

Uncertain Justice: History and Reparations¹

There is no such thing as absolute certainty, but there is assurance sufficient for human life.

- J.S. Mill *On Liberty*

§ 1 TWO QUESTIONS

Historical wrongdoing can give rise to reparative claims.² This paper considers a prominent challenge to historical reparations from within the corrective justice paradigm. This challenge—that since we cannot be certain as to whether an injury obtains in the present day, we are uncertain whether reparations are required—is addressed by both friends and opponents of historical reparation claims. Discussing the case of American slavery, this paper aims to alleviate a few of their concerns.

If reparation responds to injury, assessing a reparative claim requires answering two related questions: ‘What is the injury?’ and ‘What is owed in reparation?’ This paper’s concern with the first question considers the compass or *extent* of injury while its attention to the second concerns reparative *content*. With historical cases, those doubtful of our ability to provide sufficiently correct answers to these questions believe the uncertainty thereby produced threatens the coherence of any historical reparative claim.³ As Glenn Loury asks, in historical cases, “[h]ow would one even begin to demonstrate in quantitative terms the nature and extent of injury?”⁴ To clarify, the challenge is not that our knowledge of justified reparative content is approximate, but rather that it is uncertain as to whether *anything* is owed at all. How could we assess any present circumstance as an injury attributable to a historical wrongdoing?

¹ My thanks to Robert Jubb, Omar Khan, Rahul Kumar, Tiago Mendes, Varun Uberoi, Stuart White and the Oxford Seminar for Political Theory (March 2004). Their interventions prompted many improvements.

² The paper defines historical wrongdoing as those wrongdoings sufficiently ancient so that all or most of those individuals who were contemporary are now dead.

³ J. Angelo Corlett, "Wrongdoing, Reparations and Native Americans," in *Injustice and Rectification*, ed. Rodney C Roberts (New York: Peter Lang, 2002), 147-64, Tyler Cowen, "Discounting and Restitution," *Philosophy & Public Affairs* 26, no. 2 (1997): 181,84, John Edwards, "Group Rights V. Individual Rights: The Case of Race-Conscious Policies," *Journal of Social Policy* 23 (1994): 59, R. E. Goodin, "Waitangi Tales (Aboriginal Rights, New Zealand, Treaties)," *Australasian Journal of Philosophy* 78, no. 3 (2000), Renée Hill, "Compensatory Justice: Over Time and between Groups," *Journal of Political Philosophy* 10, no. 4 (2002): 410, Keith N Hylton, "Slavery and Tort Law," in *Boston University School of Law Working Paper Series, Public Law & Legal Theory Working Paper No. 03-02* (Boston, Mass: 2003), 40-41, Duncan Ivison, "Historical Injustice," <http://individual.utoronto.ca/sydney/injusticeoxford.pdf> Jon Dryek, Bonnie Honnig, Anne Phillips (eds) *Oxford Handbook to Political Theory* Forthcoming 2006: 12, Glenn Loury, "Trans-Generational Justice – Compensatory Vs. Interpretative Approaches," in *Reparations*, ed. Jon Miller (Oxford: Oxford University Press, Forthcoming 2006), 2, 13, Thomas Pogge, "Historical Wrongs: The Two Other Domains," *Paper available at* <http://www.etikk.no/globaljustice/> (2004): 11-12, Janna Thompson, *Taking Responsibility for the Past: Reparation and Historical Injustice* (Cambridge: Polity Press, 2002), 112, Jeremy Waldron, "Superseding Historic Injustice," *Ethics* 103, no. 1 (1992): 8-11.

⁴ Loury, "Trans-Generational Justice – Compensatory Vs. Interpretative Approaches," 2.

Since the reparative claims of corrective justice arise from injury, the paper begins with a rudimentary corrective justice framework for reparations. After situating the uncertainty challenge, the paper considers if the means for controlling uncertainty in conventional cases apply to historical cases. Can conventional limits to viable claims limit historical uncertainty? In conclusion, the paper explores whether injuries that are products of threshold failures offer further means to diffuse the uncertainty charge.

§ 2 INJURY AND LIABILITY

The corrective justice literature indicates near universal agreement on, as an ideal, the principle that *if Y injures X, X is entitled to reparation from Y for, and proportional to, the injury.*⁵ Appropriate reparation responds to the degree of injury; we can call this the proportionate reparative principle (PRP). To put this differently, the *extent* of reparative liability indicates the proportional *content* of reparative responsibility. The content of ‘full’ reparation meets the degree of injury.

We can lay the ground for the uncertainty challenge by considering the roles questions of extent and content play in assessing reparative claims. Suppose we think an injury has four elements. An injury is (1) the product or result of wrongdoing; that causes or is (2) a negative occurrence pertaining to (3) some substance attributable to a victimized agent (an interest) that (4) falls within the ambit of moral responsibility attributable to the wrongdoing. Could any present day phenomenon meet this rubric where the content of (1) is ‘American slavery’? The uncertainty problems this paper discusses concern (4). Philosophers distinguish between various responsibility genera and indeed a number of sub-species of moral responsibilities.⁶ That which concerns us is the appropriate *liability* to a certain type of treatment: specifically, being the subject of a reparative claim.⁷ Assessing an injury (and thereby a reparative claim) requires us to determine the *extent* of reparative liability; we will

⁵ This usage of ‘injury’ differs from that often employed in the literature. Joel Feinberg use ‘harm’ to describe the same concept because of his impression that injury becomes a less fitting term the more distant the analogy is to physical wounds. My reason for making the opposite choice is to capitalize on the etymology of ‘injury’. Injury combines the sense of moral or legal violation with the notion of a valid claim (*in-ius*) and thus captures the normativity of the concept better than ‘harm’. Some authors use the terms ‘harm’ and ‘injury’ interchangeably. I do not. In the usage of the paper, harm is the damage resultant from an event. For discussion see: Joel Feinberg, *Harm to Others*, vol. 1, *The Moral Limits of the Criminal Law* (New York and Oxford: Oxford University Press, 1984), 107.

⁶ For an overview see Andrew Eshleman, "Moral Responsibility," in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (<http://plato.stanford.edu/archives/fall2004/entries/moral-responsibility>, 2004).

