the wrong. I address whether that is reasonable below.

It is worth stressing that condition (ii) is open to several distinct interpretations. It is one thing to claim that (a) in order *to determine* whether B has a right to compensation from A we need not *show* that any right of B is invaded; it is another thing to claim that (b) B can have a right to compensation even if no right of B is in fact invaded. The latter claim is not necessarily entailed by the former. Suppose we focus only on cases where A harms B by way of A's duty breach against C. It could be that, for some reason, every time A invades C's rights and thereby harms B, A is also invading some right of B's. In that case, (a) is true yet (b) is false: in order to determine whether B has a right to compensation we do not need to show that any of B's rights is invaded (it is sufficient to show that C's right is invaded and this causes B harm), yet that is so even though (we are supposing) were no right of B to have invaded, B would have no right to compensation.

Boxill appears to be committed to both (a) and (b). To say that, for a valid claim for compensation for damage "...It is enough that *T* transgress against someone, (not necessarily *V*), and as a result *V* receives damage..." appears to commit Boxill to the view that T need not necessarily transgress against V at all, that is, that T need not wrong V at all, or that T only need wrong someone else and that this wrong harms V. On the

other hand, it isn't clear what view to ascribe to Sher. While he is committed to the weaker claim (a), he does not clearly need to be committed to (b).

There are many ways that one could take issue with the argument. I begin by focusing on Andrew Cohen's prominent recent discussion chain-harm argument, in which he formulates and presents a response to what he calls 'the voluntarist objection.'

Cohen on the Chain-Harm Argument

In a recent paper, Andrew Cohen offers what he calls the 'voluntarist objection' to the Boxill/Sher argument and then develops and explores a possible solution to this problem. I will argue now that his discussion is flawed in various ways. First, he misinterprets the structure of the argument as it was actually developed by Boxill and Sher. In virtue of this, second, he presents an objection that does not (or does not clearly) affect the original argument. Third, it is not even clear that his fix is successful at bolstering his own (mistaken) interpretation of the original argument.

I argue that Cohen's misinterpretation of the argument ultimately rests on a failure to distinguish between different approaches to justifying compensation claims each of which specify distinct conditions that must be met in order to justify a particular claim. This failure underlies and explains another problem with Cohen's discussion, namely that it is unclear how the voluntarist objection is supposed to work. Examining Cohen's arguments is a useful starting off point for evaluating the chain-harm argument itself, clarifying as the following discussion will, various possible objections to it. Ultimately, Cohen is correct in thinking that Boxill and Sher have not done enough to support the

claim that the child is harmed by a transgressor's invasion of her parent's right to compensation and the further claim that the child has a claim-right to compensation for that harm (against the transgressor). However, Cohen fails to diagnose the problem properly, and hence he cannot adequately address it.

Misinterpreting the Chain-Harm Argument:

Cohen begins his discussion by summarizing the Boxill/Sher argument. His presentation, however, contains some rather puzzling claims. The first puzzling claim is that the Boxill/Sher argument involves the idea that the child herself suffers a "wrong", a term which Cohen never defines. For example, he writes:

Both Boxill and Sher argue that the failure to compensate a victim after a child is born to her is a new wrong not just to the parent but also to her child. Sher writes that the child "is owed compensation for that post-conception wrong's effect." In the case of failing to compensate two former slaves, Boxill notes that their daughter is thereby harmed because she "probably grew up in ignorance and straitened conditions." The child then suffers a separate compensable wrong because her well-being is worse than it would have been had her parents been compensated after her birth.¹⁶⁰

In earlier chapters I defined 'a wrong' as a breach of duty, and noted that in the case of duties relevant to corrective justice, this breach of duty correlated with a violation of the right of a victim (the one who may be owed compensation for harm suitably related to this wrong/right's violation). Further, I suggested that P wrongs Q when P breaches his duty toward/violates the right of Q. Another way to put this is to say that, where P's act (or omission) breaches P's duty toward Q (and so violates Q's right against P), P commits

¹⁶⁰ Cohen, "Compensation," 85.

a wrong against Q, and Q suffers a wrong at the hands of P. Let me refer to a 'wrong' in this sense as a wrong₁.

For a child to suffer a wrong₁, someone else must invade the child's rights. In Cohen's discussion he might mean that the child suffers a wrong₁, or he might mean by 'wrong' a harm that follows from an invasion of rights, or what Cohen calls elsewhere 'a wrongful harm'. The latter idea might be understood as requiring that one who suffers a wrongful harm suffers both a harm and a wrong₁ (call this WH1). Or it might only require that the one who suffers a wrongful harm (call this WH2) is harmed, but not necessarily herself suffer a wrong₁ (though a wrong₁ to someone must cause her harm). A final possibility is that, by 'wrong' Cohen means a wrongful harm in the sense of a harm for which the victim is entitled to compensation (call this WH3), thereby leaving to one side the issue of who, if anyone, needs to suffer a wrong₁ in order that the harm be one for which the injurer is *prima facie* liable to pay compensation.

As my discussion of Boxill's and Sher's conceptions of reparation shows, there is no positive reason to interpret their argument in a way that regards X as having invaded a right of Z, and – in case of Boxill at least – there is some reason to regard the relevant underlying conceptions of reparation as presupposing that X need not have invaded any right of Z¹⁶¹. As an interpretive matter, then, we should note that Cohen's usage of

¹⁶¹ In the paragraph just quoted, Cohen quotes both Sher and Boxill. While the quote from Sher makes reference to a post-conception wrong, it seems (as I argue above) that Sher is only committed here to saying that Y (the parent) suffers a wrong₁ (the 'post-conception wrong' is referring to the failure to pay the parent compensation, to which the parent has a right). We need not infer that this wrong₁ to Y also invades Z's rights.

'wrong' would be problematic if it involves a commitment to the idea that X breaches a right of Z, that is as in a wrong1 or wrongful harm1.¹⁶²

In two subsequent passages, however, Cohen appears to assert that, according to the Boxill/Sher argument, X does indeed invade a right of Z. First, consider the following:

...The child then suffers a separate compensable wrong because her well-being is worse than it would have been had her parents been compensated after her birth.

Competing accounts of well-being would generate different understandings of the wrongful harm to the child. We can, for instance, understand well-being in terms of pleasure, desire-fulfillment or certain (other) independently valuable goods. Whatever our account, if the Boxill/Sher argument carries any weight, the deprivation of the compensation due a child's parent somehow impairs the child's well-being. The compensation might take the form of cash, or some other exchangeable value, or the provision of some service or opportunity intended to improve a person's lot in life. *That compensation is a commodity to which the child is entitled.*¹⁶³ [Italics and underlining added]

The first problem here is an interpretive one. The final (italicized) token of 'compensation' clearly refers back to the token I underlined in the prior sentence. But does the underlined token refer back to the parent's compensation claim (referred to in the sentence immediately preceding that) or does it refer back to the child's 'separate compensable wrong' referred to at the end of the preceding paragraph? It is natural to suppose that Cohen intended the former, since he could easily have avoided confusion by writing 'The child's compensation...' in place of the underlined 'The compensation...'.¹⁶⁴

¹⁶² I stress here that this is problematic only as a matter of interpretation of the original argument. I argue below that in fact there must be a wrong1 to the child for the argument to succeed. The interpretive problem would not arise if he were to mean by 'wrong' either wrongful harm2 or wrongful harm3, since both of those claims do not require that X breaches any right of Z

¹⁶³ Cohen, Compensation, 84-85.

¹⁶⁴ Further evidence for this interpretation comes from the subsequent paragraph where Cohen writes: "...That compensation is a commodity to which the child is entitled. The commodities a person commands

But if that is correct, then the italicized sentence is claiming that the child is entitled to some of the compensation owed the parent. And that idea, most naturally, is interpreted as saying that the child has a right (as in a claim-right) to the compensation owed the parent. If Cohen believes that the argument includes the idea that the child has a right to the compensation owed the parent, then it is not hard to see that he would be committed to the idea that X's failing to compensate the parents (Y) would invade a right of the child (Z). After all, if Z has a right to those commodities, and X fails to compensate the parents (Y), and X's failure means that Z fails to get commodities to which Z has a right, then it is clear that X invades Z's right to those commodities.

The italicized statement is thus doubly-puzzling. First, nothing close to the idea that the child has a right to the compensation the parents are owed is to be found in Boxill or Sher's presentations.¹⁶⁵ Second, the idea implies that, on Cohen's view, their versions of the argument claim that X wrongs Z (or wrongfully harms Z) which, as I note above, it does not.

The third puzzling claim, which appears when Cohen is introducing the voluntarist objection, also suggests that Cohen regards the argument as one in which X

are distinct from her wellbeing, but those commodities are often a means to well-being. Depriving the child of the commodity that would compensate for the previous injustice harms the child either by damaging her well-being or by denying her an opportunity for the improvement of her well-being... " [underlining added] (p.84-85) As I read this, the underlined tokens of 'commodity' must refer to the same thing. The latter occurrence is clearly taking about the commodity that constitutes the compensation for the parents (they are the ones who suffer the 'previous injustice'). If so, then 'That compensation...' refers to the commodity that is owed the parents as compensation i.e. it refers to the parent's compensation claim.

¹⁶⁵ Indeed that possibility is one that both Boxill and Sher appear to exclude when, in clarifying the argument, each points out that the child's claim is not to the compensation owed the parent (they argue that she cannot be owed *that* compensation- the nonidentity problem prevents that compensation claim for the child being justified).

invades a right of Z (i.e. that X wrongs Z), although it appears to identify a distinct right (or possibly, a distinct way of describing the same right):

However, showing a setback to welfare is insufficient to establish that someone has been wronged. *In order to complete the Boxill/Sher argument, one must show that the child had a claim not to have her welfare thus set back.* Accordingly, I next consider an objection that, if successful, would defeat their argument, namely that the unrealized gain in welfare could simply be a windfall loss to the child.¹⁶⁶ [Italics added]

The first sentence entails that showing that Z suffered a harm is insufficient to establish that the harm is wrongful (or that showing that X harms Z is insufficient to establish that X wrongfully harms Z). The italicized (puzzling) claim tells us what else would be required: in order to show that X wrongfully harms Z, we must show that Z has a claim not to have her welfare set back by X's failure to compensate Y. And why does that extra condition suffice? Presumably, because if Z has a claim *as in a claim-right* not to have her welfare set back by X's failure to compensate Y, then X's failure to compensate Y would invade that right of Z (just in case it does in fact set back Z's welfare). In brief, Cohen is claiming that in order to show that X wrongfully harms Z, we need to show not only that X harms Z, but that X breaches Z's right not to be harmed in that way. That provides further evidence that Cohen interprets 'wrongful harm' as WH1, that is, as requiring that the one who suffers the harm also be subject to an invasion of her (and not someone else's) rights.¹⁶⁷

¹⁶⁶ Cohen, "Compensation", 85.

¹⁶⁷ To elaborate: suppose that we understood 'wrongful harm' as WH2. It would not then be 'required' to show that Z has a claim-right not to be set back in this way. Rather, what we would need to show is that someone's right was breached (i.e. Y) and that this wrong (a wrong to Y) caused a welfare setback to Z (harmed Z).

The purpose of this close reading of Cohen's presentation of the Boxill/Sher argument has been to establish that Cohen mistakenly¹⁶⁸ interprets their presentation as requiring that X invades a right of Z. That fact is necessary to make sense both of the voluntarist objection and the solution he offers to it. But before addressing those issues I will highlight two interpretive issues to which I will return. A first obvious issue concerns why Cohen makes these interpretive errors. A second issue concerns how to make sense of the fact that Cohen has described X's invasion of Z's right in two distinct ways (corresponding to the second and third puzzling claims I described above):

(1) X invades Z's claim-right to the compensation owed Y (or to the commodities that constitute the compensation owed Y) [Call this Right1]

(2) X invades Z's claim-right not to have Z's welfare setback by way of X's failure to compensate Y [Call this Right 2]

Not only are the two rights not equivalent, but it is not even clear that one entails the other. The failure of equivalence can be seen by reflecting on how (2) does not require (1). One way in which we could interpret X as invading Z's right2 would be to say that the correlative duty X breaches is a duty not to harm Z by way of negligence (toward Z), understanding X's (wrongful) failure to compensate Y as constituting

An alternative interpretation might be that by 'claim' Cohen means 'a claim to compensation for the harm she suffers. But that would render Cohen's 'requirement' tautological, for it would then amount to saying: in order to show that Z has suffered a wrongful harm (i.e. a harm that she has a claim to compensation for- a wrong2) we need to show that Z has not only suffered a harm but that she has a claim to be compensated for that harm.

¹⁶⁸ Again, I am claiming here only that he is mistaken as matter of interpretation i.e. that is not how the argument was presented. I am not (at least not yet) claiming that he is mistaken in thinking that this is how the argument ought to be understood, even if it was not presented that way originally.

negligence with respect to Z¹⁶⁹. On that interpretation, we do not need to presuppose that Z has any claim-right over the compensation X owed Y (we are supposing only that the failure of X to compensate Y constituted negligence toward Z).

I turn now to the voluntarist objection itself.

The Voluntarist Objection

I quote the relevant passage in full, including the introductory quote:

However, showing a setback to welfare is insufficient to establish that someone has been wronged. In order to complete the Boxill/Sher argument, one must show that the child had a claim not to have her welfare thus set back. Accordingly, I next consider an objection that, if successful, would defeat their argument, namely that the unrealized gain in welfare could simply be a windfall loss to the child.

If X wrongfully harms Y and Y is thereby unable to contribute to some improvement in Z's welfare, has X also wrongfully harmed Z? According to what I call the *voluntarist objection*, the answer is no. Specifically, the objection is that, in the case of reparations to a victim who later has children, the claim to compensation is the parent's and not the children's. On this objection, transgressors are not liable for third-party welfare setbacks that depend on an intervening agent's will. The parent (the transgressor's original victim) has the right to dispose of the commodities she never received from the transgressor. The child's unrealized welfare gain would not compound the liability of the parent's transgressor. It is not a compensable welfare setback but a sort of "windfall loss".

The voluntarist objection to the Boxill/Sher argument drives a wedge between liability for harm to the parent and liability for any child's unrealized welfare gains that depend on the parent's will. As Jeremy Waldron writes, "It is the act of choosing that has authority, not the existence as such of the chosen option," so even if the counterfactual is true that the parent would have conferred (some of) the value of her reparation claim on her children were she to have received it, that is insufficient to justify a child's claim to compensation against the parent's transgressor. The voluntarist objection thus denies that the transgressor is guilty of any compensable injustice against a victim's child.¹⁷⁰

¹⁶⁹ Of course, we could also interpret X as invading Z's right not to be harmed intentionally or recklessly. The focus on a right not to be harmed negligently is not intended to preclude those other options.

¹⁷⁰ Cohen, "Compensation", 85.

The first paragraph outlines the aim of the objection: to show that, contrary to what the argument (supposedly) requires, the child (Z) does not have a claim (as in claim-right) not to have her welfare setback by way of the transgressor's (X's) failure to compensate her parent (Y). In turn, this somehow involves showing that the child's welfare setback is nothing but a 'windfall loss,' a phrase that remains undefined.

In the second paragraph, we are told that the voluntarist objection (call this VO) shows that X does not wrongfully harm Z. In the discussion above, I argued that Cohen appears to be committed to the idea that for X to wrongfully harm Z, X must both wrong Z (invade Z's right) and harm Z. One could therefore deny that X wrongfully harms Y either by rejecting the idea that X harms Z or by showing that X wrongs Z¹⁷¹. Since Cohen does not appear to be rejecting the idea that X harms Z¹⁷², I conclude that he must be taking VO to be showing that X does not wrong Y. That also fits with the idea, just noted, that VO apparently allows us to reject the idea that X has any claim-right not to be set back by X's failure to compensate Y (even though that failure is a wrong to Y).

Cohen's account of VO then includes the following key claims:

[A] "The claim to compensation is the parent's and not the children's," (where 'claim' here means 'claim-right');

[B] "Transgressors are not liable for third-party welfare setbacks that depend on an intervening agent's will."

¹⁷¹ We could also object by showing that even though X both harms and wrongs Z the harm is not suitably related to the wrong. However, this possible line of attack is not relevant to Cohen's discussion.

¹⁷² Cohen uses harm and welfare setback interchangeably, and clearly accepts that Z does in fact suffer a welfare setback in his sense.

[C] “The parent (the transgressor’s original victim) has the right to dispose of the commodities she never received from the transgressor” (the implication being that only the parent has the right to dispose of the commodities i.e. the child has no such right).

[D] “The child’s unrealized welfare gain would not compound the liability of the parent’s transgressor... It is not a compensable welfare setback but a sort of “windfall loss”.

And then, from the final paragraph:

[E] “As Jeremy Waldron writes, ‘It is the act of choosing that has authority, not the existence as such of the chosen option,’”

so

[F] “even if the counterfactual is true that the parent would have conferred (some of) the value of her reparation claim on her children were she to have received it, that is insufficient to justify a child’s claim to compensation against the parent’s transgressor.”

These claims are puzzling for various reasons. First, [A] just appears to state an obvious, uncontroversial fact (at least given the reading of the chain-harm argument I presented above, as opposed to Cohen’s reading): Y’s compensation claim is only Y’s compensation claim (and not Z’s). That seems clearly true because, on the chain-harm argument, Y’s claim to compensation is grounded on a wrongful harm that X does Y and, at the time, Z was not yet conceived. How could this obvious fact ground an objection?

Second, what does Cohen mean in [B] by ‘depend on an intervening agent’s will’? An obvious interpretation would be that a welfare setback ‘depends on an intervening agent’s will’ when the intervening agent in fact has a choice¹⁷³ as to whether to bestow some or all of the compensation on the third party, that is, when Y has a choice whether to bestow some or all of the compensation on Z. But that cannot be what Cohen means here since, by hypothesis, Y has no such choice: Y is *unable* to contribute to an improvement in Z’s welfare (whether Y wants to or not) since Y is never compensated.

