

Reparations for Luck Egalitarians

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1. Introduction

In contemporary debates on distributive justice, Ronald Dworkin's equality of resources is regarded as one of the canonical theories, if not the most important liberal egalitarian theory today.¹ At the heart of Dworkin's egalitarianism is the dichotomy between endowment and choice: It is unjust if people are disadvantaged by inequalities in their endowments but it is equally unjust that others have to pay for the costs of one's choices. Thus, people's fates should, as far as possible, depend on their choices, including their ambitions and life plans, but should not depend on their endowments—the circumstances in which they pursue their choices and ambitions. It doesn't matter whether it concerns natural endowments (differences in physical and mental characteristics of the person, e.g., talents or handicaps) or social endowments (differences in social background, like race, ethnicity, gender, and so on).²

To what extent can Dworkin's theory of distributive justice—focusing on inequalities here and now—be helpful in a defense of reparation policies—primarily focusing on historic injustices? Time and again, the association is made between the history of slavery in the United States and the current position of African Americans, and more and more egalitarian policies are justified in terms of reparations for past injustice.³ The aim of this paper is to further develop the concept of social endowments in Dworkin's *equality of resources* in such way that it can be used to defend reparation policies. I will not discuss reparations for slavery in general; my argument focuses on the situation of African Americans in the United States.

The paper is organized as follows. Section 2 gives a short description of Dworkin's normative framework and elaborates the concept of social endowment. Section 3 explains how slavery and its legacies can generate social endowments. Sections 4 and 5 elaborate why skin-color in the basic structure of American society is a social endowment and how it generates morally relevant inequalities. Section 6 compares my approach with two alternative approaches in this debate. Section 7 concludes.

2. Distributive Justice: Dworkin's Equality of Resources

2.1 Social Endowments

In the mid-1980s, Ronald Dworkin published a path-breaking paper on equality of resources that provided the first explicit formulation of the choice/endowment distinction, the “key distinction” in contemporary liberal-egalitarian political philosophy.⁴ This distinction demands that people's fates should, as far as possible, depend upon their choices, including their ambitions and life plans, but should not depend on their endowments—the circumstances in which they pursue their choices and ambitions. The central intuition is that it is unfair that some persons, through no choice of their own, have to live their lives with burdens of natural or social endowments, while others, through only good fortune, face no such hardship. Dworkin argues that government should adopt law and politics to ensure that its citizens' fates are, so far as government can achieve this, insensitive to their economic backgrounds, gender, race, or particular sets of skills and handicaps.⁵ In his discussion of endowments, Dworkin mainly focuses on natural endowments—differences in physical and mental characteristics of the person. This section elaborates social endowments—social backgrounds like gender and race—as a stepping stone to the discussion of slavery reparations later in the paper.

Let me start by elaborating the distinction between natural and social endowments.⁶ A *natural endowment* is a property of a person that, through physical or biological processes, limits this person's ability to generate impersonal resources and realize her ambitions. A *social endowment* is an attribute of a person that in and of itself need not affect the person's life prospects, but in interaction with social structures and social processes affects the person's ability to generate impersonal resources and realize her ambitions. For example, the color of one's skin is a personal attribute, which in our societies becomes a social endowment (race) because it interacts with a number of social structures and processes (an ideology of white supremacy, persistent patterns of racial discrimination, and so on), thereby affecting a person's life chances. There is no inherent necessity why being African American would need to have these inequalitarian effects: in a society without these social structures the color of one's skin would have no social meaning and race would not exist. Social endowments do not *in themselves* affect someone's lifetime prospects. Whereas natural endowments lead to inequalities through biological and physiological processes, social endowments affect the position of individuals via social structures, that is, the accumulated effects of patterns of human behavior.⁷ These social structures must be understood in terms of interpersonal processes, habits, conventions, norms, and herding. Iris Marion Young, echoing Jane Hampton, argues that such behavioral patterns make individuals, “. . . despite any good intentions they might have, act and react in a way that has the aggregate effect of structural inequality.”⁸