⁷ Cf. M. J. Zimmerman, *An Essay on Moral Responsibility* (Totowa, New Jersey: Rowman & Littlefield, 1988), 4.

only consider something to be injurious (and therefore a *pro tanto* ground for reparation) if it falls within the limits of *reparative liability*.

The Role of Counterfactuals

Assessing reparative claims requires counterfactual tests. These tests involve comparing the *actual* world with a counterfactually *rectified* world supposed by the subjunctive condition that interaction between the victim's interest and the wrongful action did not occur. In reparative justice, counterfactual tests appear in three distinct assessments.⁸ These are tests of *setback*, *reparative liability* and *proportionality*. Using Joel Feinberg's term *setback* to refer to the negative occurrence described as (2) above, it is sufficient to a setback if an interest is worse off than it would have been in the relevant rectified counterfactual. But counterfactual worsening is not necessary to a setback. Setbacks are best understood disjunctively where some setbacks are defined as threshold failures.⁹ For an example of a non-comparative setback, suppose we imagine a bicycle seller who misrepresents a bicycle as functional to a prospective buyer. When the buyer discovers the bicycle does not work, her interest in the bike's serviceability has not 'worsened', instead it is below the threshold set by a standard of 'functionality'. In this case, wrongdoing creates the buyer's threshold failure-based setback; the setback is not a wrongful effect upon extant interests. Because this class of setbacks resists the uncertainty challenge, we return to this discussion below.

Although counterfactuals are unnecessary to setbacks, they are required to establish the extent of *reparative liability*. A rectified world is morally relevant because what occurs in it was wrongfully prevented by the offender's wrongful act. However, reparative liability is limited; offenders are only reparatively liable for the relevant non-occurrence of events or situations in the rectified world insofar as these relevant non-occurrences fall within normative confines. Finally, the content of proportionate reparative responsibility is a product of a *proportionality* test that evaluates the relevant components of the rectified world and compares these with an evaluation of the relevant components in the actual world. Other

⁸ In a fourth appearance, the jurisprudential literature often considers counterfactual tests designed to determine causation. As these orthogonal to our topic we do not consider theories or tests of causation.

⁹ On this topic see: Lukas Meyer, "Intergenerational Justice," *The Stanford Encyclopedia of Philosophy* (2003), Lukas Meyer, "Past and Future: The Case for a Threshold Notion of Harm," in *Rights, Culture, and the Law: Themes from the Legal and Political Philosophy of Joseph Raz*, ed. Stanley Paulson, Thomas Pogge, and Lukas Meyer (Oxford: Oxford University Press, 2003).

things being equal, the limit of an appropriate reparative act is the proportional value of the relevant differences between the worlds.

§ 3 THE UNCERTAINTY CHALLENGE

The PRP's demand that reparation respond to the degree of injury imposes the epistemic burden of determining the extent of injury. Suppose that A wrongfully acts so as to break B's car window and the damage to the car window prevents B's from driving to catch an imminently departing airplane. To make her plane, B needs to take a more expensive taxi and upon her return she may make a reparative claim that includes the additional expense. Since her injury extends beyond the moment of the wrongful act, applying the PRP demands counterfactual projections. These projections can appear to prompt uncertainty.

Uncertainty emerges in posing and answering 'what if' counterfactual questions. As we push a counterfactual test forward through time, imagining the rectified worlds needed to assess the extent of injury can quickly become complicated. How do we know what would have (but has not) happened? Not only the attribution of reparative liability—the extent of injury—rests on the answer, we also need the data from this test to assess the content of appropriate reparation. But if imaging what would have happened to B with respect to the position she would have been in had A not broken B's car window literally involves guessing at 'might-have-beens', how are we to be confident that we are getting either right? Although present in many (all?) conventional cases, those who argue for the uncertainty challenge believe that the problems of uncertainty raised by counterfactuals become insurmountably greater when applied to historical cases.

Our predictive capacities are limited. In the above case, it is possible that had A not smashed the window, the car would have been stolen, hijacked or been struck by lightning. Perhaps B would have changed her mind, deciding to take an airport coach or maybe choosing not to fly at all. When we combine her freedom with our inability to make accurate predictions, confidence in the method's output seems impossible, even in simple cases. We cannot know what she would have done because there is nothing to be known. "There is no fact of the matter".¹⁰ The problem seems compounded in historical cases. For example, there is no reliable way to determine what would have happened in the absence of American

¹⁰ Waldron, "Superseding Historic Injustice," 11. Restated in Jeremy Waldron, "Redressing Historic Injustice," *University Of Toronto Law Journal* 52, no. 1 (2002): 145. Also cited in Ivison, "Historical Injustice," 12. For this reason Waldron claims the uncertainty objection is not epistemic in nature. However, opinions differ as to whether counterfactuals are 'truth-apt'.

slavery. It may seem we can only guess at the counterfactual ‘facts’ needed to assess the extent of injury and determine the content of appropriately proportionate reparation.

This problem of projection is one aspect of the uncertainty challenge: that in historical cases we cannot confidently ascertain the counterfactuals needed to assess injury. The next section explores why it seems counterintuitive to consider the possibilities of the car being stolen, hijacked or struck by lightning. For now, we should note the possibility of leveling this challenge against quite ordinary assessments. However, with respect to cases such as American slavery it may seem that the length of time involved makes the problem incalculably worse. Significant increases in the time elapsed between wrongful act and reparative claim allow for an indefinably greater number of counterfactual options. If our rectified history stretches back to some point during American slavery, it might be that the number of counterfactual possibilities easily exceeds our cognitive capacities. Perhaps uncertainties that are manageable in cases like the shattered car window become intractable in historical cases. If nearly anything could have happened, how can we assess what would have happened and thus determine the extent of injury? As the number of counterfactual possibilities increases, the passage of time may progressively make any attempt at determining the extent of injury a wholesale exercise in fiction.