Third, as [C] says, one might think that, were Y to have been compensated, Y (and only Y) would have the right (as in the liberty-right) to choose whether or not to bestow some or all of that compensation on his child. But why would that be relevant? Suppose I am on death row in Texas awaiting a call from the governor to decide whether or not to commute my sentence to life without parole. Suppose that the governor was planning to commute my sentence, but my enemy enters the governor’s mansion and compels her to call the prison telling them to go ahead with my execution. The governor had the right to choose whether or not to commute my sentence. But even so, I think that my family would have a strong moral claim to demand compensation from my enemy for the harm he causes me¹⁷⁴.

Fourth, what does Cohen mean in [D] by a ‘windfall loss.’ A windfall is often understood as an unexpected gain, so a windfall loss might mean the loss of an unexpected gain (for example, winning the lottery might be a windfall, losing my

¹⁷³ By ‘have a choice’ here, I mean ‘is able to’ putting aside the issue of whether the agent’s doing so would be morally permissible or not.

¹⁷⁴ This example is adapted from one of Joel Feinberg’s many intriguing cases in chapter 4 of *Harm to Others*.

winning lottery ticket might therefore be a windfall loss). But that doesn't seem to fit the context since it doesn't seem right to say that, were Y to be compensated, that would be an unexpected gain for Z¹⁷⁵.

Fifth, how does Cohen interpret the quote from Waldron (see [E])? When we refer to the Waldron paper from which the quote is taken the main point in the relevant section is that there is no truth value to counterfactuals that involve speculation about what someone would have chosen to do.¹⁷⁶ But if we apply this 'lesson' to the chain-harm argument we would in fact, contrary to Cohen's position, have to conclude that X does not harm Z at all. After all, in order to determine that X harms Z we have to rely on a counterfactual in which it is supposed that, had Y been compensated, Y *would have chosen* to bestow some compensation on Z. According to (this part of) Waldron's discussion, such a counterfactual is neither true nor false, and hence we cannot infer that Z is made worse off by X's failure to compensate Y. Plainly, that cannot be what Cohen has in mind, since having quoted Waldron he begins an inference from Waldron's quote (in [F]) with 'even if that counterfactual is true...', which asserts as a possibility exactly

¹⁷⁵ There may be some sense in which X's compensating Y would be unexpected in that no one generally expects perpetrators of serious injustices to compensate their victims, especially without compulsion. But that doesn't seem to be a good basis for a moral objection.

¹⁷⁶ Waldron, "Superseding Historical Injustice", 10-11. The relevant quote is as follows: "Supposing that I am attempting to predict how my aunt will dispose of her estate. My best guess, based on the all the evidence, is that having no dependents she will leave it to Amnesty International... In fact, my aunt surprises everyone by leaving everything to an obscure home for stray dogs... My guess has no normative authority whatever with regard to disposition of her estate..."

If this is true of decision making in the real world, then I think it plays havoc with the idea that, normatively, the appropriate thing to do is to make rational and informed guesses about how people would have exercised their freedom in a hypothetical world...

...This is not an epistemic difficulty. It is not that there is some fact of the matter ... and our difficulty lies in discovering what that is. The thing about freedom is that there is no fact of the matter. It is the act of choosing that has the authority not the existence as such of the chosen option."

what Waldron's discussion claimed was not possible (that is, if Waldron is right, it is not possible for this counterfactual to be true).

The most likely answer to these various interpretive quandaries is that Cohen has in fact relied heavily on a passage by Tyler Cowen that (Andrew) Cohen cites in a footnote. In that discussion¹⁷⁷, Cowen is addressing whether or not the descendants of someone whose property rights were invaded can claim restitution¹⁷⁸ supposing that, as seems plausible enough in many cases, the original victim would have bequeathed the property at some point to their descendants. Cowen writes:

... The logic of this view runs as follows. If A has stolen from B in the previous generation, B has been wronged. But the descendants of B have not been wronged in an equivalent manner. True, the descendants of B are worse off, for not having received a bequest (the original victim might have bequeathed some of the stolen property). The descendants of B, however, have not suffered injustice. They simply have *failed to receive a windfall gain in wealth*. The relevant injustice is the following: B was denied the option to bequeath resources to his or her heirs. This is a violation of the rights of B, not the rights of the descendants of B.

This injustice to B is not restitutable, given that B has passed away. Therefore no restitution is required on the grounds of justice. The relevant wrong, which was done to B, can never be righted. The descendants of B have suffered *windfall losses* but their rights have not been infringed. *They had no intrinsic right to the property of B*, as illustrated by the fact that if B had consumed all of the wealth, and left no bequest, the descendants could not claim any injustice.

Even if "B would have given them the money," the descendants do not have a full moral right to the resources. Would-have-been hypotheticals do not necessarily create full moral rights. *Jeremy Waldron notes, for instance, "It is the act of choosing that has authority, not the existence as such of the chosen option."*¹⁷⁹ [Italics added]

¹⁷⁷ Tyler Cowen, 'How Far Back Should We Go? Why Restitution Should be Small?' in *Retribution and Repatriation in the Transition to Democracy*, ed. Jon Elster (New York: Cambridge University Press, 2006), 17-31.

¹⁷⁸ Unfortunately, Cowen does not explain in detail what he means by restitution. His discussion suggests that he means by 'restitution' whatever form of moral repair is required to address invasions of *property* rights.

¹⁷⁹ Cowen, "Restitution," 23.

Notice that, like Cohen, Tyler Cowen also compares the descendants losses to ‘windfall losses’ and cites the same Waldron quote. Further, again like Cohen, Cowen both fails to explain what he means by ‘windfall loss’ and also does not use Waldron’s quote to make the point that Waldron had in mind.¹⁸⁰

Nonetheless, Cowen discussion can help us explain VO. The key thing to notice is that, on Cowen’s discussion, the key issue appears to be whether the descendants of B have a claim-right to property that was stolen from B. If the descendants turn out to have no such right, then (Cowen argues) they can claim no restitution. When Cowen claims that the descendants suffer a windfall loss this seems to be another way of saying that even though they suffer a loss (that is, a harm) this is not a loss of something to which they have a property right.

Cowen invokes the idea (as Cohen does in [B] above) that the original owner B would have been within his rights not to bequeath any of his property to his descendants, inferring from this that the descendants have no ‘intrinsic right’ to B’s property. The argument here might be reconstructed as follows. Suppose that a descendant, D, has a claim-right to B’s stolen property, P. If D has such a claim-right, then that would entail that B does not have a liberty-right with respect to P, that is B (were he to have the property) would not have the right to dispose of P however he wishes (for example, in a way that leaves D with nothing). However, it seems intuitively clear that, had B’s property not been stolen (or had it been returned to B), and had B disposed of P without

¹⁸⁰ To repeat the point I made above, the relevant discussion from Waldron suggests that there is no truth value to claims such as ‘B would have given them [the descendants] the money’, so it would make no sense to appeal to that counterfactual being true, as Cowen does here.

transferring or bequeathing any of it on D, B would *not* have wronged D, that is, B would not have violated any right of D. Hence, it follows that D has no claim-right over P.

This interpretation also allows us to make sense of how Cowen understands Waldron's quote. Just prior to the quote Cowen asserts that "would-be hypotheticals" do not necessarily ground full moral rights." What I think he means is this. Cowen is supposing (for the purposes of discussion at least) that property is justly transferred by way of a rule like that specified by Nozick's theory of justice in holdings¹⁸¹. One way in which B could legitimately transfer his property to someone else, say D, is by B's *actually* transferring the property to D. But, once B's property is stolen, B cannot transfer the actual property by this means (since, by hypothesis, B does not have the holding in his possession to transfer). B could possibly get round this by bequeathing the title of the property to D, even if B does not have the property in his possession. However, in order to bequeath the title, B would have to do something, that is, *actually* bequeath the title, and it is implicitly supposed (by Cowen) that B has not in fact done this. As a result, it looks like there is nothing that B has done that legitimately transfers the property to D.

The insistence that B actually do something is key here. The mere fact that B would have transferred the property to D had circumstances been different is not sufficient to show that B has transferred the property (or title to the property) to D. That is the lesson that Cowen appears to draw from Waldron's quote.

We are now in a position to interpret VO. In what follows I offer a reconstruction of the argument (I am describing, not endorsing it). Suppose X wrongfully harms Y at t1,

¹⁸¹ Notice, however, that the overall interpretation is at odds with Nozick's principle of justice rectification. That particular idea was one of the objects of Waldron's critique in 'Superseding Injustice.'

prior to Z's conception at t2, and further that X wrongs Y (from every point after t1) by failing to compensate Y for that harm. Refer to the compensation that X owes Y as compensation C. Initially, Y (and only Y) has a claim-right to C: after all, it was Y (and only Y) who X wrongfully harmed at t1. [see claim [A]]

Although Y is the only one who initially has a claim-right to C, it is conceivable that some other agent could later come to have a claim-right to C (for example, Y could actually transfer C itself, or the title to C, to another agent). However, in certain cases it seems clear that no other agent has such a claim (these are cases when the third-party's welfare setback 'depends on an agent's will', in the relevant sense). This is so when Y (the intermediate agent) has a liberty-right with respect to C, that is, where Y has a right to dispose of the commodities she never received from Z. If Y has a liberty-right with respect to C, then Z cannot have a claim-right to C (see the argument I gave above). But it seems clear that Y does have a liberty-right to C in this case, since it seems intuitively clear that, were Y to have received C and chosen not to bestow some or all of C on Z, that Y would not have violated any right of Z. Indeed, had Y been compensated and bestowed none of C on Z, then we could only say that Z suffers a windfall loss i.e. the failure to receive some windfall (understood as commodities to which Z has no right)¹⁸². [see claims [B] through [D]].

¹⁸² As we shall see below, Cohen's 'fix' denies this part of the voluntarist objection: Cohen argues that Y in fact does not have a liberty-right with respect to C. Keep in mind that here I am interpreting the voluntarist objection, not taking into account Cohen's response to it.

One possible objection¹⁸³ says that, contrary to the above argument, Z does in fact have a right to C because, had Y been compensated, Y would have bestowed some of C on Z. But this response fails. The fact that someone would have transferred a holding to a third party does not by itself confer on the third party a right to that holding. As Waldron's quote may be interpreted as suggesting, it is only *actual* actions (for example, an actual transfer of a holding or a title to a holding to a third party) that can confer a right to a holding to another agent; hypothetical actions cannot. [see claims [E] and [F]].

This interpretation addresses each of the interpretive quandaries I raised above. First, it explains the role of the trivial claim [A]: the claim to C is initially only that of the parent's and indeed the argument shows that it remains so, even after t₂. Second, it makes sense of what Cohen means by 'depends on an intermediate agent's will': a third-party welfare setback depends on an intermediate agent's will where the intermediate agent has a liberty-right with respect to the action, A, an action which, if not done, sets back the third-party (in other words, whether or not the intermediate agent is able to do or not do A, it would be permissible for her either to do or not to do A). We might refer to this as a case where the intermediate agent has a *moral option* with respect to A. Here, the relevant point is that Y has a moral option with respect to what she does with the compensation C that X owes her.

Third, the fact that Y has a liberty-right with respect to C is relevant here because it entails that Z has no claim-right to C. Fourth, a windfall loss means a loss of a possible

¹⁸³ Here I am explaining Cohen's VO which itself responds to a possible objection. I am not here making an objection of my own to VO.

improvement in welfare that is itself not compensable (or not wrongful, in Cohen's terms). Fifth, Waldron's quote is taken to mean that only actual voluntary actions (and not hypothetical ones) can ground legitimate transfers of holdings.

The final step in the argument requires that we connect VO with its initial aim: to show that Z has no right not to be set back by X's failure to compensate Y. So far, we have seen an argument designed to show that Z herself has no right to compensation C. How can we infer from *that* fact that Z has no right not to be setback by X's failure to compensate Y? One line of thought is this. One way in which we could understand Z's *having* a right not to be setback by being denied access to C (by X) is based on a presumption that Z has a right to C itself. After all, the complex set of rights that constitute a property right in a holding presumably include a right to whatever gains can (legitimately) be made by making use of that holding. If Z has a right to C, then presumably Z has a right to whatever welfare gains she would accrue by having legitimate access to C; hence, Z would have a right not to be setback by way of an unjust restriction of her property right in C.

But if Z has no right to C itself, then it follows that we cannot appeal to Z's right to C as the basis for Z's right not to be set back by being denied access to C (by X). The above argument purports to show that Z has no right to (any of) C. Given this, we might conclude that Z has no right not to be setback by being denied access to C (by X)¹⁸⁴.

¹⁸⁴ The missing premise here of course is: there is no *other* basis for regarding Z has having a right not to be setback by X's failure to give C to Y; I return to this issue when evaluating Cohen's argument below.

Having interpreted VO I can now address the two questions I raised when attempting to understand Cohen's reading of the Boxill/Sher argument: First, why does he interpret the argument as requiring that X invade a right of Z? Second, why does he describe the right of Z that X invades in two distinct ways (as Z's right to the compensation that X owes Y and as Z's right not to be setback by X's failure to compensate Z)?

The answer to both questions is to be found in a common source: Cohen is interpreting the argument through the prism of a particular conception of reparation, one based on a specific understanding of what is required for in order to repair invasions of property rights.¹⁸⁵ Given this limited focus, we might think that, for any person to have a claim for reparation, that person must herself have suffered an invasion of a property right. Were she not to have suffered any invasion of a property right, then she has no claim for repair. Within this framework, and if we suppose that Boxill and Sher share this framework, then it makes sense to suppose that, for the chain harm argument to go through, X must invade some property right of Z.

Cohen's misinterpretation, then, comes ultimately from failing to recognize that neither Boxill nor Sher share this framework¹⁸⁶. Boxill, let us recall, explicitly allowed that no invasion of Z's right was required in order that Z have a claim to compensation. Sher, on the other hand, invoked Nozick's principle of compensation. But it was precisely Nozick's principle of compensation that Waldron, and then apparently Cowen and Cohen

¹⁸⁵ This usage is implicit in Cowen as well.

¹⁸⁶ Of course, this invites discussion of which framework is correct. I address that issue later in this chapter.

following Waldron, were criticizing when they argued (in different ways) that would-be-hypotheticals do not (or not necessarily) ground claims for restitution.

Secondly, we have seen how the two rights Cohen ascribes to Z in the argument relate to one another. The crucial right ascribed to Z is Z's right to the compensation X owes Y (that is, Z's right to C). The voluntarist objection, as described, shows that Z has no right to C. Supposing that Z's right not to be setback by X's failure to give C to Y (right2) must be a corollary of or entailed by Z's right to C itself (right1) then by showing that Z has no right to C we thereby show that Z has no right not to be setback by X's failure to give C to Y.

Note that this latter move only makes sense if we suppose that right2 *must* be a corollary of right1. After all, if right2 need not be a corollary of right1 (if right2 can be grounded on some other basis) then showing that Z has no right to C would not thereby show that Z has no right not to be setback by being denied access to C (by X). Cohen, then, is not only relying on a specific conception of reparation (one at odds with those outlined by Boxill and Sher) but he is also presupposing that no other framework for justifying right2 is applicable here.

Cohen's Fix

Having presented the voluntarist objection, Cohen offers a way of bypassing the problem and so providing a fix to the Boxill/Sher argument. The fix is of interest independently since, as we shall see later on, it focuses on a factor that is in my view relevant when addressing the chain-harm argument: that of parental duties toward

children. Outlining the fix also provides support for the interpretation of Cohen's discussion that I offer above.

As we have noted, Cohen regards the key problem with the Boxill/Sher argument as lying in the fact that X does not invade any right of Z (either right1 or right2). Accordingly, he offers an argument to show that, at least under some circumstances, X does invade a right of Z. The argument relies on the idea that parents have a natural duty toward their children to ensure that their children reach some minimum level of welfare, W.¹⁸⁷ According to Cohen, in virtue of a child's right that her parent ensure that she attains W, the child has a right to whatever resources she requires in order to reach W, with the parent holding those resources on her behalf. I will refer to the required level of resources as R.

Suppose that, by failing to compensate Y, X prevents Y from having whatever resources are necessary to ensure that Z attains welfare level W, that is, X denies Y from having R. But Z, so the argument goes, herself has a right to R, and so Z has a right to whatever portion of the compensation C constitutes R. Given all this, then the child, Z, has a right to some of the very compensation that X fails to give Y.

On Cohen's view, VO only applies in cases where third-party setbacks depend on an intermediate agent's will, that is, when the intermediate agent has a liberty-right with respect to whether to cause or withhold that welfare improvement to/from the third party. But if Z has a claim-right to some or all of the compensation that X owes Y, then Y has no such liberty-right, at least with respect to that portion of the compensation to which Z

¹⁸⁷ Cohen, "*Compensation*", 88.

has a right (hence this is not a case in which the third-party's setback depends on an intervening agent's will). Finally, if Z has a right to a portion of the compensation C (that portion equivalent to R), then we can infer that Z has a corollary right not to be setback by being denied access to R. X's failure to compensate Y thus invades Z's rights. It invades Z's right to R itself (although Y would be using holding it as a trustee) and it invades Z's right not to be setback by being denied access to R. X does invade Z's right, and so the argument is fixed.

As Cohen points out, this fix leads to a more modest argument than that proposed by Boxill and Sher. On Cohen's version, Z's right is only to whatever portion of the compensation constitutes R. But in that case it might be that not all of the harm that X does Z is wrongful (that is, suitably related to this wrong). Suppose that, had Y been compensated, that Y would have bestowed resources on Z such that Z's level of welfare would have been raised above W (in actual fact, Y was never compensated, and Z ended up below W). On Cohen's fix, Z only has a right to whatever was required to raise Z to W; Z has no right to anything beyond that. Hence, Z could not demand compensation required to raise her to the level of welfare that she would have enjoyed had Y been compensated. Rather, she can only demand that she be raised to welfare level W.