2.2 Dworkin's Ideal-Theoretical Foundations

Whereas natural endowments figure prominently in equality of resources, social endowments only play a minor role. This difference can be explained as follows. Equality of resources is built up upon a thought-experiment in which the focus has shifted from actual societies to a society of shipwrecked people who wash ashore on a desert island with abundant resources.⁹ In this thought-experiment, society is built up from scratch. The institutions of the new society are the result of the immigrant's choices in an ingenious procedure of auctions and hypothetical insurance schemes. The emphasis on choice sensitivity presupposes that the choices in the auction and hypothetical insurance market are the result of authentic preferences, not biased by prejudice or stereotypes.¹⁰ This newly built society is different from actual plural and multicultural societies in that it has no history of subordination of women, homophobia, racism, or any other historical process that has unlevelled the playing field in their world of origin. To guarantee unbiased choices, Dworkin introduces the principles of authenticity and independence. These are two of a set of five principles, constituting a "liberty/constraint system" that Dworkin presents as an integrated part of equality of resources.¹¹ The principle of *authenticity* ensures that the members of the immigrant's society have authentic preferences, while the principle of *independence* ensures that they do not engage in actions or choices that are influenced by prejudice.¹² As a result, Dworkin's egalitarian theory is developed in a context in which social endowments, including race, are *assumed away*.

Two considerations can justify this approach. A theory in which choice-sensitivity is one of the cornerstones should also presuppose authentic preferences in the process of developing its institutions. More importantly, Dworkin presupposes a categorical distinction between natural and social endowments since the former are fixed and the latter are "social constructs" that are, in principle, changeable. Dworkin sees inequalities caused by social endowments as "the consequence of longstanding and unjust pattern of discrimination and stereotyping" and he sees a straightforward solution to this problem: "civil rights laws will undermine discrimination and stereotyping; this will cause social expectations to wane, so that, over time, socially-generated inequalities will disappear."¹³

There is, of course, an important difference between natural and social endowments. The appropriate policies and civil rights law could, in principle, end patterns of discrimination and stereotyping and the resulting social endowments, but policy and legislation cannot change natural endowments. Since Dworkin sees socially generated inequalities as something temporary, since it is—at least in principle—possible to undo their causes, he does not appreciate the need to discuss social endowments as endowments within the framework of equality of resources.¹⁴ This follows a distinction in his earlier work between policies and principles.¹⁵ A policy is a standard that sets out a goal to be reached, which is to be evaluated only in terms of the common good, for example, which policy should be chosen to end patterns of discrimination and stereotyping?¹⁶ A principle is a

standard that is to be observed, not because enforcing it promotes the common good, but, instead, because it is a requirement of justice.¹⁷ Dworkin thus insists that, for example, affirmative action programs are not a matter of principle but of policy: they might have unfavorable effects on persons, but do not violate their rights. The rights of whites, disadvantaged by affirmative action programs are not infringed by that policy and African Americans do not have a *right* to compel government to adopt such policies. So, although Dworkin has been one of the most prominent participants in legal debates on affirmative action, his defense of affirmative action cannot be interpreted as a requirement of justice.