In addition to ‘problems with projection’ there is a second aspect to the uncertainty challenge—one of ‘evaluating the injury’. Gregory Alexander presents evidence that people are not very good at consistently and fairly assessing interest-setbacks. In many cases, we allow non-relevant information to affect our appraisal. “Our responses are quirky, based on factors that have no moral relevance”.¹¹ Furthermore, we have trouble evaluating severe harms or damage to interests invested with particularistic or idiosyncratic value. Considering the above example, variations in the role the car plays in B’s life complicate our ability to provide the information demanded by the PRP. Though present in any conventional reparative process, these further concerns are particularly relevant to the case of American slavery. We seem to have little to guide us in determining the value or ‘disvalue’ of a life spent in slavery.¹² We might think that we can’t even roughly calculate the disvalue of cases like American slavery. There is an important truth to the thought that there is no right or sufficient measure for atrocity.

¹¹ Gregory Alexander, "The Limits of Property Reparations," <http://ssrn.com/abstract=404940> (2003): 9.

¹² This point is discussed in: Stephen Kershnar, *Justice for the Past*, ed. Robert J. Spitzer, *Suny Series in American Constitutionalism* (New York: State University of New York Press, 2004), Vincene Verdun, "If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans," *Tulane Law Review* 67, no. 3 (1993).

Recall the objection: in historical cases such as American slavery it is uncertain as to whether any injury is now occurrent and consequently whether a reparative claim is valid. The above considerations pose significant challenges to the propriety of reparation with respect to historical claims; a challenge often emphasized by writers on the subject. For example, Calvin Massey poses the uncertainty challenge when he argues that assessing the injury, "...suffered by any given present-day descendant of an American slave is so speculative as to be an exercise in imagination".¹³

§ 4 THE EXTENT OF REPARATIVE LIABILITY

If our conventional methods of managing uncertainty can assist us with questions of historical injustice, we can and should resist drawing any radical deflationary conclusions in the face of either aspect of the uncertainty challenge. This section discusses some limiting guidelines formed by the foundations of reparative justice. These limits begin with the observation that liability is never concerned with the total difference between an injury-present world and a rectified world.

The paper's simple suggestion is that reparation only concerns that for which offenders are reparatively liable. To expand, offenders are only reparatively liable for that which is not the *responsibility of others* and that which is *reasonably foreseeable*. These guidelines are commonplace enough and by limiting offender-responsibility in the actual world, they constrain the construction of rectified worlds.¹⁴ The paper then discusses a principle guiding rectified world production—the *principle of credibility*. The remainder of this section briefly expands on these three principled constraints as part of our *reasonable expectations*. It is plausible that our reasonable expectations blunt the force of reparative uncertainty by limiting the counterfactual questions of extent and content to a narrower range.¹⁵ Uncertainty is confined, but not eliminated and once its limits are clarified, its management becomes our topic.

¹³ Calvin Massey, "Some Thoughts on the Law and Politics of Reparations for Slavery," *Boston College Law Review* 24, no. 1 (2004): 162.

¹⁴ Although these principles guide counterfactual construction by determining which events and situations are relevant, since our reparative liability for the rectified world is the negation of our responsibility for events or situations in the actual world it seems more in keeping with our conventional understanding to treat the principles of foreseeability and other responsibility as applying to the actual world.

¹⁵ The constraints discussed here are unlikely to exhaust the guidelines employed in liability determination. Other guidelines could involve differences between whether or not the action was within the agent's control or whether the action was classified as a doing or allowing. Other limits are imposed by questions of justification or excuse, and the types of injuries considered as candidates for reparation i.e. we might always ignore trivial injuries. Moreover, distributive justice imposes external guidelines. An interesting source of further discussion

The Responsibility of Others

Above we suggested that the foundations of reparative justice form the limits to reparative responsibility. One of these foundations is the presumption that persons ought to take responsibility for their actions. Philosophers tend to deny that justice requires compensating a person for costs incurred when that person can be held morally responsible for those costs (her substantive responsibility).¹⁶ With respect to distributive compensation in general, this point has been subject to some debate, but it seems right when applied to reparative justice. This common argument has two related applications here. The overarching point is that persons are not reproductively liable for that which is the sole substantive responsibility of others. The offender is only liable for 'his' injury. A subordinate argument applies the overarching point to claimants: the category of 'others' includes those claimant victims who ought to take reasonable action in respect to their interests subsequent to a wrongful act.¹⁷ Jurists refer to this guideline as the 'doctrine of avoidable consequences'¹⁸ and it echoes in George Sher's discussion of counterfactually derived compensation: "[T]he transferability of a person's entitlements from a rectified world to the actual one...is limited...by the degree to which one's actual entitlements have been diminished by one's own omissions in this world...".¹⁹

When a person apart from the offender ought to accept substantive responsibility for an interest-setback, an obligation to make reparation for that setback is not imputed to the offender.²⁰ In the above example of the damaged car, if B receives reparation from A for damage to the car, yet does not bother to get the car repaired, A is not obligated to provide

is the ongoing work of the Tillburg Group. European Group on Tort Law, "Principles of European Tort Law," <http://www.egtl.org/principles/pdf/PETL.pdf> (2005).

¹⁶ Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, MA & London: Harvard University Press, 2000), David Miller, "Holding Nations Responsible," *Ethics* 114, no. 2 (2004). Thomas Scanlon, *What We Owe to Each Other* (Cambridge MA and London, England: The Belknap Press of Harvard University Press, 1998), 248. For Scanlon, a person has substantive responsibility for something if they ought to bear the cost of it.

¹⁷ Dinah Shelton, "Righting Wrongs: Reparations in the Articles on State Responsibility," *American Journal of International Law* 96, no. 4 (2002): 846, George Sher, "Ancient Wrongs and Modern Rights," *Philosophy and Public Affairs* 10, no. 1 (1981): 11.

¹⁸ Robert Strassfeld, "Counterfactuals in the Law," *George Washington Law Review* 60, no. 2 (1992): 347.

¹⁹ Sher, "Ancient Wrongs and Modern Rights," 12.