Also, the chain would be broken were it to be the case that, for some reason or other, Y can carry out her parental duty without having been compensated. If Y were able to ensure that Z reach welfare level W even without compensation, then Z would have no claim to that compensation (since, as we saw, her having that claim is contingent on X's failure to compensate Y itself preventing Y from being able to ensure that Z reaches W).

Critiquing the Fix

Cohen does not seem to recognize that the argument fundamentally changes the character of the Boxill/Sher argument. The original argument relied on the idea that whatever compensation was owed Z depended on whatever would have happened had Y been compensated by X. As Sher notes toward the end of his paper¹⁸⁸ this has a potentially worrying implication. For, if it were the case that Y would not have improved Z's position had Y been compensated, then it would not be true that X harms Z at all, and hence it would seem that Z would have no right to compensation from X. Cohen's argument, however, does not appear to rely on such counterfactuals. Suppose, as seems reasonable, that the level of R is set objectively, that is, that it is set at the level of resources that would usually have to be bestowed on a child to ensure that she reach W. If that were so, then X's failure to transfer C (and hence R) to Y constitutes a breach of Z's rights independently of whether or not Y would have used R to benefit Z. If that is correct, then Z would have a right to demand compensation from X even if Y would in fact have failed to bestow any of those resources on Z.

This is not a puzzling result given the particular model of restitution for property rights' invasions that Cohen relies upon. If we do not regard counterfactuals as having normative weight in determining whether Z has a right to C in the standard case (where Y would have bestowed some of C on Z), then we ought not to regard them as having weight in determining whether Z has a right to C in the exceptional instance where Y would have failed to bestow R on Z (although Y never got the opportunity to do this).

¹⁸⁸ Sher, "Transgenerational Compensation," 198.

Notice, then, that we cannot object to the above argument by saying that it is not really X but rather Y (or perhaps X and Y together) who prevents Z from getting what he has a right to (i.e. R): such a response relies upon a counterfactual (what Y would have done had he been compensated) that Cohen cannot countenance.

However, this is a puzzling result given that the Boxill/Sher argument itself relies crucially on the counterfactual claim as showing that Z has been harmed by X. Cohen's version, however, allows that X can claim compensation from Z even if the counterfactual is false, that is, even if X does not harm Z. But if that is right, then the argument is no longer one that is based on compensation for *harm* at all- at least not in the sense of harm that Boxill, Sher and indeed Cohen rely upon.

There is also reason to doubt that the fix works even on its own terms. The most questionable inference involves Cohen's move from the claim that 'the child has a right that her parent raise her to welfare level W' to the distinct claim that 'the child has a property right against the parent to whatever resources, R, would be required to place the child at level W.' The first right corresponds with the duty that the parent has to ensure that the child reaches a level of welfare W. Allowing that parents have this duty, it seems reasonable to infer that the parent has a duty to do *whatever is required* in order that her child reach W. But, even if we suppose that, in a particular case, doing what is required to raise the child to W would involve bestowing resources worth \$\$ on the child, and even if we suppose that, therefore, the parent has a duty to bestow \$\$ on the child, it does not clearly follow that the child has a *property* right to a bundle of money worth \$\$.

The problem is that rights to outcomes of this type are not obviously grounded in or translatable into property rights in the things transferred. This is particularly obvious when the outcome does not involve the possession of any particular holding, as is the case here (where the outcome is that the child reach welfare level W). Consider an analogy. Suppose that John has promised to take his children to the beach on Sunday. We may suppose that John has a duty to take his children to the beach on Sunday. It seems reasonable to infer that John has derivative duties to do whatever is required to ensure that he succeeds in doing this. Let us suppose that to cover the costs of the trip, including gas, ice-cream, burgers, sun-cream and so on, he would need \$80. We might say that John has a duty to keep aside \$80 so that he can successfully fulfill his promise. But surely we cannot infer that the children have a property right to \$80 from John's bank account or wallet. For one thing, the children could not reasonably demand \$80 instead of a trip to the beach. For another, were John to fail to take them to the beach on Sunday, it does not seem reasonable to regard paying \$80 as the appropriate way to make it up to the kids (as the next-best thing, as John Gardner would say, even if—as it is quite reasonable to suppose- the kids would be quite happy with \$80 instead¹⁸⁹): rather the next-best thing would (more likely) be to take them to the beach on some date in the near future¹⁹⁰.

¹⁸⁹ John Gardner, "What is Tort Law For? Part 1. The Place of Corrective Justice," *Law and Philosophy*, 30, 2011, 1-50. See especially pages 28-29.

¹⁹⁰ Suppose that the father had promised them a visit to a particular beach, but that beach is washed away by a storm on Saturday night. One might think it plausible in that case that children have a right to \$80 instead. In this case, however, it seems to me that the closest the father could come to complete conformity would be to take them to a distinct beach on Sunday.

Doubts also arise when it is money that is owed (as it is in this case), as opposed to holdings. Suppose that Bob promises to give Frank \$100 by Tuesday, but fails to do so. Frank does not have a property right to \$100 of Bob's, even if Frank does have a right that Bob perform the action of transferring to Frank \$100¹⁹¹. That would suggest that we cannot infer from the fact that X has a right that Y or Z transfer him or her compensation of \$C that Y or Z has a property right in \$C.

Evaluating the Chain-Harm Argument

We have seen that Cohen's discussion of the chain-harm argument is suspect in a variety of ways. In this section I raise my own objections to the argument and sketch some possible solutions. In order to clarify matters, I begin by outlining the structure of the argument (as I interpret the argument common to both Boxill and Sher's versions).

P1: Suppose that X has wrongfully harmed Y prior to t_1 [call this harm(i), or H_i , based on wrong(i) or W_i]; at some point after t_2 , Y conceives and later bears a child, Z. X fails to compensate Y for H_i both before and after t_2 .

P2: The reparation principle: if A wrongfully harms B, then A is liable to compensate B for that harm.

[P1/P2 entails IC1: X wrongfully harms Y and so, according to the reparation principle, X has a duty to repay Y (and Y has a right to demand compensation). Thus:

¹⁹¹ Sher makes this point while explaining why he rejects the inheritance argument in "Transgenerational Compensation," footnote 15.

IC1/P3: X's failure to compensate Y breaches Y's right to compensation for Hi i.e. X failure to compensate Y is a wrong (call this Wii)

P4 At each moment after X wrongfully harms Y, including after Z's conception at t2, X wrongs Y (that is, Wii is ongoing).

P5: Had Y been compensated after t2, Y would have used at least some of that compensation to (successfully) improve Z's condition (both at the time and afterwards).

Put another way: had Y been compensated after t2, Z would be better off than she is.

P6: The counterfactual comparative conception of harm: A harms B if A's act/omission, D, causes B to be worse off than she would have been had A done/ not done D.

P5/P6 (entail IC3): X's failure to compensate Y after t2 (an omission) causes Z to be worse off than Z would have been had Y been compensated (the non-identity problem is avoided here). Given the relevant conception of harm, this entails that:

IC3/P7: X harms Y [call this Hii]

P8: Definition of 'to wrongfully harm': A wrongfully harms B if (a) A commits a wrong i.e. invades *someone's* rights (not necessarily B's rights), (b) A's wrong harms B.

P3, P7, P8 entail IC4: X's failure to compensate Y is a wrong, and this wrong [Wii, after t2] (i.e. the failure to compensate Y after t2) harms Z (i.e. causes Z to be worse off than he would be but for X's omission; causes Hii). Hence,

IC4/P9: X wrongfully harms Z.

P2,P9: Given the reparation principle, the fact that X wrongfully harms Z entails that:

MC: X is liable to compensate Z for the wrongful harm she imposes on Z i.e. for Hii.

Criticisms of the idea that X owed compensation to Y for Wi

When evaluating the applicability of the chain-harm argument to a particular issue, the very first thing one would need to show is that the original victim, Y, has in fact been wrongfully harmed by the some transgressor (see P1). Boxill, for instance, asserts that it is obvious that the slaves were wrongfully harmed by the slave holders, and indeed – less directly—by the US government. While it is intuitively clear that the slaves were wronged by slavery, it is not immediately clear that all slaves were *harmed* by slavery, at least in the sense of harm presupposed above (see P6). The argument depends on a counterfactual comparative conception of harming. Given the history, it is possible (indeed very likely) that some persons (though probably not many) were *not* made worse off than they would have been had they not been enslaved by this particular slave holder¹⁹². Suppose, for instance, that had this person not been enslaved and transported to the US to be sold to her actual slave holder, she would have been enslaved by an African slave holder who would have treated her worse still. Supposing that the original duty breach by the slave-holder was the original enslavement, then the relevant test would require us to consider whether the act of enslavement rather than minimal compliance with the moral duty (that is, no such enslavement) causes the slave (or rather her protected interests) to be worse off than she would otherwise be. On the possible story we told above, this test would suggest that there is no wrongful harm.

This objection raises a disturbing challenge. To meet the challenge I suggest that we focus on the fact that the wrongs against the slave by the slave holder take place over

¹⁹²A problem here is that there are so many injustices that it is hard to know which to focus on in order to determine what the relevant counterfactual would be.

a long period of time. When there is a series of wrongs, it seems reasonable to suppose that the victim can choose which wrong to seek remedy for. If so, then we are not forced to focus on the wrong that is constituted by the *initial* enslavement, and hence we do not need to focus on the causal contrast that would appropriate at that time of initial enslavement (namely, that minimal compliance of the slave-holder with his duty would involve not enslaving the person in the first place). Second, it is plausible to think that long-term enslavement creates new agent-relative duties of the slave-holder toward the slave. The basic idea here is that enslavement alters the normative relationship between the slave-holder and slave in such a way that the slave-holder comes to have new positive duties to protect and care for the slave.¹⁹³ The slave-holder presumably failed to ensure that the slave was treated in accordance with these positive duties. If we apply corrective justice to *these* wrongs (qua breaches of the slave-holder's positive duties), then we may infer that the slave is caused wrongful harm in virtue of the failure of the slave-holder to treat her in minimal compliance with these duties. On this approach, the slave-holder would owe the former slave compensation for this wrongful harm (she might also owe her for wrongful harm imposed by other wrongs, if she is caused such additional wrongful harm).

¹⁹³ Of course, the ideal would be for the slave-holder to release the slave. But failing to do that, I think we can attribute duties to ensure that the slave-holder is treated well. Similarly, if I kidnap you I ought to let you go. But if I do not let you go, I ought to feed you well and ensure that no *further* harm comes to you. In the case of slavery, where the injustice is so persistent and severe, my intuition is that these duties to protect and care persist even after the release of the slave.

X does not owe Y compensation because X breached no recognized duty

Suppose we allow that X breached some moral duty that *we* recognize¹⁹⁴ and thereby harmed Y. It would presumably be true in some sense, then, that X wrongfully harms Y. One might deny however that this fact is sufficient to ground even a *prima facie* duty to compensate Y because (one might think) the appropriate conception of reparation requires that the duty that X breached be legally recognized in a way that it was not at the time.

In the case of many historical injustices, the duty was not legally recognized at the time. If one regards the relevant conception of reparation as itself normatively tied to a defense of the then-current legal institutions, then this objection might be relevant. Neither Boxill nor Share appear to take that view: they require only that there was a moral breach.

The same is true on the approach that I regard as appropriate for harm-repair, namely the moral principle of corrective justice. The moral principle of corrective justice that I defend in chapter 1 may be relevant to a defense of tort law, in which context it is likely that other temporarily constrained forms of justification would be relevant. But the moral principle can be independently employed to support a moral (non-legal) argument in favor of reparations. All that is required is that the moral duties existed at the time and that they were breached. Were the relevant moral duties breached, then the conformity

¹⁹⁴ That is, which we recognize as existing at that time.

account suggests that the injurer would automatically have a moral duty to repair the harm¹⁹⁵.

Objections to the idea that X harms Z

We might deny that X harms Z by denying that the counterfactual is true: that Z would have been better off had X compensated Y. Sher discussed one version of this objection, as I noted above. If, in a particular case, compensating Y would not have caused an improvement in Z's condition, then the argument would not hold. (Cohen's fix, recall, did not have that implication). It is reasonable to suppose that this kind of case is quite rare and so would not undermine the general applicability of the argument.

Alternatively, we might deny that the counterfactual is true by taking Waldron's view that counterfactuals that depend upon what someone would have chosen to do (or not do) have no truth value whatsoever. The radical implications of this objection, however, make it implausible. If Waldron were correct on this point, then we would be unable to appeal to a whole host of counterfactuals that we intuitively rely upon, both in everyday life and for purposes of moral and legal reflection.

A distinct way to deny that X harms Z would be to show that the counterfactual is not in fact relevant to showing that X harms Z. Even if we accept that the counterfactual is true (P5), or is likely to be true in many cases, we might deny that X harms Z. One way

¹⁹⁵ It may also be necessary that the injurer was, or ought to have been aware that such moral duties existed. That would be so if the relevant moral duty was governed by a fault standard. If no reasonable injurer could know that he was doing wrong, then he would presumably not be at fault and hence could not breach such a duty. One might take the fact that slavery was legal to undercut the presumption that the slave-owner should have known better. While the legal status of slavery is likely relevant here, by itself it does not undercut this presumption. We would not, after all, take the fact that adultery is legal to undercut a presumption that adulterers ought to have known that they breached a moral duty by engaging in it (assuming that adultery is morally wrong).

to block the move to P7 (that X harms Z) would be to deny the relevance of the counterfactual comparative conception of harming itself (either because it is false, or because it is not relevant to the appropriate reparation principle), that is, to reject P6 (as false or irrelevant). Alternatively, one could accept both P4 and P5 (accept both the counterfactual and the counterfactual comparative conception of harming) and yet still resist the inference to P6. Since I argue in chapter 2 that the counterfactual comparative conception is the appropriate one to adopt in this context, I consider only the latter type of objection.

For the purposes of this discussion I am supposing that omissions can be causes.¹⁹⁶ Even supposing this, however, we might think that the X's failure to compensate is only an omission toward Y but not an omission toward Z. If that were so, then we might deny that X's act harms Z on the grounds that X does not cause anything to happen to Z.

Joel Feinberg¹⁹⁷ usefully distinguishes between omissions and non-doings, suggesting (among other things) that omissions can be causes while non-doings cannot. It seems intuitively clear that not everything a person fails to do counts as an omission and Feinberg proposes various conditions that must be met for a person to be rightly said to have omitted to do A¹⁹⁸. Relevant here is the idea that whether or not a person's failure to do an act counts as an omission (as opposed to a non-doing) depends on whether she has a duty to do that very thing. If she has such a duty, then failure to do the act counts as an

¹⁹⁶ Jonathan Schaffer defends the standard view against powerful criticisms by Michael Moore in "Disconnection and Responsibility Causation and Responsibility," *Legal Theory*, 2011.

¹⁹⁷ Feinberg, *Harm to Others*, Chapter 4.

¹⁹⁸ Feinberg, *Harm to Others*, 159-163.

omission; if she lacks the duty, then (usually) her not doing it is not an omission but a mere non-doing¹⁹⁹.

For example, suppose Mary has promised to water Frank's flowers while he is on holiday. If Mary fails to do this then, since she has a duty to do this, her failure counts as an omission, and we can say that Mary's failure to water the flower causes the flowers to die (assuming they do). On the other hand, if Mary has not made such a promise (and supposing that she does not normally water them regardless), then her not watering the flowers is a mere non-doing, and so she has not caused the flowers to die.

In the chain-harm argument, it is argued that X has a duty to compensate Y. Hence, we can say that X's failure to compensate Y is an omission. There is, then, no objection to the claim that X's failure to compensate Y can cause something to happen to Y. We might then say that X harms Y, if it is the case that this failure to compensate Y makes Y worse off than he would have been (had he been compensated). However, on my summary of the Boxill/Sher argument, it is not a necessary condition for X wrongfully harming Y that X breach some duty toward Z; it would be consistent with the argument's conception of reparation to suppose that X has no duty toward Z. Let us suppose that X in fact has no such duty to Z. In that case, a possible objection is that X's failure to compensate Y counts as a mere non-doing with respect to Z, that is, that X's failure to compensate Y is *not* an omission with respect to Z. If this is right, then it would follow that this failure cannot cause anything to happen to Z (even though it can cause

¹⁹⁹ I say 'usually' because, on Feinberg's view, an act could be an omission if it was an act that was normally performed in that context (and so it could be reasonably expected that it would be performed on a particular occasion), even absent a duty to do it. Since that exception does not plausibly apply in our case, it is safe here to rely on the idea that absent a duty to D, failure to D is not an omission.

something to happen to Y). Hence, the objection concludes, X cannot harm Z (even though X can harm Y).

The idea that omissions are only omissions relative to particular actors is not very plausible, however. Suppose that Frank's flowerbed is on a slope that drains easily onto his neighbor Gary's adjacent flowerbed. When Frank's flowers get watered, some of that water drains onto Gary's flowers. Frank and Gary are going on holiday together, and Gary- knowing that Mary has promised to water Frank's flowers- doesn't bother to ask anyone to water his own. Mary does not water Frank's flowers and both Frank and Gary's plants die. In this case, it seems to me correct to say that Mary's failure to water Frank's flowers causes both Frank's and Gary's flowers to die.

Notice that my claim here is only that Mary's omission toward Frank can plausibly be thought of as a cause of death for Gary's flowers, and so might be said to harm Gary (in some sense, however mildly). While I suppose that Frank has a legitimate (moral) claim for compensation from Mary (for the dead flowers), I am making no such supposition with respect to Gary. Intuitively, the harm that Mary causes Gary is not wrongful. That fact might be taken to point to a *distinct* worry about the chain-harm argument: that even though X's omission harms Z in one sense, it is unclear that this harm is wrongful. I address that worry later on.