2.3 Reemphasizing Social Endowments

I agree that there is a conceptual distinction between natural and social endowments, and that this distinction is essential in the ideal-theoretical development of equality of resources. However, in real life this distinction is much less evident: Natural and social endowments sometimes interact and overlap, and both generate morally relevant inequalities that should be dealt with in an egalitarian theory. Even if one agrees with Dworkin that socially generated inequalities can be seen as temporary in theory since they could *in principle* be combated with civil rights laws, in reality they are prominent and persistent. Indeed, one could wonder why luck-egalitarians have ignored social endowments, especially since these are so central in many actual political debates. Samuel Scheffler, among others, criticizes luck-egalitarians for ignoring the most urgent egalitarian question today, namely “how best to accommodate differences of race, gender, religion, culture and ethnicity.”¹⁸ This critique might not primarily be a critique of Dworkin’s equality of resources, but more a critique of the way luck-egalitarianism has developed over the last decade. Luck-egalitarian debates have almost entirely focused on natural endowments, especially on highly theoretical discussions about where to draw the line between natural endowments and choices.¹⁹ However, the question how social endowments, assumed away in the ideal-theoretical framework, can be incorporated in a nonideal application of equality of resources has been dismissed in this debate as issues of policy or implementation, that are seen as less relevant, or not the task of philosophers to solve.

Dworkin himself accepts the normative relevance of social endowments in his recent replies to his critics. In a reply to Andrew Altman he writes:

I agree that government has an obligation to treat all those subject to its dominion with equal concern, and that a government that does nothing to redress structural discrimination fails in that obligation. . . . It is true . . . that without some direct and positive action the American governments fail in their responsibilities to treat all citizens as equals, and that is a matter of principle and not just policy.²⁰

Similarly, in a reply to Andrew Williams, Dworkin draws similar conclusions in the case of gender inequality:

Whatever difference now exists between the genders in their desire to combine a career with child-care is very likely, at least in very considerable part the upshot of social expectations that are themselves the consequence of long-standing and unjust patterns of discrimination and stereotyping. As chapter 3 [of *Sovereign Virtue*] explains, equality of resources presupposes a society free from such injustices and would therefore argue just the remedial measures, including special child-care support for women at work, that Williams says a capability approach would support.²¹

In both instances, Dworkin agrees with his critics that dealing with social endowments is an issue of justice and thus should be discussed within the framework of equality of resources; in the second reply he even claims that he already proposed remedial measures to deal with them.²² Unfortunately, Dworkin exaggerates the work that he has done in *Sovereign Virtue*. Chapter 3 does not argue for any specific remedial measures to mitigate the effects of social endowments, nor does it tell us how we could base such measures on the theoretical foundations of equality of resources.

However, the value of the ideal-theoretical device hangs upon its value for tackling problems of inequalities in actual societies. Conclusions derived in an ideal-theoretical realm must be translated—or should at least be translatable—into a nonideal application for societies in which such unjust stereotypes do exist. Dworkin, however, does not elaborate how, or under what conditions, the principles of the liberty/constraints baseline can be met in real life.²³ We have to translate the conclusions derived in an ideal-theoretical world to a nonideal application in which Dworkin's principles of authenticity and independence do not apply. That is the focus of the next two sections.

3. Social Endowments, Racial Inequality, and the Legacy of Slavery

The tragedy of slavery remains a sore spot in American politics and society, even up until today. It is beyond dispute that slavery was an unjust institution: it violated the pivotal liberal axiom of equal respect and concern, denied equal citizenship, economically exploited persons, and violated their humanity and integrity. It is likely that the effects of slavery spill over into the present. Empirical studies unequivocally show that African Americans, living in the United States today, fare worse than whites on every possible indicator—education, income, wealth, health, home ownership, and so on.²⁴ How can we understand current racial inequalities in terms of the legacy of slavery?

To answer that question, we need to discuss slavery as a major institution in the basic structure of American society.²⁵ Until the end of the Civil War, slavery was a formal institution of the American society, and as such it created various social positions, and determined different expectations of life. For sure, the institution of slavery favored the starting places of free people over that of slaves. However, with the abolition of the institution of slavery in 1865, the effects of this (former) institution did not stop. We can distinguish several spillover effects of slavery that continued to affect race relations, even until today. The *legal* vestige

of slavery can be recognized in the fact that Post–Civil War government was not very active to protect the civil and political rights of former slaves:

After having made the newly freed slaves citizens, the federal government abandoned them. It allowed southern whites, through terror and law, to recapture control of state governments, disenfranchise African Americans. . . . Governments—state and federal—made no effort to vindicate the rights the Civil War Amendments extended to blacks. This failure prevented African Americans from successfully following the immigrant model, and the failure persisted into recent times. Only after World War II did the tide began to turn and only after 1954 did the U.S. begin to expend real effort toward defending the civic and human rights of blacks. That effort is far from complete today.²⁶

Other legal vestiges, such as “Jim Crow” legislation in the form of government-sanctioned discrimination and segregation, lasted until the mid-fifties of last century.²⁷ The *informal* vestige of slavery can be recognized in the form of racism that has long dominated American culture and society, and is still present today. Slavery contributed greatly to the spread and resilience of racism. Slaveholders needed a racist atmosphere to be able to maintain the institution of slavery. Slavery promoted the dichotomy between black inferiority and white supremacy.²⁸ Both have been passed down from generation to generation and are still imposed upon African Americans today: Martin Gilens concludes in his book *Why Americans Hate Welfare* that such racial generalizations are still very much present in contemporary American society. “In particular, the centuries-old stereotype of blacks as lazy remains credible for large numbers of White Americans.”²⁹ As Hylton argues:

Like a resilient virus, racism has a tendency to replicate itself in successive generations and is to some extent self-confirming. On the institutional level, an agency such as a police force will tend to screen for applicants that hold the same views and will train according to methods that have been used in the past to avoid dissension within the agency. Thus, racism once embedded in an institution is likely to remain for several generations.³⁰

The *social* vestige of slavery can be understood in terms of disruption of family relationships and social conventions among African Americans.³¹ Marriages and relations between parents and children under slavery were always precarious and uncertain, because their stability was dependent on the cost-benefit calculus of the slaveholder. This constellation generated many perverse incentives. The relatively low probability that the family unit would remain intact weakened incentives to invest in the marriage relationship or to invest in children by taking responsibility for their education, moral development, or economic security. Hylton concludes that the much discussed weakness of the African-American family unit today can be traced to incentives created under slavery.³² The *economic* vestige of slavery follows from the fact that slaves were deprived of education, which placed them at a competitive disadvantage after the Civil War, pushing African Americans into economic relationships with peonage-like

elements.³³ Moreover, former slaves started with no wealth, which had its effects in growing racial disparities in wealth accumulation. Nowadays the average white household has six to ten times the wealth of the average African-American household.³⁴ Thomas Shapiro concludes that much of the net-wealth gap between African Americans and Whites today is almost certainly the result of multiple generations of inheritance, if inheritance is defined broadly to include not only gifts of cash and property at death but also support in the form of college tuition and help with home down payments.³⁵ This also generates differences in educational opportunities since, as Dalton Conley argues, it is the wealth rather than income of parents that proves pivotal to a child's ascending the academic and economic ladders to the middle class and beyond.³⁶

These are only some examples of vestiges of slavery that, without doubt, can be supplemented by others. None of them alone provides an indisputable or knockdown explanation for current inequalities between African Americans and Whites. However, I hope to have shown the plausibility of the claim that slavery and its vestiges have institutional spillover effects that affects African Americans in the United States, even today.

4. Slavery and Its Vestiges in an Institutional Context

In most discussions on reparations, slavery is seen as a discrete and historic incident that ended around 1865. However, the effects of slavery on American society did not stop with the abolition of the institution of slavery. Some argue even that the legacy of slavery could have been overcome by now if the U.S. government had been more active after the abolition of slavery:

Had there been adequate measures taken to allow former slaves to gain economic and educational advancement, it is doubtful that anyone would be talking about reparations now, for there would be no need for them. African Americans would have educational opportunities and wealth equivalent to (or approaching) that of the white population.³⁷

This indicates that the disadvantaged position of African Americans in the United States is not only generated by slavery, but also by the lack of post-Civil War policies, fighting its legacies. The basic structure of the American society has been penetrated with legal, social, economic, and informal vestiges of slavery. Some residues are embedded in *legal coercive institutions*: those institutions that are connected to the coercive powers of the state such as governmental policies, public law, and statutes. Jim Crow-like legal discrimination and segregation lasted until the mid-1950s, when the "separate but equal" doctrine was struck down. With the abolition of these policies, the legal-coercive vestiges of slavery have been, more or less, eliminated from the basic structure of society. But it seems to be very implausible to conclude that with this abolition the basic structure is freed from all vestiges of slavery. Other residues of slavery such as racism are still embedded in the institutions of the basic structure of society.