²⁰ A guideline of other-responsibility may seem objectionable if it imposes obligations on victims as a result of being injured. But victimhood and standing for a claim are different roles. Victims may not be obliged to avoid bad consequences for themselves, but 'claimworthiness' differs from that of victimhood. Reparative liability concerns the former and not the latter. Unlike victimhood, claiming potentially requires the public marshalling of reasons. Even when an offender's repair preempts the laying of claim, the assumption of reparative liability and consequent reparation occurs in recognition that publicly available reasons obtain. For discussion see: Thompson, *Taking Responsibility for the Past: Reparation and Historical Injustice*.

her with cab fare after sufficient time has elapsed for her to make alternative transport arrangements. Taking particular circumstances into account, such as the availability of convenient public transportation and the presence of service garage ‘courtesy car offers’ could mean we impose relatively strict limitations on any transportation-related reparative liability.

The responsibility guideline raises questions regarding third parties. For an example in terms of B’s damaged car, if an incompetent mechanic causes B to suffer further interest-setbacks, these are not enumerated in A’s reparative responsibility. It is a different injury in part because it is the substantive responsibility of another. We could suggest that the attribution of reparative liability and the calculation of reparation stop at the point where another agent was obliged to and could have taken reasonable steps in preventing or reducing further damage, but this version of *novus actus interveniens* raises further questions regarding multiple contributory wrongdoings, either antecedent or subsequent. The guideline need not eliminate the possibility of joint or vicarious responsibility and, in many examples, should allow for an apportionment of liability. Joel Feinberg discusses the case of a railroad conductor who disembarks a female passenger half a mile from the platform in an area known for violent criminal activity.²¹ Although any primary offender (in this case, a rapist) takes the lion’s share of the blame, reparative liability for subsequent harm to her (until the time when she could have taken reasonable steps to ensure her safety) is partly attributed to the conductor or the railroad company by virtue of a contributory failure.

Causation and Foreseeability

Other-responsibility poses external limits: foreseeability fills out internal constraints. Some people think that reparative liability is simply a function of the degree of foreseeability of setback and its avoidability.²² We will not focus on the latter part of this definition, as it seems possible that we can be reparatively liable for interest-setbacks that we contribute to

²¹ Feinberg, *Harm to Others*, 122. The example draws from an actual case *Hines v. Garrett* 131 Va 125, 108 S.E. 690 (1921). Moore’s alternate reading holds that the railroad company violated a duty and is thus liable for not disembarking her in a safe place. If this is a reparable injury it might support the idea that the conductor (or railroad) shares in the injury, but it would not help us if we thought the liability of the conductor (or the railroad) differs depending on whether or not the woman is raped. Michael Moore, "For What Must We Pay? Causation and Counterfactual Baselines," *San Diego Law Review* 40, no. 4 (2003): 1478.

²² Jules L. Coleman, "Theories of Tort Law," *The Stanford Encyclopedia of Philosophy* Winter 2003 Edition, no. Edward N. Zalta (ed.) (2003), Julian Savulescu, "Beyond Bristol: Taking Responsibility," *Journal of Medical Ethics* 28, no. 5 (2002).

regardless of whether the setback could not have been avoided.²³ Instead, the paper discusses foreseeability, which is perhaps the primary test for attributing reparative liability.

Before exploring foreseeability, it might be helpful to locate the role of causation within the discussion. The literature on historical reparations often conflates causal responsibility with reparative liability. Consequently, by pointing out the tenuity of any causal relationship with extant interest-setbacks, critics argue that current disadvantages have other, more morally relevant, sources. In respect to American slavery, this argument persuades some who are otherwise friendly to reparative claims.²⁴ Nevertheless, the advocates' initial position that slavery has had some disadvantageous effects is also plausible. The results of a wrongful act seem of *prima facie* moral concern; there is a natural linkage between what we cause and that for which we are liable.²⁵

Assessors of cases like B's broken window might use causation as a proxy for assigning reparative liability. In such simple cases, an assessor decides in advance what actions, omissions or situations count as being causes/or caused by and then assigns liability. However, causation is unlikely to have such inbuilt normativity and a solid historical reparation claim requires more than causation.²⁶ Of course, causal relations play normative roles apart from the kind of reparative liability we are discussing, but, for our purposes, causation must be refined.²⁷ Reparative liability is an aspect, circumscribed by foreseeability, on causation's larger canvas.

²³ As is argued by Christopher Kutz, *Complicity* (Cambridge: Cambridge University Press, 2001).

²⁴ Janna Thompson, "Historical Injustice and Reparation: Justifying Claims of Descendants," *Ethics* 112, no. 1 (2001): 118-19.

²⁵ Tony Honoré discusses this in respect to 'outcome responsibility'. Honoré argues that taking responsibility for what we cause is essential to understanding ourselves as agents. Arthur Ripstein takes issue with Honoré's construal by pointing out that liability is not a natural element of agency, but rather a shared normative conception. What a person is liable for is not a relation between the person and the object, but rather primarily an understanding between persons. Honoré need not disagree as he recognizes that his understanding of outcome responsibility would be hopelessly large if we were to identify our agency, in any sort of valuable manner, with all of that which we cause. Tony Honoré, *Responsibility and Fault* (Oxford: Hart Publishing, 1999). Arthur Ripstein, "Justice and Responsibility," *Canadian Journal of Law and Jurisprudence* 17, no. 2 (2004).

²⁶ Judith J. Thomson, *The Realm of Rights* (Cambridge Mass & London: Harvard University Press, 1990), 235. Perhaps as another variation, some people might be tempted to say that interest-setbacks caused by a wrongful act compose that injury, but this is surely incorrect. This construal would imply that every wrongful act has a huge liability stretching into a limitless future. Miller, "Holding Nations Responsible.", Ripstein, "Justice and Responsibility," 373.

²⁷ In suggesting that causation may play a more unadorned role, I am thinking of discussions regarding moral taint or rescue duties.