Denying that X causes whatever Y does that leads to Z being worse-off

In the chain-harm argument, the only way in which X impacts Z is indirectly, by way of affecting Y²⁰⁰. Given this, one might wonder whether it makes sense to say that X causes whatever happens to Z. Whatever Y does or does not do (that impacts Z) depends, at least partly, on choices that Y makes. And one might doubt that X can cause Y's voluntary choices²⁰¹. But if X cannot be said to cause these choices, and if it is in virtue of these choices that Z is made worse off, then X cannot be said to cause Z's being worse off (that is, X does not harm Z).

To clarify this objection it is important to be clear why it is true (as we are supposing it is) that, had Y been compensated, then Z would be better off than she in fact is. In particular, we need to distinguish between (a) cases in which X's failure to compensate Y makes it practically impossible for Y to improve Z's welfare beyond the level that Z in fact reaches, from (b) cases in which X's failure to compensate Y makes it difficult for Y to improve Z's welfare beyond the level that Z in fact reaches, and (c) cases in which X's failure to compensate Y provides only a slight practical impediment to Y's improving Z's welfare beyond the level that Z in fact reaches. Which type of case we have depends on tricky issues such as what options were open to Y to obtain alternate sources of revenue and what degree of self-denial would be reasonably expected of Y in order that we not judge as her own fault his failure to allocate some of those resources she does in fact have onto Z. But the intuitive idea is I think clear enough.

²⁰⁰ That is not strictly true on Boxill's argument, at least if we regard X as the Government: Boxill regards the government as not only harming Y by failing to compensate him but also doing other things that prevent Y from recovering from slavery

²⁰¹ I rely heavily in this section on Joel Feinberg's 'Causing Voluntary Actions,' from Feinberg, *Doing and Deserving*, 1979.

In an obvious sense, not having compensation makes it harder for Y to contribute to Z's welfare improvement: it is easier to confer resources on someone when those resources are provided directly than when one needs to find some other way to obtain them. But suppose that realistic options were available for Y to labor sufficiently to make up the difference- in some real sense, then, Y could have avoided (at least some of) the welfare setback that we are attributing to Z. In these kind of cases [i.e. (b) and (c)], we can imagine that some parents who would have contributed to Z's improvement had they been compensated in fact did not contribute to such an improvement even though they were not objectively lacking in such opportunities. For example, an already demoralized parent might have been inspired by receiving compensation, but absent it was unable to summon the required motivation to strive to obtain those goods by other means, even though objectively such realistic opportunities did in fact exist. Those latter cases we might think of as falling in class (c).

The objection that X cannot cause Y's voluntary actions only clearly applies to cases (b) and (c). In (a), where it is practically impossible for Y to do better for Z than Y in fact does, it seems wrong to describe X's failure to compensate as causing Y not to choose to improve Z's welfare (more than he actually does). In this case, by hypothesis, Y has no choice about whether to improve Z's welfare or not. Rather, this is a case in which X prevents Y from being able to choose whether to improve Z's welfare or not. In that respect, this is more like a case of coercion than of causing a voluntary action. (No

one, I take it, worries that we cannot hold first parties liable for harms that second parties are coerced into committing against third parties)²⁰².

However, even if we focus only on cases (b) or (c) it isn't clear that the objection works. After all, there seem to be many cases in which it does seem to make sense to say that a person causes someone's else's voluntary actions²⁰³. Given this last case (c), however, I briefly note a distinct objection. Suppose that it does make sense to say that X harms Z by way of voluntary actions performed by Y. We might think that, in such cases, even though X harms Y, X does not wrongfully harm Y: surely, one might think, only the actor can be held morally liable for what Y did.

X harms Z but the harm is not wrongful

As I see it the major internal problem with the chain-harm argument lies in *demonstrating* that the child's harm is wrongful. In supposing that the child's being harmed by the failure to compensate the parents by itself entails that the child suffers wrongful harm, Boxill and Sher left unaddressed various crucial issues that become clear when we focus on the reparation principle itself. First, their underlying principles of reparation *presuppose* that a third party (the child) who is harmed by a wrong to someone else (the parent) *can* have a claim for compensation. But that is not an uncontroversial

²⁰² Notice that both Boxill and Sher address this concern, although not as it was presented here. Boxill made very clear that he regarded this as a case analogous to coercion. Indeed, an explicit goal of Boxill's discussion was to rebut the possible objection that blacks were morally responsible for passing harms unto their descendants because (the objection goes) they could have avoided passing them on. Sher did not make clear what kind of case he thought this fit into. But he indirectly addressed this kind of concern by referring back to one of his early papers ["Ancient Rights and Modern Wrongs."] in which he discussed the possibility that compensation was subject to discounting based on the ability of the victim to recover from his injuries.

²⁰³Feinberg describes a number of examples of this type in Feinberg in "Causing Voluntary Actions."

claim. Second, neither author discussed a further necessary condition for valid compensation claims, that the harm be suitably related to the wrong (not too remote or indirectly associated). Again, their discussions simply presuppose that the child's harm is suitably related to the wrong against the parent. Reparations for historical injustice are controversial. The intuitions of many are that the descendants of original victims are not wrongfully harmed at all. The onus, then, is on the defender of harm-based reparations claims to present as strong an account as possible; it is not sufficient that the argument be merely internally consistent.

Earlier in the thesis I argue that accounts based on corrective justice (in my sense) offered a natural and promising approach to addressing questions of reparation for historical injustice. In my view, then, it is more important to address whether these presuppositions are warranted on the corrective justice approach that I favor, namely one that regards corrective justice as grounded in the conformity account.

The conformity account suggests that, in order for P to have a duty to compensate Q, P must breach a primary duty owed to Q. This follows from the fact that a duty to compensate is nothing but a primary duty *itself* under conditions where the primary duty has been breached. It is the same duty in each case, and as such the mere fact of breaching that duty cannot alter *who* it is owed to. Suppose that P has a primary duty with respect to R and only R. The mere fact that P breaches that duty cannot alter the fact that the duty is owed to R and only R. P's breaching a duty not to repay a loan to R itself

does not affect to whom P has a duty to pay the loan later on (with interest), that is, R. The late payment is owed only to R.

This is consistent with claiming that a breach of P's duty toward Q can *also* be a breach of P's duty toward R. Suppose P negligently crashes into Q's car, and this forces Q's car into R. As a result both Q and R are injured. In this case, P breaches duties toward both Q and R, and in a sense P's breach of duty toward Q caused P to breach his duty toward R. P then had duties to compensate both. My claim, however, is that in order for a duty to compensate R to exist, P must breach some duty owed to R.

Given this, if X breaches no duty toward Z, then X can have no duty to compensate Z. For there to exist a duty to compensate Z, there must have been some duty owed to Z that has been breached. Since in the context of corrective justice, duties correlate with rights, this entails that if X invades no right of Z, then X can have no duty to compensate Z. But the chain-harm argument claims that X does have a duty to compensate Z. For this argument to succeed therefore we need to show that X does in fact invade a right of Z²⁰⁴. On that point, Cohen turns out to have been correct.

We need to be clear what it means to say that X has a duty to compensate Z in the context of corrective justice. This means more than simply X has a duty whose satisfaction involves X transferring something to Z. A duty to compensate Z is a duty that is *owed* to Z herself for a specific reason. In particular, a duty to compensate Z is a duty to do or give Z something in order to repair harm that Z suffered *in virtue of* a breach of

²⁰⁴ Of course, if X does have a duty to compensate Z then that itself entails that Z has a right against X, namely the right that X compensate her. However, to assert that Z has a right that X compensate her and to derive the duty to compensate from it merely begs the question. We still need to know *why* Z has that right in the first place.

X's duty toward Z. The idea of a duty to compensate in this context refers to a specific rationale for making compensation (understood in a broader sense).

Contrast this with a broader notion of compensation. Even if P has no duty to compensate Q (under corrective justice), P can still compensate Q for some harm by giving Q something to repair that harm. Compensation in this latter sense is broader: the idea is one of giving something to repair a harm without reference to the normative reason behind doing so.

In my view, anyone can satisfy another person's duty to compensate, so it is possible for P to compensate Q in order to satisfy R's duty to compensate Q (under corrective justice). But it may also be that P compensates Q simply because P feels sorry for Q, even when no one has a duty to compensate Q. To indicate that I am referring to a case where P is owed compensation *under corrective justice* and not simply to one who is being compensated in the broader sense I will restrict my use of 'compensation' from now on to compensation under corrective justice (unless otherwise specified).

The problem for the chain-harm argument is that we need to explain what right of Z's is invaded by X, and invaded in such a way that the setback to Z's interests caused by X's failure to compensate Y constitutes wrongful harm to Z. That is, we need to show not only that X breaches a duty toward Z, but that this breach is suitably related to the harm Z suffers by X's failure to compensate Y.

The discussion of Cohen pointed to two possible answers. First, it could be a right to some property. The obvious choice would be a right to some or all of the money that X

owes Y. The problem, as I argued in rejecting Cohen's fix, is that we have no reason to regard Z as having a right to any of the compensation X owes Y.

Second, it could be a right not to be setback by X's failure to compensate Y. Even if X's failure to compensate Y does invade some right of Z, we would also have to show that this can cause wrongful harm to Z. But we have yet to be given a reason to think that Z in fact has any such right, let alone that it could cause the relevant wrongful harm. One possibility I raised earlier was that we might understand X's failure to compensate Y as constituting negligence toward Z²⁰⁵. Although this is a possibility it is not at all clear why we should think that the duty not to harm negligently (or recklessly) protects the child from being setback by a failure to compensate her parent. Perhaps an argument for this position can be made, but I do not develop one here. In the remainder of this chapter I sketch another possible strategy for overcoming this problem.

A Proposal: Harming Z as Wrongfully Harming Y

Rather than argue that X causes wrongful harm to Z directly, I will argue that X's harming Z counts as further wrongful harm to Y. X's doing something to repair Z's interest is required in order to compensate Y. This, in turn, may be thought to ground a right that Z has to receive something from X, a right that is not grounded on, or equivalent to, a duty to compensate Z.

²⁰⁵ By saying this, I do not mean to exclude other possible interpretations such as that X's failure to compensate Y constitutes recklessness toward Z or that X purposely fails to compensate Y in order to harm Z.

First, we might think that X's failure to compensate Y itself causes setbacks to some morally protected interests of Y. In one sense this is trivially true. The fact that X has a duty to pay Y compensation \$C may be understood as imposing on Y (at each moment of non-payment) wrongful harm that is equivalent in value to \$C. That is, X's failure to pay \$C to Y rather than X's paying \$C (at t1) causes Y's monetary interest to be in state s1 rather than s2 (at t2), where in s1 Y has \$C less than s2 (and where t2 is a time just after the hypothetical payment).

However, it is also conceivable that the duty to compensate itself can cause *further* wrongful setbacks to Y's interests. In virtue of not being compensated Y may be unable to afford to see a doctor and so be crippled by a disease that would otherwise be easily curable. Under certain conditions it seems reasonable to regard this *further* setback to Y's welfare interest as the wrongful result of the failure to compensate. Thus, if we suppose that Y's being crippled in that way was not caused by Y's own bad choices, and not caused by someone else's wrongfully making Y sick, then it may be reasonable to regard the failure to repay Y as causing the harm Y suffers (the harm being her being crippled rather than recovering quickly from the illness). It seems clear that that these conditions are at least sometimes met in the chain-harm argument.

One interest of Y is the interest that Y has in the well-being of her own child, that is, in Z's well-being. Of particular relevance here are cases that Feinberg refers to as setbacks to 'purely' other regarding interests. In this "...kind of case, C has "invested" a desire so strong, durable, and stable in D's well-being, that he comes to have a personal

stake in it himself. It becomes, therefore, one of his ulterior interests or focal aims.”²⁰⁶

Indeed, the example that best exemplifies this case in Feinberg’s view is harm to a loving parent: “Harm to a child may itself be harm to its loving parent in that it directly violates the parent’s “purely” other-regarding interest,”²⁰⁷

The chain-harm argument supposes that the failure to compensate Y prevents Y from contributing more to Z’s welfare than she otherwise would have. In that way, it sets back Z’s interest (in the counterfactual comparative sense). But if it harms Z in this way, and on the reasonable assumption that Y is a loving parent, then *ipso facto* it harms Y. Indeed, insofar as the Y’s “purely” other-regarding interest is identified with the Z’s interest, the extent to which the Z’s interest is setback likely corresponds to the extent of the parent’s setback (in this ulterior interest in the child).

Setbacks to the child may also *instrumentally* set back the parent’s interest. As Feinberg suggests, in severe cases a setback to the child’s interest “may also be instrumentally damaging to various self-regarding interests of the parents, in that it creates a drain on their funds, a burden on their time and energy, and a strain on their emotional stability.”²⁰⁸ Furthermore, the parent’s self-regarding interest may be instrumentally harmed because setbacks to the child may affect the child’s ability to support the parent in sickness or old age.

Suppose for now that Y’s interest in her child is sufficiently important that its being setback makes it an appropriate candidate to count not only as a harm caused by

²⁰⁶ Feinberg, “Harm to others,” 70.

²⁰⁷ Feinberg, “Harm to others,” 70.

²⁰⁸ Feinberg, “Harm to Others,” 71.

X's wrong (failure to compensate Y) but as a wrongful harm to Y. That is, suppose that it is a morally, if not legally, protected interest. Above, I presumed that Y's welfare interest in not being crippled was sufficiently important that its being caused by the wrong of failing to compensate Y could warrant its being a wrongful harm. Here, I suppose that Y's other-regarding interest in her child is of similar moral importance.

X's failure to compensate Y (X's wronging Y) harms Z. It thereby harms Y's interest both instrumentally and directly (since it harms her self-interest in Z and her purely other-regarding interest in Z respectively). Further, this constitutes a new wrongful harm to Y. Hence, X has a new duty to compensate Y (distinct from his original duty to compensate Y) for this and any other wrongful harms Y suffers in virtue of the original failure to compensate Y. Compensating Y for the wrongful setback to her interest in Z requires that X do or transfer something to ensure that Z's harm is itself repaired. In brief, this new duty to compensate Y requires that X repair Z's harm.

Here, X is required to compensate Z (in the broad sense only) in order satisfy his duty to compensate Y (under corrective justice). This is the normative ground for X's action. Insofar as X's requirement to pay Z is *required* in order to compensate Y, then the force of the requirement to pay Z is the same as the force of the requirement to compensate Y. In other words, X has a duty to pay some amount to Z. This is not a duty to compensate Z (in the sense of compensation relevant to corrective justice). But it is a duty to pay that very amount to Z. As such, it is debt to which Z can demand from X as a matter of *Z's right*. X's failure to pay this debt to Z can now be thought of as a wrong to Z. Furthermore, if Z has children and if this failure to repay Z sets back Z's children's

then the same strategy can be used to ground a payment to *Z*'s children. In this case, the payment to *Z*'s child would be required in order to satisfy a duty to compensate *Z* (and not a duty to compensate her child).²⁰⁹ Nonetheless, the child would still have a right to whatever is required to repair the harm that the failure to pay *Z* caused *Z*'s child.

To be clear, this is not to say that *Z* has a *property* right to whatever *X* has a duty to pay her (in order to satisfy the duty to compensate *Y*). I therefore do not fall prey to the problem that I identify with Cohen's fix. In the final section of this chapter I raise and respond to various possible objections to my proposal.

Objections and Responses

First, we might worry about the instrumental setback to the parent's interests. Recall that Feinberg suggested that a harm to a child can instrumentally harm a parent. Feinberg seems to have primarily had in mind here serious physical harms, hence the reference to financial costs and burden of time. For that reason one might doubt whether the right kind of harms would likely occur in the case of the chain-harm argument. The worry might be that only certain harms (perhaps non-comparative ones) would have this instrumental affect on the parent.

This, in turn, points to a more general worry that applies to the harm to the parent's other-regarding interest. Granting that the failure to compensate *Y* harms *Z*, we

²⁰⁹ The idea here depends on the claim that *Z* herself has a right to compensation herself. If she has such a right, then the failure to compensate *Z* (in violation of *Z*'s right) likely causes a setback to *Z*'s interest in the welfare of her own child, *D*. In turn, *D* would have a right to compensation herself.

If on the other hand we reject the idea that *Z herself* has a right to compensation, then we might still be able to defend the idea that the original injurer has to increase *D*'s welfare as a way of compensating *Y*. After all, by failing to compensate *Y*, *Y*'s interest in his grandchild *D* is likely setback. Of course, this presupposes that *Y* has some interest in *D*.

still might question whether this setback to Y's interest in Z is wrongful. The worry here is that Y's interest in not the right kind of interest to count as wrongful.

Even if we accept the first worry it is certainly possible, indeed likely in many cases, that the counterfactual comparative setback to the child's interest includes at the same time placing the child in non-comparatively bad states she would otherwise have avoided. Boxill points to such a possibility when suggesting that the children of former slaves might inherit slavery-imbued traits that are bad for them²¹⁰. Furthermore, these children over the generations are quite likely to be subject to poverty, and hence the increased likelihood of malnutrition and diseases associated with it. Given this, it is very likely that the parent's self-interest is instrumentally setback by the effects on the child's interest.

This fact is no doubt exacerbated by the suffering that likely accompanies the knowledge that the parent cannot herself do more for her child. The fact that she cannot do more for the child is, of course, itself based on the fact that she is not being compensated as she ought to be. Indeed, this particular consideration suggests a possible response to the first objection since it suggests a plausible example in which the parent's interest is instrumentally set back even where the setback to the child is *not* also a non-comparative one. Parents, after all, may suffer from knowing that they cannot do more for their child even where they can still do enough to ensure that the child avoids (easily preventable) non-comparative harms.