Institutions are “public systems of rules, which define positions with their rights and duties, powers and immunities, and the like.”³⁸ Institutions are social practices that are realized via the thought and conduct of persons: sets of rules that provide a common basis for determining mutual expectations within a society. Indeed, a society is not a random aggregate of individuals; instead, it is the conjunction of persons in a shared and perpetual project of shared institutions, that is, a society is a perpetuating rule-governed system of mutual obligations and expectations. To analyze the residues of slavery, we have to distinguish legal-coercive institutions from informal institutions. Legal-coercive institutions are made by the state and are “hard” and formalized, for example, laws and statutes. Laws and rules of legal coercive institutions are the result of explicit decisions by authorized governmental bodies, can be found in black letter law, and their origins can be traced back to parliamentary protocols and foundational documents like the *Federalist Papers*. Other institutions, informal social institutions, have developed over time within a society, without governmental backing, such as etiquette and other social conventions. Informal social institutions are not constituted by explicit rules and laws but by belief systems, implicit social norms, conventions, usage, and (unarticulated) expectations. For example, although racist norms are not explicitly formulated, still they can be understood by everyone, are known to be followed by many (consciously or unconsciously), to such an extent that they generate structural inequalities that can be measured in outcome evaluations.

Institutions, formal and informal, exist when the actions specified by them are carried out in accordance with a public understanding that the system of rules defining the institution is to be followed.³⁹ Many informal social institutions do not have far-reaching distributive effects and are thus less relevant in a theory of justice, for example, etiquette. Other informal social institutions, such as sex and race differentiated norms on what it implies to be a good employee, do have a profound effect on the social division of burden and benefits and, as such, should be subject to the principles of social justice. Social structures that have profound effects on individual lives should be subject to theories of egalitarian justice.⁴⁰ There is every reason to assume that not only legal coercive institutions have such profound effects, but also informal social institutions.

The inclusion of informal social institutions in our normative analysis is not self-evident. Dworkin’s argument hinges upon the distinction between choice and endowment. We thus have to distinguish between social structures—generating social endowments—and individual choices and decisions made within those structures. In reality it is unclear, however, where the line should be drawn precisely. Individual behavior and social institutions are not independent but, instead, mutually reinforcing: institutions direct patterns of behavior, while the existence of these behavioral patterns reconfirms the institutions. It is clear that erratic day-to-day activities of individuals are excluded from the normative analysis and legal coercive institutions included. It is unclear where informal social institutions, structural patterns of behavior, fit in this dichotomy. Informal

social structures are harder to conceptualize because their institutions are less “concrete.” These are not explicitly formulated by government but have developed over time in society. Both legal coercive and informal social institutions pattern individual behavior, but the influence of the latter is less straightforward to recognize: it is harder to pinpoint (the rules of) social norms and conventions, primarily because they are used implicitly. However, if we interpret an institution as *a public system of rules* there is no reason to exclude informal institutions from our normative analysis, as long as such rules for individual conduct can be understood by everyone and known to be generally followed by citizens or subcategories thereof. Following Douglass North’s influential definition, we can see institutions as the rules of the game in a society, the humanly devised constraints that shape human interaction.⁴¹ The major role of such institutions is to reduce uncertainty by establishing a stable structure to human interaction. Described in this way, institutions have structural effects. As Thomas Nagel argues:

Every social system depends on conventions and rules and laws that the members uphold, and if these have foreseeable consequences of a systematic kind, then the society is responsible for those consequences and they cannot be placed outside the reach of judgments of justice and injustice.⁴²

Informal institutions should be included in our normative analysis if they fulfill two conditions. First, if the actions specified by the rules that define the institution are followed to such an extent that the rules that define the institution are effective.⁴³ Second, if the effects of the rules that define the institution pattern human interaction in such a way that they have a profound (inegalitarian) effect on the distribution of burdens and benefits in society.