In Arthur Ripstein's terms, "...foreseeability provides an outer bound beyond which there can be no liability."²⁸ We are not generally obligated to make reparation for interest-setbacks that would not have been reasonably foreseeable from the standpoint of those engaging in the wrongful act.²⁹ (We might term this 'the offender's standpoint').³⁰ The inverse is also usually true. *Ceteris paribus*, we can be reparatively obliged by interest-setbacks whose relationship to the wrongful act is predictable and, because the offender is acting wrongly, we place a heavy burden on what she should have foreseen.³¹ Frequently this burden takes the form of 'reasonableness'. A popular understanding of reasonable foreseeability is a test involving the general capabilities of the agent in respect to the specific circumstances of the relevant standpoint.³² If, in the case of the broken car window, B had left her luggage in the car, A may well be liable for any consequent damage to B's luggage. Even though this information was unknown to A, it is reasonably foreseeable that objects of value will be kept in cars. But if instead of rushing to the airport, B was rushing her ill son to the hospital and damage to the (unoccupied) car indirectly contributes to increasing the severity of her son's illness, she cannot pursue a reparative claim in this respect insofar as it is not reasonably foreseeable that her interest in her car includes the dependence of life and limb on immediate use. If A is not reparatively liable for harming the child, his reparative obligation may include providing transport, but will not extend to any derivative harm.³³

To sum up our discussion so far, the combination of other-responsibility and reasonable foreseeability are commonplace limits to reparative liability. We are reparatively liable for non-occurrences in rectified worlds. The two principles of foreseeability and other-responsibility guide counterfactual construction by determining which counterfactual worlds may contain relevant information. As such, the two principles apply to the actual world, what

²⁸ Ripstein, "Justice and Responsibility," 374. Ripstein's reasoning for this position implies that foreseeability is a determinate of wrongfulness. His argument depends upon 'cannot implying ought not'. "One cannot be responsible for an unforeseeable injury because one cannot owe another a duty to avoid one." As the paper considers foreseeability in terms of liability, I am not obviously committed to Ripstein's position, but nor I am sure that I need to disagree.

²⁹ Larry May, *Sharing Responsibility* (Chicago and London: The University of Chicago Press, 1992), Miller, "Holding Nations Responsible.", Eric A. Posner and Adrian Vermeule, "Reparations for Slavery and Other Historical Injustices," *Columbia Law Review* 103, no. 3 (2003).

³⁰ Neil Levy discusses a similar temporal positioning when he argues that our moral judgement is 'temporally indexed'. Neil Levy, "The Apology Paradox and the Non-Identity Problem," *The Philosophical Quarterly* 52, no. 208 (2002): 368.

³¹ Cases of strict liability depart from this model, but it is noteworthy that strict liability is penumbral in respect to conventional reparative practice.

³² See: Tony Honoré, "Being Responsible and Being a Victim of Circumstance," in *Responsibility and Fault*, ed. Tony Honoré (Oxford: Hart Publishing, 1999).

³³ This emergency could well impose obligations in addition to that which is required by reparative justice (such as assisting them to the hospital).

could have been foreseen from the offender's standpoint and what is the responsibility of others. We can think of these guidelines as respectively imposing internal and external constraints to our reparative liability. Having determined which interest-setbacks fall within the ambit of liability, we construct a rectified world to determine the nature and value of the non-occurrences for which we may be liable.

The Credibility Requirement

The credibility requirement concerns the character of counterfactual futures. If any interest-setback suffered by extant African Americans is to give rise to a reparative claim, the interest damaged by the setback must appear in a credible rectified world.³⁴ What occurs in a rectified world is relevant because it was wrongfully prevented by the offender's act; therefore, because we are interested in what agency would have produced in our world had wrongdoing not occurred, rectified worlds containing unlikely events are discarded.³⁵ Our method of assessment requires credible counterfactual worlds wherein credibility is defined by the normal.³⁶ This assertion derives support from the above observation that the conditions for counterfactual uncertainty unproblematically appear in commonplace reparative questions. In conventional cases such as B's projected trip to the airport, we simply discard as irrelevant those abnormal subjunctive futures containing events like lightning strikes and hijackings. A combination of probability, the behaviour we can expect from normal agents and knowledge of how the world was at the point of interaction with wrongdoing provides our rectified worlds with credibility.³⁷ This credibility requirement can impose the need to off-set costs against benefits. In the case of the broken window, an assessor might subtract the costs of petrol and parking if it is reasonable to suppose (from the evidence presented) that B was planning to use the car and that she would have chosen to park near the airport. To put this another way, in positing future agency as a concern of reparative morality, we simultaneously posit a background in which projects and decisions are pursued and taken.

³⁴ The paper puts aside the various problems which arise from the non-identity phenomenon.

³⁵ Though, if the projected future is of sufficient temporal length there may be reason to include some statistical average of unlikely events.

³⁶ A. John Simmons refers to our counterfactual reparative projections as, "...guided by conservatively holding most elements of the background stable"; meaning we discard those worlds containing abnormal or un-credible elements. A. John Simmons, "Historical Rights and Fair Shares," in *Justification and Legitimacy: Essays on Rights and Obligations*, ed. A. John Simmons (Cambridge: Cambridge University Press, 2001), 228.

³⁷ Special or specific information in the offender's standpoint can change the extent of our reparative liability in part by changing the relevant interests assessed by the counterfactual history we construct. If we learn that due to a pre-existing mechanical malfunction B's car could not have served to transport her to the airport, the reparative responsibility attributable to A will not include airport transportation (as no credible counterfactual world would then include this trip).

Agency depends on probability estimates. We guide our choices by what we think will or could happen in the future; therefore, when constructing rectified worlds we think about what is likely to have happened and we ignore worlds with radically different natural laws or unlikely catastrophes.³⁸

We can link this credibility guideline with our discussion of foreseeability. Both arise from the relevance of the normal state of the world. Indeed, we might think of them as the same foundational justification applied in different realms. One foresees what will result and compares it with what would have resulted. The priority of foreseeability is important. We only concern ourselves with counterfactual worlds containing those relevant interests which have wrongfully undergone foreseeable setbacks in the actual world. This imposes initial limits that are then bolstered by the limits of credibility.³⁹

In itself, the credibility requirement posits a twofold constraint of normality. First, the constraint of normality eliminates implausible worlds (those with lightning strikes and worlds with radically different laws of nature). Second, since the counterfactual is a morally rectified world—the normality of the credibility requirement is normatively-governed. Moral normality appears first in the counterfactual world’s rectification—the stipulated non-occurrence of the wrongful act, but moral normality goes further in entailing the irrelevance of subsequent wrongful acts.