²¹⁰ Boxill, "A Lockean Argument," 54.

The second worry was that the other-regarding interest might not be the right kind of interest to be protected by a moral duty. The analogy with legal duties possibly supports this objection. As Feinberg suggests, legally protected interests tend only to be welfare interests and not ulterior interests. The worry Feinberg had here was that, in our society, interference to prevent such setbacks cannot in general be justified. Hence he writes:

In general, those who invade my ulterior interests in any way other than by invasion of my welfare interests, either do so simply in the exercise of their own proper liberty without moral blame, or, if they do incur blame, do so in subtle ways not preventable as a practical matter by the law.²¹¹

Two responses may be made here. First, we are concerned with a moral argument for reparation. The question is whether there is a moral duty not to setback such interests. The central importance of the child's interest to the interest to the parent (or most parents) cannot be denied. Second, the considerations that protect others from being interfered with raised in this last passage do not clearly apply in the context of the chain-harm argument. By supposition the setback results from a choice that X does not have a liberty to make: X has a duty to compensate Y. We cannot then worry that X's liberty would be unfairly interfered with in this case. It is less easy to say how blame factors into matters. X is likely to be a candidate for blame since he likely ought to have known that he (or it if we refer to the government, it) had such a debt. However, since we are concerned with corrective justice and with duties that are not fault-based (as duties to compensate are not) this consideration does not have much force.

²¹¹ Feinberg, "Harm to Others," p. 62.

Another objection to the proposal concerns what happens when Y dies (supposing that Y dies before Z). We might think that if Y is dead, then he (Y) cannot be compensated. And if the only reason for X to remove Z's harm was in order to compensate Y, then Y's death would entail that X no longer has reason to remove Z's harm. First, this reply presupposes that Z does not in fact come to an independent right to have her harm removed. If Z can be said to have such a right, then Z's claim is independent of Y's compensation claim and so is not threatened by Y's death. Second, even if Z cannot be said to have such a right against X, we could still appeal to the idea that Y is posthumously harmed by X's failure to remove Z's harm. Intuitively, it seems that persons can be posthumously harmed. For example, as Thomas Nagel has argued, it is plausible to think that a writer is harmed if, after his death, the belief became widespread that his books had been written by his brother.²¹²

A final objection calls into question the claim that Z herself comes to have a right against X (that X remove Z's harm). Suppose that I promise you that I will give \$100 to your friend. If I fail to pay your friend, I have committed a wrong against you (you had a right that I pay your friend). But it is not clear that I have breached any duty that I owe your friend: after all, I did not make the promise to the friend and so it is doubtful that the friend has any right to that money. Similarly, we might think that X's failure to remove Z's harm is contrary to Y's right (Y's right to compensation for the setback to Y's interest in Z), but does not violate any right of Z.

²¹² Thomas Nagel, "Death." In *Mortal Questions*, 1-10. New York: Cambridge University Press, 1979.

In response, I suggest that in the promise case *both* you and your friend have a right against me. Evidence that your friend has such a right comes from the fact that the friend has the power to remove this obligation from me if she so wishes. That is, if she tells me that I do not have to give her \$100, I am no longer under any obligation to give her the money (and this is so regardless of what you think about it). But in order that she can waive the debt, it must be that she has a right to the money. Similarly, it seems that Z could waive the obligation that X has to remove Z's harm, which suggests that Z herself has a right against X (that X remove Z's harm).

Conclusion:

In this chapter I have analyzed and attempted to bolster the chain-harm argument. I argued that Cohen misinterprets Boxill and Sher's reading of the argument by supposing that, in order for Z to have a right to compensation (from X) X must both violate a right of Z and also (thereby) harm Z. I suggested that this interpretive error reflects a deeper misinterpretation of the argument, namely that the argument necessarily relies on the idea that Z has a property right to some of the compensation that X owes Y. I then suggested that Cohen's fix, in which he attempts to argue that Z does indeed have a property right to some of the compensation, fails on its own terms.

Next, I presented and responded to various objections to the chain-harm argument. Of particular importance I argued that even though Z need not have a property right to the compensation X owes Y, Cohen is in fact correct (and Boxill and Sher mistaken) to suppose that, for X to have a duty to compensate Z (under corrective

justice), Z's harm must be caused by X's violation of a right of Z. Given this, there is an important gap in the argument as Boxill and Sher present it. One possible strategy to address this shortcoming would involve uncovering a right of Z's that is violated by X's failure to compensate Y. However, I pursue a different strategy, arguing that X's removing the harm he does Z is required in order for X to compensate Y for the *further* wrongful harm that X's failure to compensate Y (for the initial injustice against Y) causes Y (which includes the setback to Y's interest in Z's welfare).

Chapter 4: The Risky Policy

Introduction

As we have seen, the non-identity problem denies that acts that are a condition of a person's existence can harm that person. Acts of this type include examples relevant to my inquiry. A first example (that I addressed in chapter 3) involved historical injustices: for example, how can the injustices of US chattel slavery harm the current descendants of slaves given that those current descendants would not exist but for slavery? A second example is not usually considered in the context of addressing historical injustice, but it raises similar problems. How can a government that adopts a policy that predictably risks a radiation 50 years from now harm future persons who would be affected by that radiation, supposing that those particular future persons would not exist if the government had not adopted that policy. This latter case is referred to in the literature as *The Risky Policy*²¹³. To be clear, my concern with this case is slightly different from the standard worry. The central question for me is: are the victims of the radiation leak owed compensation by the government for causing the harms imposed by the radiation leak?

A number of authors respond to the non-identity problem by arguing that identity-conferring acts that take place before a person comes into existence can in fact harm that person. These authors take 'A harms B' to mean that 'A causes B to suffer harm,' but disagree about what counts as suffering harm (at least in the puzzles in which the non-identity problem is raised). Recently, Judith Jarvis Thomson has defended a version of

²¹³ The original case is from Parfit, *Reasons and Persons*. The version I discuss is from Thomson, "More on the Metaphysics of Harm."

this approach that employs her revised version of the counterfactual comparative notion of harm. Since many find this notion of harm the most intuitively appealing and since this is the notion of harm relevant in the context of corrective justice, a successful defense of this type would be very welcome. I argue however that her defense in the context of the Risky Policy does not succeed. In particular, I argue that, contrary to her view, it is not at all clear that the government's adopting the risky policy causes the harm she ascribes to a future person.

I then argue that it is not in fact a necessary condition of the government's having a duty to compensate the child for the cancer that the risky policy itself harms the child (that is, that the policy causes the child to suffer harm in the counterfactual comparative sense). On my view, the government has a duty to compensate the child because the government's failure to prevent radiation from harming the child constitutes a breach of its duty of care (a breach which takes place after the child is born). It is this wrongful omission, and not the disposal choice itself, that causes the child to have lung cancer rather than the child to have healthy lungs. Given this, and the fact that the other conditions for causing wrongful harm are met, it follows that the government causes wrongful harm. In virtue of breaching this duty of care toward the child, then, the government has a duty to compensate the child for the wrongful harm it causes her.

Although the risky policy itself does not harm the child, the fact that the government adopts the risky policy explains why the government has an agent-relative duty to prevent the radiation from harming persons (whoever they may be), and hence explains why the failure to do so counts as a wrongful omission by the government. The

choice of the risky policy is thus essential to the explanation of why the government can be held morally liable for the harmful effects of the radiation leak although no part of this explanation relies on a claim that the choice of the policy *itself* caused these effects.

The Non-Identity Problem

Here I explain the specific problem that I and Thomson address in this chapter. I do not claim to offer any general solution for non-identity worries. For example, I take no position on whether or not it makes sense to say that the plaintiff in wrongful life suits has been harmed by being brought into existence.

In this chapter I am concerned with *The Risky Policy*.

Child with lung cancer: For reasons of economy, government B chose to permit unsafe disposal of some radioactive waste. Fifty years later, there still is a considerable amount of radioactive pollution in the atmosphere. Many people, including many who would not have been born if B's choice had not been made, become seriously ill early in life. One child who would not have been born if B's choice had not been made, has just been found to have lung cancer.²¹⁴

My concern is to evaluate the claim that the government has a duty to compensate the child for wrongful harm that she suffers in virtue of having lung cancer. A natural explanation for why corrective justice grounds such a duty is that the government's choice of the risky policy was a wrong²¹⁵ (a breach of its duty), which caused the child to suffer harm (the lung cancer). Given that the other conditions required for a harm to be

²¹⁴ Judith Jarvis Thomson, 'More on the Metaphysics of Harm,' 456.

²¹⁵ One might worry that the status of the risky policy as a wrong is in doubt unless we can show that it does in fact harm those who would not exist but for the decision. This would be problematic since, if the government breached no duty by making the decision then it could not cause any *wrongful* harm at all. Here I suppose that, even if it does not harm those persons, it could still plausibly be regarded as a breach of duty on other grounds.

wrongful are met in this case (for example, the harm was reasonably foreseeable, the child did not cause her own harm) it would follow that the government causes the child wrongful harm. The government would then have a duty to compensate the child for the wrongful harm.

However, it is not clear that the government's choice of the risky policy (the wrong) causes the child harm in the appropriate sense. The appropriate test for harm in the context of corrective justice is the counterfactual comparative sense, where the relevant contrast is taken to be that the government acts in minimal compliance with its duty. To show that this wrong harms the child we need to show that the government's choice of the risky policy at t1 causes the child at t2 to be worse off than she would otherwise have been at t2 (had the government minimally complied with its duty at t1)²¹⁶.

The apparent harm is the child's getting lung cancer, and so I will take t2 to be the time at which she has just been diagnosed with that disease. In order to determine whether the child is worse off at t2 we need to compare how well off she is in fact at t2 with how well off she would have been at t2 had the government chosen a safe policy. According to the non-identity claim, however, had the government not chosen the risky policy this particular child would not exist (indeed, would never have existed). But if that is so, then it is not clear that the child is in fact worse off at t2 since it is not clear that it is worse (at t2) for the child to have lung cancer than not to exist at all (that is, never having existed in the first place).

²¹⁶ I formulate this test as a test for momentary wrongful harm. However, the same point could be made using a test for episodic harm that focuses on the time after the child gets sick until she either recovers or dies.

Various interpretations of this comparison are possible. According to one, this comparison cannot coherently be made. Suppose we represent how the relevant interest of the child (for example, her welfare interest) is faring on Feinberg's interest graph²¹⁷. Suppose we can say that her welfare interest is at -3 (below the centerline). The problem is that the relevant counterfactual does not yield us with *any* alternative point on the graph with which to compare this (since she does not exist in that counterfactual scenario)²¹⁸. On this interpretation, it is clear that the adoption of the risky policy does not cause harm to the child (in the relevant sense)²¹⁹.

On a second interpretation, comparisons between states of existence and nonexistence are sometimes coherent. For example, it is plausible to think that some lives are so bad that they are worse than not existing. One might then argue that it could be true that the risky policy caused the child to suffer harm if the child's life (after the harming act) is not worth living. But this will not do. First, it is not clear that this is true of the child with lung cancer: quite possibly her life is worth living. Granted, she could be faring so badly (in so much pain, with so little prospect of recovery) that she is worse off than she would be were she not to exist at that time. But, if that were in fact true, it would produce an intuitively absurd measure of the harm that she suffers. Compensation for the risky policy would involve placing her in the position she would have been in but for that

²¹⁷ See Feinberg, *Harm to Others*, Chapter 1. I explain this idea in chapter 1.

²¹⁸ We cannot assign non-existence a zero on the interest graph because a zero means that the interest is on the center line of the x-axis. But that presupposes that the interest *exists*, and that it is neither doing well nor badly in absolute terms. A similar problem arises for death, but that hard case provides other difficult puzzles that I do not address here. Hanser raises this problem in "Metaphysics of Harm." Thomson defends the counterfactual comparative claim against his objections in "More on the Metaphysics of Harm."

²¹⁹ That the child is below the centerline allows us to say that she suffers harm in another sense. But that sense is not the one appropriate in the context of corrective justice.

policy; and but for that policy, she would not exist. On this reading, then, repairing the child's harm would involve making it such that she no longer exists²²⁰. On the contrary, however, it seems intuitively clear that the government owes the child compensation that would, ideally²²¹, bring the child back to good health.

An approach that denies that the non-identity claim entails the no-harming claim:

A number of responses to this version of the non-identity problem in this context are possible. A first response denies the non-identity claim itself. I will not pursue that strategy and will assume that the non-identity claim is true. I evaluate a second approach on which the non-identity claim is taken to be consistent with the idea that the risky policy does in fact harm the child.

As in cases typically associated with reparations for historical injustices, some authors have appealed to the idea that the risky policy causes non-comparative harm to the child. This is the approach taken by Elizabeth Harman.²²² On this approach, whether the child suffers harm in virtue of having lung cancer depends only on what state she is

²²⁰ The fact that the child was previously better off than she is now is not relevant here. It would only be relevant if one accepts an actual comparative conception of harm and its associated conception of compensation. I explain why I reject these conceptions in chapter 2.

We could perhaps avoid this implication if we take compensation to involve placing someone's interest in a position that is no worse than it would have been but for the wrongful act. In that case, if the child could be cured then curing her could constitute compensation, since the child's interest (in health) would presumably be no worse off were she to be in good health than if she were not to exist.

²²¹ I include the caveat that this would be the ideal measure of compensation since, if the child's life is not worth living and if, therefore, the child and parents opted for voluntary euthanasia (supposing that were permitted), then the government might be liable to compensate for the costs of the euthanasia. However, that intuitively reflects a situation in which ideal compensation (that which would compensate her for losing her good health) is impossible.

²²² Elizabeth Harman, 'Can we Harm and Benefit in Creating?' *Philosophical Perspectives* 18, (2004); Elizabeth Harman, 'Harming as Causing Harm,' in Melinda Roberts and David Wasserman (eds.) *Harming Future Persons: Ethics, Genetics and the Nonidentity Problem*, 137-154, Springer (2009).

actually in; no comparison with a hypothetical state (such as the state that she would be in had the act not been done) is relevant to determining whether she suffers harm. In this way, Harman denies that whether the risky policy harms the child depends on whether the child would be worse off were that choice not made. Hence, she is able to put aside the worry raised by the non-identity claim. As I argue in chapter 2, however, this approach relies on a notion of harm that is not relevant to corrective justice.

Thomson on the other hand adopts a notion of harming and suffering harm that depends on the counterfactual comparative account relevant to corrective justice. On Thomson's view, the choice of the risky policy causes, by means of radiation, the child to have healthy lungs and also prevents the child from having healthy lungs. She therefore denies that, for the purposes of determining whether the child is harmed, the relevant comparison is between the child having lung cancer and the child's not existing at all. On her view, the relevant comparison is between the child's having lung cancer and the child's having healthy lungs. Her approach thereby addresses the non-identity worry by suggesting that, contrary to appearances, the child exists in both the relevant actual and hypothetical scenarios.

However, I do not think her argument succeeds. Specifically, it is doubtful that the risky policy itself causes the child's having lung cancer rather than the child's having healthy lungs. But if the choice does not cause the child to suffer harm, then it is hard to see how the government can owe the child compensation for that harm.

Thomson's revised counterfactual comparative account (RCC):

Thomson develops a revised counterfactual comparative account of suffering harm and harming in the light of problems she identifies with (what she defines as) the standard version. The standard version she defines as follows:

Comparative counterfactual account of suffering a harm: A's suffering a harm is A's being in a state *s* such that: A is worse off in a way for being in *s* than he would have been if he hadn't been in *s*.

Comparative counterfactual account of harming: B harms A if and only if B causes A to be in a state *s* such that: A is worse off in a way for being in *s* than he would have been if he hadn't been in *s*.

The first problem is related to indeterminacy over what the appropriate contrast ought to be for the purposes of evaluating whether harming and suffering harm occur. Consider a case in which a doctor improves the patient's vision from virtually blind to merely dim sighted. Does the doctor harm the patient? To judge this we need to know what the relevant contrast would be. It is natural to suppose that had the doctor not operated, the patient would have remained blind, and thus judge what the doctor does as not harm the patient. But why suppose this? Perhaps if the doctor had not done the operation a different and better doctor would have performed it, in which case the patient would have had normal vision. Or perhaps the doctor could and should have improved the patient's vision still further. Given either of these last two alternate scenarios the

doctor's act would be judged to have harmed the patient (in either case, the patient is worse off than she would have been had the doctor not done the surgery).

A second problem arises in cases of the following type. Suppose that a villain throws acid in your eyes that would blind you completely; however, just afterward a passerby throws an acid-neutralizer in your eyes, leading you to end up having dim vision. On the simple account, (supposing that the indeterminacy problem is avoided), the villain and the passerby together caused you to have dim vision; but if they had not acted, then you would have remained with normal vision (we suppose). This implies that both parties harmed you. Intuitively, however, the villain harmed you while the passerby did not.

Thomson argues that we can avoid these problems by adopting the following revised comparative counterfactual account of harming:

Y harms A just in case A is in a state *s* such that:

Y causes A to be in *s*, and for some state *s**, (i) Y prevents A from being in *s** by the same means by which Y causes A to be in *s*, and (ii) A is worse off in a way for being in *s* than he would have been if he had been in *s**²²³

By explicitly referring to the alternative hypothetical state, *s**, Thomson addresses the indeterminacy issue. And by incorporating the notion of prevention, she addresses the counterexample: The villain's throwing acid into your eyes both causes you to have dim vision and prevents you from having good vision by the same means by which it causes you to have dim vision: hence the villain harms you. However, while the passerby's

²²³ Thomson, 'More on the Metaphysics of Harm,' 446.

throwing neutralizer in your eyes causes you to have dim vision, it does not prevent you from having good vision; hence it does not harm you²²⁴.