Racism as a belief system can be a feature of formal and informal institutions, and as such affects the distribution of burdens and benefits. In virtually all societies, but especially the United States, race is used routinely to divide people into categories, based on the possession of specific characteristics, and to attribute beliefs and assumptions about individuals in that category. Moreover, the effects of the rules that define the institution have a profound (inegalitarian) effect:

If someone is perceived or identifies himself or herself as belonging to the African American or another racial group—regardless of the person’s precise physical or other characteristics—that classification creates a social reality that can have real and enduring consequences. For instance, racial classification can affect access to resources (e.g., education, health care, and jobs), the distribution of income and wealth, political power, residential living patterns, and interpersonal relationships.⁴⁴

If informal social institutions, structural patterns of behavior, structurally disadvantage a specific category of individuals on a relevant measure of well-being, they affect the members of the category as social endowments, and should as such be elements in our egalitarian analysis.

Claims of inequality, arguing that a specific social category is disadvantaged, have to compete with other urgent claims on the political agenda. Social endowments and their inegalitarian effects are less straightforward to recognize than natural endowments—for example, Dworkin's ideal-theoretical example of a handicap. Such claims thus have to be supported by arguments that can do the normative work in an egalitarian debate. Arguments for egalitarian policies should therefore include a plausible explanation for the observed disadvantage in terms of the interaction of the social endowment—an unchosen element that is shared by the persons in such a category—and social institutions in the society in which its members live. In terms of Iris Marion Young:

We must explain how institutional rules and policies, individual actions and interactions, and the cumulative collective and often unintended material effects of these relations reinforce one another in ways that restrict the opportunities of some to achieve well-being in the respect measured, while it does not so restrict that of the others to whom they are compared, or even enlarge their opportunities.⁴⁵

That explanation should include arguments explaining how the interaction between personal characteristics—for example, skin color—and social institutions and social structures generates the inequality, for example, racism. Moreover, such an analysis should at least include a suggestion of policies that are appropriate to deal with the inequalities at hand.⁴⁶

5. Slavery, Its Vestiges, and Inequality

It is clear from all statistics that African Americans fare much worse than whites on every possible indicator. To what extent can these inequalities be understood as the result of slavery and its vestiges? Let me start by discussing the opposite claim. African Americans are not worse off because of some structural barriers, but simply because they make different choices in life. We must leave it as an open possibility that African Americans have different attitudes toward ambitions and life plans. But treating African Americans as a homogenous group, characterized by some core attitudes that set them apart from other racial categories is theoretically suspect and empirically implausible.⁴⁷ This is especially the case when strong alternative explanations are available, for example, the structural barriers in society that block equal opportunities of African Americans. It seems more plausible to assume that the different racial categories would normally fare equally, and that inequalities are caused by social endowments. Thus Ann Phillips argues that, in our assessment of the causes of inequalities, the burden of proof lies with those who argue that inequalities are caused by different attitudes and core values, not with those who emphasize these structural barriers.⁴⁸ Still, let me elaborate an explanation of emergence of structural barriers, as the result of racism, the most prominent vestige of slavery.⁴⁹ The emergence of social

barriers, generated by racism, can be explained in terms of social processes of ascription.⁵⁰