Both aspects of normality appear in classic examples of overdetermination. Suppose it is true that either E or F will (independently and wrongfully) push G into the path of an oncoming truck.⁴⁰ If E fails to push, then F will perform the injurious action. Following F’s push and G’s injury by the truck, G’s reparative claim is not based on how G would have *in fact* fared in the rectified world where E does not push yet F does. The point brought out is twofold. First, we do not use the *net effects* of a wrong to determine reparation. We do not say that E can avoid a reparative obligation because the net effects of E either pushing or not-pushing would have been the same to G. Second, because the purpose of constructing a counterfactual is to create a morally rectified world, we eliminate counterfactual worlds

³⁸ Robert Nozick, *Anarchy, State & Utopia* (New York: Basic Books Inc, 1974), 152.

³⁹ The right conception is to imagine a morally-rectified world that ‘branches off’ from ours at a point of difference, the non-event of the wrongdoing’s interaction with the interest. This of course assumes some difference in the natural laws since in our world the injury is a necessary product of its antecedents. In the branching world this difference is bracketed, and this bracketing is justified by virtue of the object of inquiry. This difference is not an objection to the construction of the counterfactual since the object of the inquiry is what would have happened in the rectified world, the impossibility of which we consciously stipulate. We explore this further below.

⁴⁰ Cf. Stephen Kershnar, "The Inheritance-Based Claim to Reparations," *Legal Theory* 8, no. 2 (2002): 245.

containing further wrongful acts. In such cases, the relevant counterfactual baseline is not how the claimant would have in fact fared in a rectified world where the only difference is that the injury does not take place. In the overdetermined pushing case, we consider the injurious pushing in isolation from the abnormal circumstance of an immediately subsequent wrongful pushing. This twofold normality is part of what isolates the interest-setback attributable to a reparative claim from that which could not have been reasonably expected.

Perhaps we should ‘walk through’ the application of our method to this case. We begin by establishing that E’s pushing is wrong. Then⁴¹ we ascertain some rough knowledge regarding the relevant interests of G. Subsequently, we might assess setbacks by constructing a counterfactual beginning at the moment these interest(s) interact with E’s wrongful pushing (let’s call this ‘the counterfactual standpoint’). This rectified world is both a credible future and purged of abnormalities. Suppose we establish (either counterfactually or otherwise) that a setback has occurred. Then, in the actual world, we assess the extent of E’s reparative liability across the relevant setbacks by examining the limits imposed by the responsibilities of others and foreseeability from the offender’s standpoint. Comparing, in the actual world, those restricted interest-setbacks for which liability may be attributed, with the same interests in the rectified world, the counterfactual absence of the interest-setbacks constitutes the reparative liability of E. Finally, in determining appropriate content we assess the value of the relevant interest in the rectified world and compare it with the relevant interest in the actual world. These observations raise two points. First, reparative claims do not concern the net effects of the wrong, but are limited by reparative liability. Second, rectified worlds do not stretch back over time but rather forward over our reasonable expectations.

Recognition of this last point is important if the paper is to meet the uncertainty challenge. In assessing cases like the slavery reparation claim, we do not ask how the world would have been today if slavery had not occurred. Rather we ask whether and how any particular setback falls within the remit of reparative liability. The rectified worlds used in this assessment are credible particular futures and their purpose determines their character. We might say that the content of reparative responsibility is limited by the interest-setbacks we could generally expect in the offender’s standpoint and determined by an assessment made from the counterfactual standpoint.

⁴¹ This ‘then’ should not be read as indicating temporal priority. We might only discover the wrongdoing after observing interest-setbacks.

Authors such as Jeremy Waldron argue that the indefinitely large number of counterfactual possibilities render our attempts to comprehend what would have happened in the absence of a historical wrongdoing such as slavery massively uncertain. In response, we have now shown that our conventional practice contains guidelines that can eliminate a large subset of these *prima facie* potential counterfactual possibilities. We only concern ourselves with those rectified worlds containing the relevant interest-setbacks that fall within the limit of foreseeability and that are not the sole responsibility of others. Further, our rectified worlds are guided by the principle of credibility. Probability, the dual character of normality, and a knowledge of how the world was at the counterfactual standpoint guide rectified-world construction. If we can ascertain a world that meets these criteria, this world would seem to offer the right data for a *pro tanto* reparative claim.

Timing the Counterfactual

But those who advance the uncertainty challenge will not be convinced. They are going to say that the core of the challenge is precisely the failure of confidently ascertaining a setback of slavery. Without a setback, (or so they should argue) any discussion about reparative liability is so much smoke. In response, this section discusses the temporal location of the counterfactual standpoint. Above, the paper intimated that this is not always the same as the offender's standpoint. This divergence is easiest to see in cases where the test of setback is not counterfactual, but rather that a wrongdoing results in a threshold failure. As an example of an injurious threshold failure, recall the purchase of a misrepresented bicycle. When the buyer (J) discovers the bicycle does not work, her interest in the bike's serviceability has not 'worsened', rather it is below the required threshold.

Suppose that this failure is foreseeable and that it does not fall into the exclusive responsibility of any agent other than the seller (K). Suppose further that no other relevant questions arise. How do we ascertain K's reparative liability? The process is the same as above and employs a counterfactually rectified world. Beginning at the point where K's actions *interacts* with J's interest (the counterfactual standpoint), we construct a credible counterfactual world containing the non-event of the wrongdoing. K is reparatively liable for not-selling a non-functional cycle.

It is of particular interest that the temporal duration between the wrongful act and the event of threshold failure in the affected interest can have little effect on the assessment of reparative liability. Indeed, our assessment of reparative liability would be unlikely to change

if K's misrepresentation consisted in writing 'FUNCTIONAL' on the bike box six months, six years or sixty years before its purchase by J. Because the counterfactual standpoint is not the time of the wrongful act, but rather the moment of interaction with the relevant interest, elapsed time will not impact our method for assessing K's *pro tanto* reparative liability. (Although, there may be other reasons to act differently in each case.)