Given this conception of harming, Thomson briefly addresses the risky policy case (a brief response is all she thinks is required). As a reminder, here is her case once again:

Child with lung cancer: For reasons of economy, government B chose to permit unsafe disposal of some radioactive waste. Fifty years later, there still is a considerable amount of radioactive pollution in the atmosphere. Many people, including many who would not have been born if B's choice had not been made, become seriously ill early in life. One child who would not have been born if B's choice had not been made, has just been found to have lung cancer.²²⁵

She then presents the non-identity worry and offers her response:

Most people say that government B acted wrongly. Can it be made out that B harmed the child? On any view, it harmed the child if it caused the child to have lung cancer, and indeed, did so by choosing that disposal policy. Did it? Many philosophers are struck by the fact that if government B had not made that disposal policy, then this child would not have existed. And they wonder: how can it be that B caused this child to have lung cancer by making that disposal choice, given the fact that if B had not made that disposal choice then this child would not have existed?

But it is just a mistake to be troubled by that fact. Surely we can suppose that by making its disposal choice, B started two different causal processes (among indefinitely many others). One issues in the birth of the child. The other (off in another direction) later issues in the child's acquiring lung cancer. There can be no objection, then, to the idea that B's disposal choice caused the child's having lung cancer. It was presumably by causing radioactive pollution that B's disposal choice caused the child to have lung cancer. It was also by causing radioactive pollution that B's disposal choice prevented the child from having healthy lungs. The revised account therefore yields that government B harmed the child- as any acceptable analysis of harming should, given that B caused the child to have lung cancer.²²⁶

Thomson makes three main claims here. First, the non-identity claim is taken by some to call into question the idea that the government's disposal choice causes the child

²²⁴ My own test for wrongful harm also addresses both problems that Thomson identifies. However, I sketch her account so that her own solution can be understood.

²²⁵ Thomson, "More on..." 452.

²²⁶ Thomson, "More on..." 452-453.

to have lung cancer. Second, the government's disposal choice does cause the child to have lung cancer. Third, the disposal choice also prevents the child from having healthy lungs.

The first claim is somewhat mysterious. Why is the non-identity claim thought by some to entail that the disposal choice does not cause the lung cancer? To answer this we need to get clearer on what is meant by 'causing the lung cancer.' A parallel earlier passage discussing a distinct case suggests what meaning she intends. Here she is discussing a case in which a child is born blind because the mother suffered from German Measles while pregnant; but had the mother waited three months to conceive, a different but sighted child would have been born:

Many philosophers are struck by the fact that if the Bs had waited three months, the child they then conceived would not have been *this* child who was born blind. And they wonder: how can it be that the Bs caused *this* child to be blind given that if they had waited, then it wouldn't have been *this* child that would be sighted—it would have been some other child that was sighted?²²⁷

In that passage, doubt over the idea that the Bs caused *this* child to be blind is based on the observation that, had they acted differently, some other child would be sighted. This suggests that the claim 'the Bs caused *this* child to be blind' is to be read as 'the Bs caused *this* child to be blind rather than *this* child being sighted,' as opposed to 'the Bs caused *this* child to be blind rather than some other child to be sighted.'

Assuming that she is making the same point when discussing the risky policy, the non-identity claim is taken to cast doubt on the idea that 'the disposal choice caused *this* child to have lung cancer rather than *this* child to have healthy lungs,' as opposed to the

²²⁷ Thomson, "More on..." 450.

idea that ‘the choice cause this child to have lung cancer rather than this child not existing.’ It is important to make this explicit since the claim that ‘the disposal choice causes *this* child to have lung cancer’ is consistent with both readings²²⁸.

Thomson does not explain, however, *why* she thinks some philosophers take the non-identity worry to cast doubt on the idea that the disposal choice causes *this* child to have lung cancer rather than *this* child to have healthy lungs. I presume that the worry here is the one I explained when presenting the problem earlier. The worry is generated by the idea that, in order to judge whether the disposal policy causes the child to be worse off than she would otherwise be, we need to compare how well off the child is having lung cancer with how the child would be faring had the government chosen some non-risky policy. But, as the non-identity claim suggests, had the government chosen a safe policy then the child would not exist. Put another way, the disposal policy seems to cause the child’s having lung cancer rather than the child’s not existing.

Since the argument Thomson presents is aimed at refuting this doubt, I suppose that it is made in defense of Thomson’s (implicit) contrastive reading of the claim (that the choice caused this child to have lung cancer rather than this child to have healthy lungs). Notice that the contrastive reading itself seems to entail the third claim. After all, to say that ‘the disposal choice causes this child to have lung cancer rather than this child to have healthy lungs’ is equivalent to claiming that ‘the disposal choice both causes the child to have lung cancer and prevents the child from having healthy lungs’. Given this,

²²⁸ Perhaps the point is that to cause something to happen to *this* child implicitly means that some difference is made to this child, which itself presupposes that the child exists in both scenarios (both with and without the cause). If that is right, then this would rule out the latter interpretation.

the argument that supports the second claim (that the disposal choice does cause the child to suffer lung cancer) presumably is intended to support both the second and third claim (the third claim being that the child is prevented from having healthy lungs).

What is her argument for these two claims? The argument involves two premises. The first premise is that there is a causal process connecting the disposal choice and this child's having lung cancer. The second premise is that this causal process is distinct from the causal process connecting the disposal choice and the birth of the child. As I interpret the argument, the first point (that there is a causal process between the disposal choice and the lung cancer) is sufficient to show that the disposal choice causes *this* child having lung cancer rather than *this* child having healthy lungs. The second point (that this causal process is independent of that in virtue of which the non-identity claim is true) then shows that the non-identity worry is independent of this consideration and hence does nothing to refute it.

In the third paragraph quoted, I take Thomson to be providing more detail about the causal process that connects the disposal choice with the lung cancer. The relevant extra consideration here is that this causal process involves the disposal choice affecting the child *by way of causing* the radiation leak. The radiation leak causes *this* child's having lung cancer rather than *this* child's having healthy lungs. Because the disposal choice causes the radiation leak, Thomson thinks it reasonable to interpret the case of the Risky Policy using the revised counterfactual conception of harming as follows:

The government harms the child just in case the child is in a state *s* such that:

The government causes the child to be in state s (has lung cancer) and for some state s^* (has healthy lungs), (i) the government prevents the child from being in s^* (has healthy lungs) by the same means (the radiation) by which it causes the child to be in s (has lung cancer) and (ii) the child is worse off in a way for being in s (has lung cancer) than he would have been if he had been in s^* (has healthy lungs).

The difference of Thomson's approach to that of the skeptic is that Thomson thinks that, in order to show that the disposal choice causes lung cancer (rather than healthy lungs) we can legitimately focus only on what the radiation itself causes to happen to the child. If we take this route, we are not asked directly to evaluate what would have happened had some other choice been made. The skeptic on the other hand focuses on this last consideration and hence reaches a different conclusion.

Another, related way to interpret this difference is this: by focusing on the causal chain that connects the disposal choice and the lung cancer, we reach a different conclusion than if we ignore the causal chain. The causal chain here can be simplified as involving two steps: the disposal choice causes the radiation, and the radiation causes the lung cancer. There are thus two distinct ways to evaluate the truth of the causal claim 'the choice of risky policy causes *this* child to have lung cancer rather than *this* child to have healthy lungs.' The skeptic evaluates this claim by asking after the truth of the counterfactual 'if the government had chosen the safe policy, then this child would have had healthy lungs.' The non-identity claim suggests that this counterfactual is false: in the closest possible world in which the government chose the safe policy, the child would not exist and hence *this* child would not have healthy lungs.

By contrast, Thomson invites us to evaluate the causal claim by focusing on the second link of the causal chain. According to this approach, we need to evaluate the claim that ‘the radiation causes *this* child to have lung cancer rather than *this* child to have healthy lungs.’ To evaluate this, we ask after the truth of the counterfactual ‘if there were no radiation, then this child would have healthy lungs.’ On a plausible reading that is true²²⁹, in which case the causal claim would be true.

There are two problems with Thomson’s argument, one minor and one major. The minor problem is that showing that there is a causal process connecting the disposal choice with the child’s getting lung cancer is not sufficient to support the claim that the disposal choice caused the child to have lung cancer, at least not in the relevant sense of ‘caused’ in this context (in the context in which ‘P harms Q’ means ‘P causes Q to suffer harm’). I explain this problem in the remainder of this section. The major problem is that it is not at all clear that interpreting the causal claim in terms of a causal chain yields the result that Thomson thinks it does. In the next section, I argue that according to one plausible conception of causation- Jonathan Schaffer’s view of contrastive causation- the claim that ‘the disposal choice causes this child to have lung cancer rather than *this* child to have healthy lungs’ is false. In particular, it is false when interpreted in terms of a causal chain, as Thomson’s account suggests it ought to be. If that is correct, then it does not follow that the disposal choice both causes the child to have lung cancer and prevents the child from having healthy lungs, and hence does not show that the disposal choice harms the child.

²²⁹ That is, it is plausible to think that in the closest possible world in which the radiation does not leak, the child exists but does not get lung cancer.

The Minor Problem:

An implicit premise in Thomson's argument is this: if there is a causal process that connects A and B, then A causes B. Unfortunately, this seems open to a counterexample suggested by her own discussion. If this premise is true, then not only does the disposal choice causes the child's having lung cancer (which seems at least plausible), it would also follow that the disposal choice causes this child to be born (since as she says, there is a causal process that leads from that choice to the child's birth). However, it is not clear to me that this last statement is true.

It is useful here to distinguish between A's being *a cause* of B, from A being *the cause* of B. I take no position on whether A's being the cause of B is an objective matter. For now I rely on the intuitive idea familiar from cases like the following. Suppose Bob lights a match starting a fire in the forest. The presence of oxygen is a cause of the fire but not the cause, whereas lighting the match is the cause. Nor am I committed to the idea that there need always be one and only one thing that counts as the cause: we might equally say that a cause is one of the causes. For example, suppose Bob holds the matchbox and Rob strikes the match. It seems right to say that both Bob and Rob were the causes of the fire.

To say that 'A causes B' may be read in either sense. In the context of Thomson's characterization of harm, however, I think we must read 'A causes B' in terms of A being not merely a cause but also being the cause of B. Intuitively, while it is plausible to think that the disposal choice is *the cause* of the child's lung cancer, it is only *a cause* of the

child's being born. As such, in the relevant sense, it does not follow that the choice causes the child's being born.

Why should we read Thomson's use of 'A causes B' this way? The reason is that only this interpretation makes sense of her claim that "On any view [of harming], it [the government] harmed the child if it caused the child to have lung cancer, and indeed, did so by choosing that disposal policy."²³⁰ Thomson holds that, for each of the distinct views of harm on offer (she earlier dismisses the temporal comparative and noncomparative views), to harm is to *cause* to suffer harm. Since having lung cancer is, on any view, suffering harm, the only issue left to resolve is whether or not the government *caused* this state to come about. Generalizing, suppose we have determined that A suffers harm; in order to determine whether B harms A, we need to ask whether B causes A to suffer harm. And we will only end up with a plausible account of harming if we interpret 'B causes A' in this context as invoking the (stronger) idea that A is the cause of B.

To see this, consider the following example. Suppose we are considering whether or not Hitler's invasion of Poland caused a toothache I had yesterday after I broke my tooth on some German chocolate. On any plausible view of harm, my toothache counts as my suffering harm. The remaining issue then is whether Hitler's invasion caused it. Now suppose we read 'caused' here as requiring only that A is *a cause* of B. It is almost certain that if Hitler had not invaded Poland that I would not have been born, and hence that I would not have had a toothache. Given this, we can say that the invasion initiated a

²³⁰ Thomson, "More on ...," 453.

causal process that ended up with my having toothache²³¹. As such, Hitler's invasion of Poland is a cause of my toothache.

Naturally, we would say: Hitler did not harm me because he did not cause my toothache. Even though Hitler's invasion was a cause of my toothache, it was not related to it in the right way to be correctly described as the cause (or one of the causes)²³². What we mean by 'A causes B' in this context is not merely that A is a cause. Thomson's implicit premise is therefore false. The fact that there is a causal process between the risky policy and the lung cancer is not sufficient, by itself, to show that the policy caused the lung cancer.

Although being a cause of a harm is not sufficient for being the cause of a harm (and hence for harming), it is presumably at least necessary. In order for something to be the cause of an outcome, it is necessary that it be a cause of the outcome. So, if it is correct that an action has to be the cause of someone's suffering harm in order for that action to be an instance of harming, it follows that it must at least be a cause of the person's suffering harm. Perhaps it is this claim that Thomson is defending against the skeptic. The fact that a causal process leads from the disposal choice to the child's lung cancer suggests that it is a cause of the lung cancer. Whatever else is required to make

²³¹ If we worry that this causal process is not distinct from the one that led to my birth (and so invokes whatever worry Thomson implicitly implies is thereby raised) we can simply stipulate (again plausibly enough) that the invasion of Poland invoked a distinct causal process that led to the production of unusually hard German chocolate that was in my possession and on which I bit yesterday, thereby causing my toothache.

²³² The fact that the example is itself a non-identity case may be taken to undermine its force in supporting the general claim that C's being a cause of E is not sufficient for C's harming the person affected by E. Consider, then, the following case. Fran places broken glass in his trash and puts it out. The trash is picked up by a tornado and the glass is sent across town landing outside my door. The next morning I step on the glass cutting my foot. Here there is a causal process connecting Fran's disposal of the glass to my foot being cut. This then is *a cause* of my cuts. Intuitively, however, it seems wrong to say that Fran's disposal of the glass causes the cuts on my feet.

something not merely a cause but the cause is presumably not related to issues of causation. Plausibly those additional factors are normative considerations. For example, as Matthew Hanser notes when discussing the risky policy²³³, the government seems responsible for the harm because it can foresee that the disposal choice risks a leak of radiation, and hence it can foresee that future persons are at risk of harm from this radiation. That could explain why, as intuitively seems correct, the government causes the lung cancer but does not cause this child to exist (that is, in both cases it is a cause, but only in the former case was the outcome foreseeable).

Even granting this point, however, I do not think that Thomson is correct. In the next section I argue that, according to one plausible account of causation, it is not true that the risky policy causes the child to have lung cancer rather than the child to have healthy lungs.

Why the Risky Policy Does not Cause the Child to Suffer Harm

*Schaffer's Contrastive View of Causation*²³⁴:

Jonathan Schaffer has proposed that statements of the form 'A causes B' ought to be interpreted as involving four relata: 'A rather than A* causes B rather than B*' where he refers to A* as the causal contrast and B* as the effectual contrast. What these contrasts are depends on the context in which we are evaluating the causal statement.

²³³ Matthew Hanser, "Harming and Procreating," in *Harming Future Persons* 182 -183. By 'responsible' Hanser does not mean that the government is necessarily at fault.

²³⁴ I offer more detail on Schaffer's account here since this background is necessary to see the problem that I identify.

Once the relevant contrasts have been specified, the causal statement is true just in case the related counterfactual is true: if A* had occurred, the B* would have occurred.'

By way of illustration and since it is of particular relevance to the discussion here, consider Schaffer's view of how the context of causal statements determines the contrasts in the context of US tort law. One necessary condition for a successful pursuit of a claim under tort law is that the defendant causes harm to the plaintiff. But, Schaffer argues, the relevant contrasts here are determined by the nature of the causal inquiry, that is, by the fact that the causal question 'did the defendant cause the plaintiff's harm?' is asked against background considerations according to which the defendant was under legal obligations to avoid certain kinds of action (including omissions).

In this context, Schaffer argues, the causal contrast is determined not by what the defendant would have done had he not committed a tort but rather by what he should have done, that is, what he would have done had he acted in (minimal) compliance with his legal duties. On the other hand, given that tort law is concerned with whether or not to award compensatory damages for harm resulting from tortious conduct, and that harm is understood- in this context at least- in counterfactual comparative terms, the effectual contrast is specified by asking whether or not the plaintiff would have been better off had the defendant done what he ought legally to have done.

Suppose that Bjorn has negligently driven into the back of Mustafa's BMW and Mustafa has made a claim against Bjorn in tort law. One component of Mustafa's claim is a causal one: did Bjorn cause the harm that Mustafa alleges? On Schaffer's account, determining whether this causal condition is met involves evaluating the claim that:

‘Bjorn’s driving as he did versus Bjorn’s driving in a legally permitted manner caused Mustafa’s BMW to be damaged as it was rather than the BMW to remain unaffected.’

We evaluate this by asking: if Bjorn had driven in the legally permitted manner, would there have been less damage to the BMW? If in fact Bjorn’s driving as he legally ought to have done would have resulted in the same damage (or more) then there is no harm for which he is to be held liable. But if it would have resulted in less damage, then Bjorn causes the damage and is liable to compensate Mustafa for it.

On this view, evaluation of causal statements in which the causal and effectual contrasts have been specified appropriately provides an answer, within that context, to the question: ‘what is *the* cause of the outcome?’ On the other hand, what counts as possible answers to the question: ‘what is a cause of the outcome?’, is given by the set of all possible causal contrasts for which the relevant counterfactual would be true (that is to say, something is at least a cause of outcome *o* just in case there is some possible causal contrast, *c** such that, for a statement *c* rather than *c** causes *e* rather than *e**, if *c** were to occur, then *e** would occur.)

Specifying the cause of an outcome- as opposed to what is merely a cause of that outcome- is thus an objective matter at least in some respect. It is objective in the sense that once the relevant contrasts have been specified, whether or not the statement ‘A is the cause of B’ is true is an objective matter (since it depends on whether or not, in the closest possible world in which *A** occurs, *B** occurs, which is itself an objective matter). On the other hand, there is no context-free answer to the question: ‘is A the cause of B?’ In that sense, it is not an objective matter.