Ascription is the attribution of certain characteristics, behavior, and beliefs to a social collective of individuals who share a certain attribute, for example, the color of their skin. As a result of processes of ascription, all individuals who share this attribute are categorized in a specific category: African Americans. Processes of ascription transform the color of one's skin into race. All kinds of beliefs, values, and behavior are attributed to the members of this category. African Americans do not necessarily share specific common cultural beliefs, norms, or values. Instead, they display the same range of conceptions of the good life as the rest of society: there are left-wing and right-wing African Americans, religious and atheist African Americans, and so on. Still, the category of African Americans has a different position in the basic structure of American society, which is generated by the different stereotypical images of different ethnic groups. For example, Asian Americans are regarded as productive, hard-working, and obedient, while African Americans are regarded as good at sports and music, but less suitable and reliable as employees, or straightforwardly lazy. Such categorical distinctions and the underlying racial stereotypes are intimately linked with the history of slavery.⁵¹ The term "stereotype" is used here in the nonpejorative form and refers to the beliefs or expectations about the qualities and characteristics of specific social categories.⁵² Such stereotypes are very influential because of the human tendency to take strong inferences from surface similarities: "our thinking about social categories gives disproportional strength to category differences correlated with physical appearance."⁵³ Thus, in social interaction, race is the distinguishing determinant separating African Americans from other ethnic categories.

Racism, as a legacy of slavery and an informal social institution in the basic structure, does not only affect direct biological descendants of former slaves but, instead, all African Americans living in the United States. Racist stereotypes do not discriminate between biological descendants of former slaves and other African Americans. As a result, all African Americans, regardless of their individual skills and attitudes, face certain barriers in their everyday lives that members of other social categories do not face.

6. Looking Forward, Looking Backward, or Both?

My luck-egalitarian defense of reparation policies incorporates both historical and ahistorical elements. It focuses on current racial inequalities, but explains them in terms of historic events—slavery and its legacies. Moreover, egalitarian policies are justified in terms of the historical injustices. To elaborate my approach further, I will compare it with two alternative theories in the field: current legal defenses of reparation policies, embedded in tort law, and Leif Wenar's *Reparations for the Future*.

6.1 Corrective Justice

Scholars and lawyers arguing for slavery reparations have long embraced the corrective justice approach.⁵⁴ *Corrective justice* focuses on private obligations between individuals created by one party wrongfully harming another. It relies on very specific legal arguments as employed in the private law of tort: If person A wrongfully harms B, A must pay compensation to B. Corrective justice is the default method for obtaining compensation for harms inflicted, usually in court. There have been attempts to claim reparations for slavery in court.⁵⁵ Such a legal approach has one strong pragmatic advantage over a more political. *If* it were possible to make a compelling case in court, African Americans could claim compensation, bypassing political processes, similar to the way the Supreme Court decision on *Roe v. Wade* enabled the right to abortion, despite great political resistance.

The tort-law route to justify compensation for slavery hinges upon a causal relation between an injustice and injuries to descendants. But is it possible to trace a direct link between the harm done to the original victims of slavery, six generations ago, and current African American claimants for reparations? The move from the paradigmatic tort-law case between A and B—as described above—to such indirect claims saps the intuitive strength of the corrective justice rationale.⁵⁶ Courts in the United States have never allowed claim to damages that have incurred as a result of harm caused to their grandparents, great-grandparents, or further distant relatives.⁵⁷ The underlying idea is that the concept of foreseeability does not extend beyond human beings who have been conceived or were born at the time of the tortious act. In his contribution to this volume, Wenar explains these problems in philosophical terminology.⁵⁸ First, the counterfactual character of such claims: computing the damages, after so many generations and interactions, requires so much counterfactual arguing that the calculation of compensation is “weakened beyond usefulness.”⁵⁹ Second, the non-identity problem: Many descendants of slaves owe their existence to slavery, because without the institution their parents would not have met and procreated. How can someone claim compensation for the negative effects of a phenomenon without which one would not have existed?