This point is important to some historical cases if it allows part of the elements for determining injury to advance forward in time towards the present. Herein, threshold failures may differ from those setbacks apparent in counterfactual worsening tests. In the latter case, if the interest is extant and the wrongdoing quickly results in a setback, then, as in the case with B's car, it seems likely that the limits of foreseeability and other-responsibility will quite quickly constrain liability attribution. Our judgment appears to depend, at least in part, upon whether the interest or the wrongful action is 'in play'. If either is 'in play', limits on liability are much tighter. But there is little reason to think that a foreseeable interaction that is not reasonably expectable must occur at the moment or even close to the moment of act initiation. If the terrorist plants a bomb under my currently existing house, the length of time the fuse will run is irrelevant to assessing the resulting injury.⁴² Similar argument applies to historical cases. If extant individuals suffer interest-setbacks apparent as threshold failures and the relevant counterfactual standpoint is sufficiently close to the present-day so as, in combination with other liability-limiting guidelines, to permit much greater certainty in the assessment of extent, we have reason to think that the first aspect of the uncertainty challenge does not present an insurmountable obstacle to historical cases.

To summarize the discussion so far, wrongdoers may be reparatively liable for the credible non-event of interest-setbacks that foreseeably result from their wrongful actions and which are not the responsibility of others. The paper's focus has been on the guidelines that limit the extent of reparative liability. Although these limiting guidelines normally impose reasonably short limits on reparative liability, because the temporal location of the counterfactual standpoint from which we construct counterfactual worlds is the time of interaction between the wrong and the interest, the limiting function of these guidelines may, in some particular cases, be held in abeyance. We can expect greater persistence when interests, or interactions between wrongs and interests, are somehow insulated—enabling

⁴² Of course, the damage is likely to differ and the people involved will change, but this is not immediately relevant.

resultant setbacks to be more foreseeable and preserved from effects that are the responsibility of others.

§ 5 EVALUATIVE DELIBERATIONS

Having established the extent of reparative liability, assessors derive the proportionate value of reparative content by comparing the relevant interest in the rectified world with that of the actual world. For example, in the case of the misrepresented bicycle, we assess J's interest in the actual world, assess the relevant interest in the rectified world and evaluate the difference between the two assessments. The maximal limit to the appropriate content of reparative obligation is that which satisfies the PRP. Continuing with the bicycle case, for the sake of argument, perhaps the bicycle's non-functionality is valued at 5. The output of the proportionality test is that the maximal limit of K's reparative obligation to J is 5.

Perhaps we think this case is too simple and too immediate to permit analogy with the slavery case. Above the paper noted that the second aspect of the uncertainty challenge points out that assessing historical injuries places substantial epistemic demands on our evaluative capacities. We need to assess the disvalue of injuries attributable to cases such as ethnocultural enslavement, but the evidence indicates our evaluative capacities are unreliable. Compounding this problem, the paper reviewed the suggestion that, even if we were good at evaluation, we would have trouble assessing the disvalue of an atrocity such as slavery. But perhaps this paper need not address this latter concern. Reparations only go to injured agents and only extant agents can suffer injury.⁴³ In the case of American slavery there are now no enslaved persons; therefore, it seems plausible that the paper need not consider possible reparative claims by an enslaved person and can thereby avoid assessing the disvalue of being enslaved. The nature of claims for slavery reparations may vary, but the problems posed by evaluating the disvalue of slavery itself may not be relevant. Instead, any relevant interest-setback is likely to be much less severe.

Correct or not, these remarks are unlikely to settle the second objection regarding the uncertain evaluation of reparative content by means of our admittedly imprecise evaluative capacities. Furthermore, the guidelines used to narrow the range of uncertainty are not conclusive. The construction of these guidelines is open to contestation: throughout the paper used terms such as 'reasonable', 'probable' and 'normal'. As a result, uncertainty remains as to whether our counterfactual projections are the right ones and whether we can properly

⁴³ Excluding the possibility of making reparation to the dead.

value the relevant interest-setbacks. The persistence of both problems, albeit in a more manageable range, makes moral deliberation ineliminable.

Deliberative procedures offer ways to generate acceptable answers to complex normative issues. Requiring the balancing and weighing of a multifaceted series of principles, reparative determination requires, or at least assumes the possibility of, moral deliberation. By making reasons to proceed (or not to proceed) with reparation available to both the offender and the claimant, as well as improving the epistemic character of those reasons, deliberation allows us to bridge over remaining uncertainties.

To expand, moral deliberation answers the first question of getting the extent of reparative liability correct in a negative capacity. Jeremy Waldron seems right when he says that here we cannot perceive facts as touchstones by which to guide our decisions.⁴⁴ Instead of perception, in questions regarding the ‘facts’ of counterfactual projection or in respect to the application of normative criteria, right judgement can be helpfully thought of as the possibility of communicating reasons acceptable by competent judges. Our reparative practice is an imperfect procedure in which guidelines such as foreseeability, other-responsibility and counterfactual credibility direct reparative deliberation. Considering these guidelines, with respect to any particular case the rightness of deliberative decision is signaled by its acceptance among assessors, but this judgement does not *make* the judgement correct. However, on the negative side, if an assessor fails to find reasons for accepting a claim persuasive, we have three options. Either we consider the assessor’s capacity for judgement faulty, believe that the evidence available to them is flawed, or decide that the claim itself is not justified.⁴⁵ If, through deliberation, we can disabuse ourselves of first two options without resolving the question, the third remains. In these cases, deliberative non-agreement tells us that we have not found good grounds for proceeding.

Many authors consider reparation to be an expressive act of the offending agent.⁴⁶ This understanding offers further reason to employ deliberative procedures. If the offender is to make such an expression, it seems plausible that she would need to know the reasons for

⁴⁴ Waldron, "Superseding Historic Injustice," 11.

⁴⁵ These thoughts about the role of moral deliberation with respect to uncertainty have been greatly influenced by: John Skorupski, *Ethical Explorations* (Oxford & New York: Oxford University Press, 1999). See chapters 1-3 in particular.