Also relevant to this discussion is Schaffer's view on the transitivity of causation. He follows David Lewis in arguing that while causation is transitive, causal dependence is not. In analyzing causal chains, transitivity of causation holds only so long as the contrasts in each step of the chain are interpreted consistently across the chain. Suppose that we are analyzing a causal chain such that a causes b , and b causes c . Given that transitivity holds, a causes c . On the contrastive view, this is read as: a rather than a^* causes b rather than b^* , and b rather than b^* causes c rather than c^* . Transitivity will hold such that a rather than a^* causes c rather than c^* , but only if the contrast b^* is interpreted *in the same way* when it appears in both steps of this chain (in the first claim it is the effectual contrast, in the latter it is the causal contrast).

Schaffer endorses Mackie's view that judgments about cause and effect are judgments about making a difference against a set background:

The causal inquiry determines a three part structure: (i) the background circumstances, (ii) the causal options: C and C^* , and (iii) the effectual options: E and E^* . This is the Mackian view, on which "A causal statement will be the answer to a causal question," where "Both causes and effects are seen as differences within a field" (Mackie 1974, 34–35)²³⁵.

Although Schaffer does not discuss the relevance of this point when evaluating causal chains, it suggests that the background must be held constant for the purposes of evaluating each step in a particular chain. This would be justified if it were the case, as also seems natural to suppose, that the context of the causal inquiry does not itself shift when shifting between the various steps in the chain.

²³⁵ Schaffer, "Contrastive Causation," 348–349, referring to J. Mackie, *The Cement of The Universe*, OUP (1974).

Application to Thomson's account

How ought we to interpret the causal and effectual contrasts in the following statement: 'the disposal choice caused the child's lung cancer'? Consider the interpretation of Thomson I offered above. There is a causal chain: Disposal choice causes radioactive pollution; radioactive pollution causes the child's lung cancer.

Suppose we put this causal chain in contrastive terms:

C1: Choice of risky policy rather than choice of safe policy (at t1) causes radioactive pollution rather than no radioactive pollution (at t2).

C2: Radioactive pollution rather than no radioactive pollution (at t2) causes the child's lung cancer rather than the child's healthy lungs (at t3).

Notice that while both steps are plausibly true if evaluated independently, they would not be true if the relevant possible world in both cases is the same. C1 seems plausible because the relevant possible world is one in which the choice of risky policy was never made: had a safe policy been chosen there would be no radioactive pollution because there no radioactive waste would have been buried and so no radiation would be released when the earthquake strikes. C2 seems plausible because the closest possible world to one in which the radioactive pollution does not occur would likely be one in which the child exists— for example, even though the waste is buried (and the child exists) the earthquake never takes place.

It is not at all clear, however, that this is permissible if we interpret C1 and C2 as a causal chain according to Schaffer's view. On this view, the causal contrasts in each statement are determined by the context of the causal inquiry, and not by the closest

possible world in which the actual cause (in each case) does not occur. For Schaffer, only once we have specified the causal contrast do we evaluate the counterfactual: if c^* had occurred, then e^* would have occurred. And crucially it is the background to the causal inquiry that sets how we ought to understand the nature of the possible world in which we evaluate the statements (given those contrasts).

On Schaffer's approach, transitivity is sustained here so long as the contrasts remain constant across the chain. The doubt here, then, relates to whether the contrast 'no radioactive pollution' is the same in both steps of the chain (this is, that the effectual contrast in C1 and the causal contrast in C2). But how are we to interpret this chain? Presumably, we have to start at the beginning of the chain and move forward. That is, we evaluate C1 according to Schaffer's approach and see what the scenario 'no radioactive pollution' involves. C1 is true just in case the following counterfactual is true: 'if the choice of the safe policy had been made, then there would be no radioactive pollution.' This is true. But notice that its truth is guaranteed by an interpretation on which we interpret no radioactive pollution to arise because no radioactive waste was ever buried. Call this the W1 world.

On Schaffer's view, however, background considerations have to be kept constant across the steps in the causal chain. Whatever background considerations are relevant to 'no radioactive pollution' in C1 must therefore be inherited in C2: if they are not inherited, then transitivity is not ensured across the chain. Given this, however, when we evaluate C2, we must interpret the causal contrast 'no radioactive pollution' with background considerations that include, among other things, the fact that the child does

not exist (in W1, recall, we stipulated that C does not exist). But if this is correct, then C2 is false, since- giving the background assumptions relevant to W1- the counterfactual ‘if there had been no radioactive pollution, then the child would have had healthy lungs’ is false.

To think that transitivity across the relevant causal chain holds relies on an illicit shift in the meaning of ‘no radioactive pollution.’ It is therefore not true that ‘the choice of the risky policy rather than the choice of safe policy causes the child’s lung cancer than the child’s having healthy lungs.’ Thomson’s argument therefore fails. On the other hand, the statement ‘the choice of the risky policy causes the child’s lung cancer’ is true, but only if it involves some effectual contrast in C2 for which the relevant counterfactual is true. For example, it may be true that: ‘the choice of the risky policy rather than the choice of the safe policy causes the child’s lung cancer rather than some other child’s having healthy lungs.’ But this, as I noted above, is the skeptic’s position.

The denial of Thomson’s interpretation implies that the choice itself does not cause the child to suffer harm (in the sense relevant to Thomson’s account). The only true statements involving ‘the choice of the risky policy causes the child’s lung cancer’ will be ones on which the child is not prevented from having healthy lungs (or healthier lungs)²³⁶. For on those interpretations the child does not exist. Hence, as the skeptic argues, it seems that the choice of the risky policy does not harm the child (on Thomson’s plausible interpretation of harming and suffering harm).

²³⁶ As such, the argument I present above implies not only that the choice is not the cause of the child’s suffering harm, but also that it is not a cause of the child’s suffering harm (although it is both a cause and the cause *in some sense* of the child’s having lung cancer).

Admittedly the argument here depends upon a particular account of causation. Like all such accounts it is controversial. Perhaps there is some plausible view of causation on which we can support Thomson's conclusion. In the next section, however, I argue that the best explanation of what is going on in the risky policy case does not rely on the claim that 'the risky policy rather than the safe policy causes the child's lung cancer rather than the child's having healthy lungs'. On my view, the government does in fact cause the child's having lung cancer rather than the child's having healthy lungs. However, although the correct explanation for this fact makes reference to the government's choice of the risky policy, that explanation does not involve appeal to the claim that the choice of the risky policy causes the child's lung cancer (rather than the child's having healthy lungs) by way of choosing the risky policy.

Justifying the Government's Duty to Compensate the Child for Wrongful Harm

Suppose that I am wandering through a public square at 5am. No one else is around. Overcome by a burst of anger, I smash a glass bottle on the ground. Suppose that I leave the mess I have made (the shards of glass on the ground) and depart the square. If, later on that day, P steps on the glass cutting her foot, then we would naturally judge that I have caused her to suffer harm (a harm understood as 'P having cuts on her feet rather than P having no cuts on her feet'). Furthermore, it seems that I have breached a duty

(committed a wrong) and that it was this wrong that (foreseeably) caused P to suffer harm. As such, I caused P wrongful harm, and indeed I have acted culpably²³⁷.

This seems right, but it is not yet clear which duty I breached or when I breached it. Suppose we follow Raz's analysis of the duty not to harm by way of carelessness as involving two duties: a duty of care and a duty not to harm in virtue of breaching a duty of care. In that case, it seems that there are two wrongs we could identify. I breach the duty of care by creating a state of affairs that risks harming someone or other (I refer to the threatening state of affairs as a harm-threat). And I breach the duty not to harm by breaching this duty whenever P is in fact harmed (when P cuts her foot on the glass).

But it is still not exactly clear *when* I breach the duty of care. In the case I describe, there is no one around at 5am. If I were immediately to completely clear up all the broken glass, then I would have removed the shards before anyone was even likely to be harmed by it. By itself, then, it does not appear that my breaking the glass has breached the duty of care.

It seems clear however that I have reason to clear up the mess I made, and to do so as quickly as possible. Presumably, I must clean it up in order to remain in full conformity with my duty of care. If I fail to clean up the mess, and thereby place someone at risk of being harmed by the glass shards, then I will have breached that duty. It seems clear then that the duty of care itself places me under a derivative duty to take whatever steps are necessary to avoid the glass shards threatening harm to others. If

²³⁷ Recall that one need not be culpable in order to commit a wrong. Here I take it that I am culpable since to breach the relevant duty requires that I acted carelessly or recklessly. In other words, this is a case in which faulty liability is appropriate.

cleaning up the mess is the only way to do this, then this entails that I have a duty to clean up the mess (before it risks harming others).

Notice that this duty is an agent-relative one. The duty to clean up the mess is a duty that *only* I have because only I created the mess in the first place²³⁸. It is not a duty that anyone else has because, as we are supposing, they did not create the mess. In saying this I am not denying that I, like everyone else, may have an agent-neutral reason to clean up a harm-threat that is easily removable. Suppose that, later in the day, Q sees a large shard of glass on the ground. It is plausible to think that Q ought to pick it up and dispose of it because, at very little cost to himself, he can protect others from a predictable harm-threat. Nonetheless, I have a reason that Q does not have to remove this threat, a reason that derives from the fact that if I do not remove it then I will have breached a duty of care. Q's failing to remove it would not constitute a failure to a duty of care, although it might constitute a breach of some other duty, such as a duty of easy rescue²³⁹.

Suppose that I do not clean up the glass shards, but instead leave the square and give the glass no further thought. At some point later when people start wandering through the square, it will be true that the risk posed by the broken glass becomes unacceptably high. At that point, my duty of care is breached²⁴⁰. In particular, what constitutes the breach of my duty of care here is my failure to remove the threat of harm:

²³⁸ That is not to say that only I can remove the threat. Of course, if someone else cleans it up for me then I no longer have a duty to clean up the mess because there would be no mess to clean up.

²³⁹ This point may be seen more clearly if we imagine that picking up all the shards will require some investment of time.

²⁴⁰ Alternatively, if we suppose that as a matter of fact people will enter the square later in the day, then we might think that I create the risk to those people at the time that I break the glass. In that case, I would breach the duty of care when I break the glass and so I would have reason to clean up the mess in order to ensure that I am no longer in breach of the duty of care.

I breach the duty to clean up the mess (a duty that I must fulfill in order to conform fully with my duty of care).

The relevant wrong (duty breach) occurs at the time when my failing to clean up the mess before the risk of harm becomes unacceptably high, that is, at that point at which I am in breach of the duty of care²⁴¹. Later on in the day, P cuts her foot on this glass. When we ask ‘what caused this harm?’ the appropriate answer, from the perspective of corrective justice, refers to the wrong constituted by my failing to clean up the glass. Using Schaffer’s test: my failing to clean up the glass rather than my cleaning up the glass causes P to suffer cuts on her feet rather than P to have uncut feet.

Notice also that the wrong of failing to clean up the glass may be an ongoing one. Suppose that there are people milling around the square for thirty minutes before P is unlucky enough to cut her feet. It seems then that, had I cleaned up the glass during that thirty minute window- as I had a duty to do-, then I could have avoided breaching my duty not to harm P carelessly. So, even after I have breached the duty of care, I still have a duty to clean up the glass, but (in this scenario) in order to avoid breaching my duty not to harm carelessly²⁴². Given this, the exact timing of the wrong (the failure to clear up the glass) may be unclear. But it would be reasonable to apply the test by picking as the timing for the wrong a time just prior to the feet getting cut.

²⁴¹ I am assuming here that it makes sense to say that I commit a wrong simply by placing people at risk even if they do not end up getting injured. In that case, I would wrong those people even though I do not harm them. Recall that, on my view, the duty of care is distinct from the duty not to harm by acting without due care. In order to breach the latter duty it must be the case that someone is harmed. But one can breach the duty of care without harming anyone.

²⁴² The duty of care itself may also give me reason here. My cleaning up the state of affairs that constitutes my breach of the duty of care may be thought of as partially conforming with that very duty of care.

On this account, the wrong is not to be identified with the original smashing of the glass. My act of breaking the glass did not breach any duty. After all, had I cleared up the glass quickly (and effectively) then no risk of harm to others would have been created. On the other hand, my breaking the glass does play an indirect and crucial role in the explanation of why it is that I am taken to have later breached a duty. It is because I broke the glass that I have an agent-relative duty to clean up the mess. Had I not broken the glass, I would not have been under, and hence could not have breached, such a duty. Similarly, in this case, the act of breaking the glass itself (understood as an act that is completed upon the smashing of the glass) is not clearly the one in virtue of which I ought to be held culpable. What was culpable about my behavior was my failure to clean up the glass when it was reasonably foreseeable that the glass would soon constitute a harm-threat.

To clarify, it is worth contrasting this explanation with an alternative one. The alternative explanation focuses only on the positive action: my breaking the glass. It identifies this as the wrong (the duty breach) that both threatens and also ultimately causes actual harm (the cut foot). Furthermore, it takes this act to be the one for which I am to blame. But this alternative explanation is mistaken. As my explanation makes clear, that act itself might not have led to a risk of harm and/or the harm itself had I taken steps to remove it.

For my purposes, the crucial thing to notice is this. The claim that ‘my breaking the glass caused P to suffer harm,’ itself plays no direct role in justifying the existence of my duty to compensate P for the broken glass. The justification of the duty to compensate

depends on showing a causal connection between my failing to clean up the glass (the wrong) and P's cut feet. On the other hand, the claim that 'my breaking the glass caused there to be shards of glass on the ground,' does play an indirect role in the justification. It is because that claim is true that I have a duty to clean up the glass, and hence, that my failure to clean it up can constitute a wrong²⁴³.

In justifying the compensation claim in this case, then, there is no need to evaluate the truth of a *causal chain* that involves the following steps: (1) 'my breaking the glass rather than not breaking the glass on the ground²⁴⁴ caused broken glass on the ground rather than no broken glass on the ground,' (2) 'broken glass on the ground rather than no broken glass on the ground caused P to have cuts of her foot rather than P to have an uncut foot.' It is sufficient to show that each step of the chain is itself true, without addressing whether or not effectual contrast in (1) is specified in an appropriately similar way to the causal contrast in (2).

Notice, that I am not denying that the overall causal claim here is true (that each link in the chain is true and that the links are specified in a manner that allows us to affirm the overall claim). In this case, it is true that, 'My breaking the glass rather than my not breaking causes P to have cuts on her foot rather than P to have uncut feet.' My point is simply that, for the purposes of evaluating whether I owe P compensation, it is not necessary that this causal claim is true.

²⁴³ Hence, a possible defense against P's claim against me would be to show that I did not break the glass and hence I did not wrong P by failing to clean it up.

²⁴⁴ To be more accurate I should specify that I did not break anything else on the ground either, but for clarity's sake I put this complication aside.

Applied to the Risky Policy:

Further details about the Risky Policy are not provided by Thomson. But one set of assumptions consistent with the case as it is described presents us with a situation parallel in the relevant respects to the thought experiment I discuss above. For example, suppose that we know that the earthquake will not take place for at least 30 years from now. Further, suppose that we know that it will be possible in this time to act in such a way to ensure that the buried waste would not create a radiation leak were there to be an earthquake. For example, perhaps the waste could be dug up and relocated. Or perhaps it could be sealed in better containers (now under construction but not yet completed) that would protect it against leakage in case of an earthquake²⁴⁵.

Given this specification of Risky Policy, we can apply my explanation of the broken-glass case. On that account, the burial of the radioactive waste is not itself a wrong- it does not (at the time of the burial) breach a duty of care- nor it is a decision for which (evaluated by itself) the government is to blame²⁴⁶. But, were the government to fail to take the steps necessary to prevent it from becoming a threat (that is, were they to fail to do whatever is necessary to ensure that it does not pose a threat at the time, thirty years later, that an earthquake becomes possible) then its failure to remove the threat would lead to a breach of the duty of care that they owe persons living at that time. After

²⁴⁵ We can also suppose that, even if it could not do this, the government could protect those who would potentially be exposed to the threat by not allowing anyone to live in the area once the danger of earthquakes became too great. A parallel consideration would be that, where I break a glass in the square but cannot clear it up properly, I could still avoid breaching my duty of care by cordoning off the area and preventing people from entering it.

²⁴⁶ The government might be to blame for making the decision on the grounds that it is unwise and cost ineffective. But the government cannot be blamed for making the decision on the grounds that this decision harms the future child. What harms the future child, as I argue above, is its future omission of not removing the threat (which, I am supposing includes an omission after the child is born).

thirty years, the duty of care would be breached, and it would continue to be breached by the continued failure to remove the harm-threat prior to an actual earthquake (after 50 years).

This wrong (the failure to ensure that the buried waste does not threaten harm) is ongoing until the earthquake causes the leak. When the radiation leaks and causes the child to get lung cancer, the relevant wrong to focus upon would be the failure to remove the leak just prior to the earthquake. It is reasonable to suppose that the child existed at the time of *this* wrong²⁴⁷. Given that fact, the relevant test for wrongful harm would require us to evaluate the following causal claim: ‘the failure to remove the threat (the wrong *during* the child’s lifetime) rather than removing the threat (minimal compliance with the government’s agent-relative duty) causes this child to have lung cancer rather than this child to have healthy lungs.’ That statement is straightforwardly true: had the government removed the threat just prior to the earthquake, then this child would have healthy lungs.

Also relevant would be the truth of the claim that ‘the disposal choice rather than some other safe choice causes the radiation leak rather than no radiation leak.’ We need to show that this is true in order to show that the government does in fact have an agent-relative duty to remove the harm-threat in the first place (in order to show that its failure to remove the harm threat was a wrong, and hence that the child suffered *wrongful* harm

²⁴⁷ If we suppose that the child would not have existed at this time, then we can focus instead on what the government ought to have done in order to protect the child from radiation that had already been released—that is, from the distinct harm-threat it had caused that consisted of radiation in the atmosphere. Alternatively, we may not need to make any such move if it is the case that this wrong did not affect whether or not this child would exist e.g. if the failure to remove the threat was not a cause of this child’s existing.

when the government failed to remove the threat)²⁴⁸. But in justifying the existence of the government's duty to compensate the child, we at no point need to evaluate the claim that 'the disposal choice rather than some other safe choice caused the child to have lung cancer rather than the child to have healthy lungs.' Hence, even if this causal claim is false (as I argued in the previous section that it is), *that* fact would not undermine the justification of the government's duty to compensate the child.

Extending the account:

An obvious preliminary objection to this account is that it depends on the Risky Policy case being fleshed out in a particular way. What if, in an alternative scenario, it is not possible for the government to do anything about the radioactive waste once the risky policy has been chosen and the waste buried deep underground?²⁴⁹ Under those conditions, the objection goes, the burial of the waste *itself* seems both to constitute the breach of the duty and to be the decision (by itself) for which the government is culpable (at least intuitively). There are two separate worries and I will deal with them one at a time.

One worry is (or is claimed to be) that the relevant breach of duty takes place at the time of the burial. The objection must hold that this is the *only* wrong upon which we

²⁴⁸ Notice also that if the government had no duty to remove the harm threat, then we would have no ground for claiming that the government's failure to remove that threat *causes* the child to suffer harm (not even that it causes harm but harm that is not wrongful). Absent a duty, the government's failure to remove the harm-threat would not constitute an omission at all. Rather, in that case it would merely be a non-doing and so, as Feinberg argues, it would not be properly regarded as a cause at all (see 'Harm to Others, chapter 4).

²⁴⁹ This scenario is not as plausible as it might first seem. Even if the government cannot prevent the radiation leak, it may still be able to relocate (or offer to relocate) those persons who are living in an area predictably threatened by a possible radiation leak).

ought to focus. After all, if it were true that a duty was breached by the burial decision, but also by the failure to remove the threat later on, it would still be appropriate to regard the latter wrong as the cause of the child's cancer, and so the problem could still be avoided. On the other hand, if this is in fact the only wrong that can appropriately be ascribed to the government, then the problem would remain: we would be forced to run our test for wrongful harm focusing on the wrong constituted by the burial decision itself, and hence we would need to evaluate the problematic claim (that the risky policy rather than a safe policy causes the child to have lung cancer rather than to have healthy lungs).

But even if this burial decision can be itself regarded as a wrong, why think that it is the only wrong? Why can we not also reasonably understand the later failure to remove the harm-threat as a distinct further wrong that is relevant in explaining the cause of the child's harm? The obvious worry here is that this line of thought is precluded by the fact – stipulated in this version of the case- that the government was *unable* to remove the threat. Many regard the idea that 'ought implies can' as an axiom of moral theory. Based on this, it might be argued that there cannot be duties to do what it is impossible (practically speaking) for the duty-holder to do.

This implication, however, does not follow on the Razian view of reasons that I adopt. Duties are reasons for action that can apply even when it is in fact impossible (practically speaking) to comply with them. That is true, for example, of a duty to repay Bob a \$50 loan by Friday. Even if I cannot repay my loan because I trip and spend Friday unconscious in the hospital, that does not entail that I do not breach my duty by failing to pay Bob \$50 on Friday. Indeed, it is still appropriate to regard my failure to repay the

loan on time as a wrong and to cite my failure to repay it on Friday as the cause of Bob's lacking \$50 come Saturday morning (which, at that point, constitutes a wrongful harm, albeit one for which I am not culpable). Similarly, if I promise that I will take my child to the beach on Saturday, I have reason to do so (a duty to do so) even if I could foresee when making the promise that it would be impossible for me to keep it (perhaps I knew that I would be kidnapped Friday night).

Given this, then, the fact that the government can foresee that it will be unable to remove the threat of harm does not entail that it has no duty to remove the threat of harm. It has a duty to remove the harm-threat because it caused a state of affairs (buried waste in an earthquake-prone area) that does or will predictably threaten harm. From each moment on, it had a reason (a duty) to take whatever steps it could to prevent persons²⁵⁰ from being exposed to a risk of being harmed by the harm-threat (and to prevent persons from being harmed by the harm-threat). The fact that it was practically speaking impossible to conform with that duty does not entail that its failure to conform with it was not a wrong. It was a wrong and hence can still be cited as the cause of harms that are later caused by the radiation leak²⁵¹.

The second possible objection pointed out that it seems appropriate to regard the government as culpable in virtue of the act of burying the waste itself. It certainly seems

²⁵⁰ It had a duty to protect persons who exist at whatever time the threat exists.

²⁵¹ Whether or not it is appropriate to say that, under these circumstances, the government committed a wrong at the time of burying the waste is unclear. Suppose we focus on the duty of care here. One possible way to ascribe a time to the initial breach of duty of care is to identify not the point at which the risk of harm to others becomes unacceptably high, but rather the time at which it is no longer possible to prevent that risk from becoming unacceptably high at some later point. If we follow this approach, then we could say that the initial wrong took place at the time of the burial decision (on this scenario at least). But that does not affect my argument here.

that the government is culpable for the harm it predictably causes (by way of releasing radiation). But how can that be so if the relevant wrong consists in its failure to remove the threat at some later point in time? In particular, how can the government be culpable for breaching the duty to remove the threat at the later point in time when, as we are supposing here, it is impossible for it to do so?

Breach of duties of care requires carelessness (or reckless or intentional exposure to unacceptable risks of harm), and so acting culpably is required in order to breach those duties.²⁵² In my view, the culpability of the government's choice depends in part on the fact that it can reasonably foresee that it will be unable to protect persons in the future from harms caused by the harm-threat it creates in burying the waste. Foreseeably placing oneself in a position where one will inevitably breach a duty (a duty that one can predict that one will have at that time) is careless (or reckless). That is true even if at the future time at which the duty is breached one is not capable of avoiding breaching the duty.

For example, suppose that Q knows that if he takes a certain narcotic then he will black out and be likely to go out joy-riding (Q has done this before, or he has seen friends who have had this experience). Suppose Q takes it anyway and gets into an auto accident while driving erratically. Prior to taking the narcotic, Q can predict that he will likely breach a duty of care in the future by driving while impaired. Indeed, Q can predict that at the time he drives impaired, he will not have the capacity to act rationally at all. These

²⁵² As I discuss in chapter 2, it is not always required that one act culpable in order to breach duties not to cause wrongful harm. For example, duties not to harm by breaching property rights may be regarded as requiring only that the harm was foreseeable, not that the act causing it was at fault.

facts explain why Q can be held to have committed a wrong²⁵³ at the time of driving even though the carelessness (or recklessness) of the wrong (driving dangerously) was rooted in an action that took place earlier.

In this version of the Risky Policy, the government's burial decision is culpable because (as we suppose is true) it was reasonably foreseeable that (a) it would create a state of affairs that would in the future threaten to harm persons, and hence that (b) it would place itself under a duty to remove that harm-threat, a duty which (c) it would be unable, at that time, to conform with. The government then would be culpable for the act of burying the waste itself, and in virtue of that act, the latter wrong (of failing to remove the harm-threat) can be appropriately regarded as (derivatively) careless.

Other objections:

Another objection focuses on a distinct case in which it is supposed that the government ceases to exist soon after the burial of the waste, and before the child is conceived. If duties can only be attributed to existing agents, then the government cannot be said to have a duty to remove the harm-threat (after it ceases to exist). Hence, it cannot be attributed that duty after the child is born. But if so, then we cannot attribute the cause of the child's lung cancer to a wrong that consists in the government's failure to remove the threat after the child is born. Hence, the strategy would fail.

A first point here is that it is not clearly absurd to think that events in the future can constitute breaches of duties of agents that no longer exist. To cite a variation on a

²⁵³ In this case, in order that there be a wrong there must be culpability. That is because the duty not to harm negligently is governed by a fault standard of liability.

familiar case, suppose a bomber plants a bomb that is set to go off in six months time. Before the blast goes off, the bomber dies. The explosion constitutes a breach of the bomber's duty not to harm. One interpretation would be to say that the wrong itself takes place at the time of the explosion, that is, after the bomber has died. On the other hand, one might think it only intelligible to regard the duty breach as taking place within the bomber's life. After all, one might think it makes no sense to say that an agent can act (or omit to act) when dead.

But in a relevant sense we can still judge the bomber to be acting (or omitting) after he is dead in virtue of steps he could (or should) have taken to affect what happens after he dies. For example, the bomber could have hired someone else to defuse the bomb after his death. Of course, he was not likely to do this, but this possibility shows that there was something he could have done while alive to remove the harm-threat even after he dies. Since he has a duty to defuse the bomb (since he planted it) it is intelligible to think that this grounded a derivative duty to ensure that he take contingency measures such that, if he were to die, the bomb would not go off. We might then regard his failure to have the harm-threat removed in this way (after his death) as the cause of the bomb explosion. Similarly, since the short-lived government has a duty to remove the threat (because it buried the waste) it is intelligible to think that this grounds a derivative duty to ensure that it undertake whatever steps were necessary to ensure that, were it to cease to exist, the threat would be removed. We could then regard the government's failure to have the harm-threat removed in this way (after its demise) as the cause of the radiation leak, and hence as the cause of the child's lung-cancer.

A final point here is that, even if valid, the objection would not undermine the justification of compensation claims that can coherently be made in this scenario. If the government does not exist, and if non-existent agents can have no duties, then no duty to compensate can be attributed to the (no longer existing) government. *A fortiori* no duty to compensate the child would be justifiable under corrective justice. Hence, even if this is a case in which the government cannot be said to have caused the child wrongful harm (because it cannot be said to have caused the child lung cancer rather than healthy lungs), that point makes no *practical* difference since claims to compensation against non-existent agents would *already* be precluded.

Another possible objection agrees that we can make sense of the idea that the government breaches a duty in failing to protect the child from the harm-threat after the child is born, but suggests that the existence of this duty is explained by the fact that the government has a duty to protect its citizens from predictable harms of this type. On this reading it would be irrelevant whether it was in some sense the same government that buried the original waste or indeed whether it was some private corporation instead.

I agree that the government likely does have this *further basis* for doing whatever is necessary to remove the harm-threat. But this does not preclude there being a distinct agent-relative duty that the government has (the two duties overlapping in content), a duty that itself exists only because the government created the predictable harm-threat in the first place. This, then, is not really an objection to my account. It does, however, suggest that the case might be clearer if we focused on a non-governmental agent as the one that buries the waste.

Harm-Threats and for Harms Related to Historical Injustice

As I noted above, the Risky Policy presents a problem for the application of a principle of corrective justice to harms related to injustices that take place many generations before. Cases of this sort are likely to arise in the future (in the future, we may well look back at decisions taken now and be faced with dilemmas of the sort raised in that case; from that perspective, the injustices will be historical.

On the other hand, discussion of cases that are historical injustices to us now, do not often seem to involve a mechanism for transmission similar to radiation. In the risky policy case no intermediate persons were involved or harmed. But in the case of historical injustices, we typically think that the transmission of harm takes place across and indeed by way of the intervening generations. This latter mechanism of transmission is analyzed by Bernard Boxill and George Sher's approach that proposes a series of connected but distinct wrongdoings and harms passing down the generations into the present. I discussed this approach in chapter 3.

However, in my concluding remarks, I want here briefly to suggest how my analysis of the risky policy case might be thought to help us understand how historical injustices may ground claims on the basis of (at least some) harms suffered by the presently living descendants of original victims of the injustice. The basic idea is this. Harm-threats need not be restricted only to dangerous *physical* phenomena. We might also regard certain social phenomena as harm-threats. Harm-threats might be external or even internal to those affected by them. For example, we might regard exposure to certain adverse social conditions (e.g. poverty, lack of education) as harm-threats. Or we might

regard certain exposure to and incorporation of various types or aspects of personal identity as counting as harm-threats.

For example, suppose that the identity that a particular person develops depends to a significant extent on her exposure to certain possible ways of being, manifested in the social and cultural modes of living that are presented as possible for her (by her family, neighborhood, class, race, country and so on). Suppose further that certain forms – or aspects- of identity are in fact bad for persons. I will call these toxic forms of identity. We might think of exposure to and incorporation of these potential identity-forms (or aspects) as harm-threats. Those exposed to such toxic forms of identity are at risk of incorporating these elements into their own identity in the course of their own identity-development (mainly in their childhood, but also to a lesser extent, as adults). Those who incorporate toxic forms of identity into their own identities likely suffer (predictable) harms as a result of having these toxic forms or aspects of their identities

Suppose further that certain toxic forms (or aspects) of identity are the predictable (if not necessitated) responses to a history of systematic and targeted injustice against a group of persons. In such a case, those who carry out such historical injustices might be regarded (ideally at least) as having an ongoing duty to remove this threat (even if, as may be true in the radiation case) this is not practically feasible. In that case, those who carried out the historical injustices, by failing to carry out this duty, cause wrongful harm to some currently living persons, just in case these are persons who have been exposed to and incorporated this type of toxic identity-based harm-threat and who also suffer the

predictable negative effects associated with having this harm-threat incorporated in their identity.

My suggestion here is of an entirely conditional nature. I do not know, or claim to know whether any elements in this story can be correctly ascribed or related to any real-life cases of historical injustice. My claim here is merely that this is a possible mechanism by which historical injustices *might* relate to current harms in a manner that would allow us to ground moral liability for those harms, while avoiding the non-identity problem. Whether or not this possible mechanism applies appropriately to any real world cases is a controversial question (both empirically and normatively). It is one that may, however, warrant further exploration

Conclusion

In this chapter I have examined The Risky Policy, a case which raises once again the non-identity problem. I examined a solution to this problem offered by Judith Jarvis Thomson. Relying on Jonathan Schaffer's view of 'contrastive causation' I argued against her claim that we can make sense of the idea that the risky policy causes child C to have lung cancer rather than C's having healthy lungs. I suggested that the steps in the causal chain upon which Thomson implicitly relies cannot both be interpreted as true without relying on an illicit shift in the characterization of the scenario in which radiation does not leak into the atmosphere. Given the failure of Thomson's account, the problem still remains: how can we understand the government as owing compensation to the child

if its earlier decision to bury the radioactive waste does not cause C's having lung cancer rather than C's having healthy lungs?

Accepting that the burial decision itself does not in fact cause C's lung cancer (rather than C's having healthy lungs) I argue that the government can be understood as causing this (contrastive) effect in virtue of its wrongful failure to remove the threat posed by the buried radioactive waste, a failure that takes place (in part) after the child has been born. The fact that the government buried the waste is only indirectly relevant here. Because it buries the waste, the government has a duty to remove the threat posed by the waste, and hence, when it fails to remove that threat, this failure can be understood as a breach of its duty. It is the breach of this latter duty that causes C to have lung cancer rather than C's having healthy lungs. The government therefore owes C compensation to repair the harm that consists in C's being worse off (having lung cancer) than she would have been had the government complied with its duty and removed the threat (in which case C would have had healthy lungs).

Conclusion

This dissertation contributes to the literature on reparations for historical injustice. In particular, it attempts to clarify and support a particular approach to reparations for historical injustice, one on which the reparations are understood as compensating currently existing persons for wrongful harms they suffer, harms that are in some way related to the historical injustice. My approach differs from others those that take this harm-based approach by supposing that it is both essential and illuminative to focus on the moral principle that grounds duties to compensate for wrongful harm, namely the principle of corrective justice.

In chapter 1 I defended the conformity account of the moral basis of corrective justice. Defending the conformity account, according to which duties to compensate naturally derive from breach of duties not to cause wrongful harm, provided support for the idea that moral duties of corrective justice exist and that they could arise in the historical context.

In chapter 2 I examined the principle of corrective justice. I argued that the notion of harm relevant to this principle is a counterfactual comparative one. This suggested that harm-based arguments for reparations must face the non-identity problem. The problem is that, on this sense of harm, historical acts cannot harm persons who would not have existed had those acts not taken place. But if historical injustices *cannot* harm currently existing persons then we face the difficult task of explaining how reparations for harm to currently living persons can be owed in virtue of historical injustices.

In chapter 3 I addressed this issue for cases that plausibly involve harms being passed across the generations. I examined a promising strategy for explaining how harms to current persons relate to historical injustices. This strategy is the chain-harm argument developed by Bernard Boxill and George Sher. By interpreting and critiquing Andrew Cohen's discussion of that argument I attempted to clarify the approach and identified the problems that those who adopt such a strategy need to face. I then offered some suggestions as to how these problems might be tackled.

In the final chapter, I considered an alternative type of case in which the harm to currently existing persons is related to an historical act, but where the harm is not passed down the generations but rather appears directly be grounded in the historical injustice itself. This type of case is exemplified by the Risky Policy. I rejected a possible solution according to which, contrary to the non-identity worry, the historical injustice can be understood to harm to a currently living person, P. I then proposed that the historical actor can be understood as causing the harm to P in virtue of the actor's wrongful failure to remove a harm-threat that exists, at least in part, within P's life-time. In this case, the historical act (the injustice) is not understood itself to cause the current harm, but rather it forms an indispensable part of an explanation of how the perpetrator can be understood to cause wrongful harm in the present.

Having completed these tasks much remains to be done. I have presupposed throughout that we can make sense of the idea that there is a currently existing party that it is appropriate to hold morally liable for the repair of wrongful harms suitably related to

the historical injustice. Providing such an account is itself a very difficult task. Even if such a party could be identified, we would only have shown that there exist *prima facie* duties to compensate in accordance with harm-based arguments. In order to support an all-things-considered defense of reparations we would have to address the various practical and moral objections to the carrying out of these *prima facie* moral duties to compensate. In future work I hope to address these concerns and to do so adopting the approach I have developed here.

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