⁴⁶ This expressive component is emphasized by: Gerald Gaus, "Does Compensation Restore Equality?," in *Compensatory Justice*, ed. John Chapman, *Nomos* (New York and London: New York University Press, 1991), Rahul Kumar, "Responsibility and Rectification for Past Injustices: The Case of American Chattel Slavery," *Draft paper on file with the author*. (2004), David Miller, "Inheriting Responsibilities (Second Draft)," <http://www.trinitinture.com/documents/miller.pdf> (2004), Michael Ridge, "Giving the Dead Their Due," *Ethics* 114, no. 1 (2003).

making reparation. We might say that reparative actions require endorsement. Similarly, deliberation can empower the victim by providing an opportunity for him to speak about his injury. This latter point is perhaps more problematic than the previous. In practice, deliberative procedures have the potential to re-victimize rather than empower. That said, ideal deliberative reparative discourse involves the use of publicly acceptable reasons (referencing the guidelines and principles elucidated above), relations of non-domination, and a willingness among the parties to come to agreement.⁴⁷ Of course, even approximating this situation is often impossible. When we cannot meet these requirements, we have recourse to dispute-settlement procedures, preferably procedures that protect against re-victimization. The inclusion of dispute resolution procedures (e.g. arbitration and courts) in our practice indicates that the application of the guidelines and evaluation of interests may be in doubt. Facing limited uncertainty, reparative claim assessment is (ideally) a product of an open-ended process, enabling both parties to revisit agreements if new arguments or relevant facts become apparent.

While deliberation is a helpful procedure for choosing under conditions of limited uncertainty, it also offers further means of narrowing the range of uncertainty. Because the need for communication in the act of claiming imposes the obligation of public reasoning upon both the offender and claimant, deliberation can provide information about the acceptable value-content of a particular interest-setback. We can suppose that part of our common reparative practice involves a shared rough evaluation of any particular interest. We might not know exactly how much a broken arm is ‘worth’ but we do know that it is usually less than a severed leg and more than a bruised finger. This sort of rough ranking system may combine with other factors (such as precedents) to produce publicly accepted evaluations. Alexander may be right that our evaluations vary—but it would be surprising if the ranking of our evaluations evidenced radical discrepancies.

Other things being equal, a reparative claim is limited by those interest-setbacks that can be *justifiably* connected to the wrongdoing. This need to justify raises a further point. Deliberative procedures allow for the appreciation of those external considerations that limit reparative justice. Although not essential to the validity of a reparative claim, even *if* a claim is justified, reparations face distributive constraints. The practical question of whether and how to make historical reparations is embedded within a broad spectrum of concerns,

⁴⁷ Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge MA & London: The Belknap Press of Harvard University Press, 1996).

including those pertaining to distributive justice. In facing this kind of complex decision matrix, deliberation is essential because it increases the shared aspects of different understandings, clarifies the grounds of moral disagreement and functions to produce legitimate and justifiable policies.⁴⁸

§ 6 SOME CONCLUSIONS

In the literature on historical reparations, there is a tendency to formulate the uncertainty challenge as follows: ‘How can we guess what would have happened in the absence of historical wrongdoing and then compare that world with the present-day situation?’ Usually, writers voice the uncertainty challenge when they stand in the shoes of extant claimants and look back to the time of wrongdoing. However, counterfactually rectified worlds do not stretch back through time to the wrongful act. That perspective is looking the wrong way, as it were.

Our discussion indicates that the uncertainty emerging from the methods for assessing the extent of injury and reparative content might not pose insurmountable problems for all historical injuries. Injury assessment involves a forward-looking procedure that formulates the content of liability from the counterfactual standpoint. Temporal extent between the wrongful act and the reparative claim does not create problems with applying our method. Instead, its limits are normative and there is no requirement for the standpoint of the offender and the counterfactual standpoint to share a temporal point. Indeed, the case of the misrepresenting bicycle-seller who simply writes ‘FUNCTIONAL’ on the box indicates there is no strict maximum temporal limit between these points. Limits to reparative liability are second-level and include the guidelines of foreseeability and other-responsibility. These do not eliminate reparative liability by direct reference to time, but rather by reference to our judgements and, in at least some cases, we are confident in judgements that extend across substantial temporal periods.

If advocates wish to make a justified claim for slavery reparations, they must argue that the interest-setback for which they claim is (or ought to have been) a reasonable expectation for agents in the offender’s standpoint. The setback interest must then appear in a credible rectified world derived from the counterfactual standpoint. Because our method formulates the content of justified reparative acts from the counterfactual standpoint, those friendly to historical reparation claims should emphasize that the counterfactual standpoint is

⁴⁸ Ibid.

the point at which the wrongful act interacts with a relevant interest. The uncertainty challenge is strongest when it targets claims that rely on lengthy counterfactual histories. Therefore, these sorts of claims will not be the most plausible historical claims. Plausible historical claims will meet this requirement by describing instances from the class of interest-setbacks apparent as threshold failures. Using the example of the misrepresented bicycle, we observed that wrongdoing could sometimes create interests that injuriously fail to meet threshold standards. A threshold failure-based claim allows the relevant setback to be the creation of, rather than an effect upon, relevant interests. If the foreseeable setback is a necessary component of an interest that only comes into existence in the recent past, its non-existence during the period between the wrongdoing and its creation can preserve it from muddling events that would impose the constraints of other-responsibility and non-foreseeably. Furthermore, if relatively recent, such sub-threshold interest-creation would allow the rectified world's departure from the counterfactual standpoint to occur much closer to the present day (within the life span of current claimants).

For cases such as American slavery reparations, it does not seem unfeasible that some sort of threshold-based description could be true, but limits placed on the assessment of injury will place constraints on the consequent character of reparation that advocates can demand. But we cannot here take up that discussion. The paper's aim has been to oppose the uncertainty challenge by defining some of the characteristics of a viable historical claim. We began with the PRP: *If Y injures X, X is entitled to reparation from Y for, and proportional to, the injury.* The principle imposes the requirements of determining the extent of injury and the content of reparation. The uncertainty challenge poses interesting difficulties to answering these questions. In facing these difficulties, the best strategy emphasizes the limits to a viable claim: by posing limits we can circumscribe uncertainty. These limitations and a clear understanding of the methods employed do not completely resolve the uncertainty challenge but rather confine its ambit, putting structures in place for resolution.