I want to emphasize a third problem within the corrective justice approach toward reparation for slavery: it considers slavery as a discrete and historic injustice that ended around 1865. Is it really the case that the present disadvantaged situation of African Americans can be traced *solely* to slavery? This suggests that, although the institution of slavery was abolished some six generations ago, the inequalities it generated have persisted until today. African Americans have inherited poverty and whites inherited affluence, and no new injustices have affected the distribution since then.

Slavery generated enormous inequalities. These inequalities are important elements in the explanation of current inequalities; however, it seems implausible that this historic injustice is the *only* explanation. The effects of slavery did not end

the day the institution was abolished. Via its legal, informal, social, economic, and other vestiges, embedded in the basic structure and its institutions, the history of slavery generates new inequalities, even today. An institutional analysis acknowledges that past injustices can be embedded in current major institutions and thus can create new social, economic, and political relations that generate new inequalities.⁶⁰

From this argument we can derive two differences between the corrective justice approach and my distributive approach. Corrective justice presupposes a direct connection between the historic injustice and current reparation policies. Within the distributive justice approach a claim for reparations is made indirectly, and proceeds in two steps. First, it acknowledges that slavery has various legacies, which are embedded in the current basic structure of society in the form of legal coercive and informal social institutions. Second, it emphasizes that some of these new institutions generate racial inequalities, affecting African Americans living today. This indirect approach implies that, unlike in the corrective justice approach, we do not have to presuppose a direct causal relation between the ancient institution of slavery and current inequalities. Moreover, we don't have to identify the exact wrongdoers of slavery, its victims and their interactions. It is enough to show the effects of social endowments: current African Americans are worse off than others through no fault of their own, and slavery and its legacies are important determinants of this inequality.⁶¹ It explains how the legacies of slavery are embedded in the current basic structure of society and how racial inequalities are the result of spillover effects of this historic injustice.

The second difference is that the justification for compensation in the corrective justice framework is justified by the fact that current African Americans are the descendants of slaves who were exploited and never paid for their labor. The consequence is that *only* African Americans who can show a family relation to actual slaves are entitled to claim compensation. Reparation policies in the distributive justice framework are justified because the institution of slavery and its vestiges affects current African Americans, as social endowments, in their chances to realize their ambitions and life plans. The central focus is justice *here and now*, although it is acknowledged that current injustices arise out of historic injustices. Racism affects African Americans not as individuals, but as (members of) a social category. As mentioned in the last section, racist stereotypes do not discriminate between biological descendants of former slaves and other African Americans. Thus the egalitarian policies apply to all African Americans living in the United States today.

6.2 Wenar's "Reparations for the Future"

In his contribution to this issue, Leif Wenar distinguishes backward-looking considerations for reparations—as formulated in the corrective justice approach, discussed above—and forward-looking considerations for reparations—focusing on the current distribution of burdens and benefits. He emphasizes the primacy of

distributive justice and argues that backward-looking approaches add no weight to entitlements for reparations. Referring to past events might be helpful to understand the current basis for action, or may serve strategic purposes, but can never be used for its justification.⁶²

Wenar and I both employ a distributive justice defense for reparations, and I agree that the many difficulties that plague strict backward-looking approach undermine the plausibility of a corrective justice defense for reparations. I also agree with his conclusion that reparative principles have little weight independent of forward-looking distributive principles.⁶³ But I disagree with Wenar's conclusion that principles of distributive justice and principles of reparative justice can be in conflict:

Take some distributive principle (as Nozick said in the Wilt Chamberlain argument, "your favorite"). Imagine this favored distributive principle to be instantiated in the world as it is now. Now imagine that reparations beyond the limited principle would require us to dislodge this distribution of perfect justice, so that the world would become distributively less just. I doubt that many of my fellow theorists would be willing to make that transition.⁶⁴

My favorite distributive principle defends forward-looking policies of egalitarian justice, but justifies these policies in terms of backward-looking arguments on how some inequality in a specific society came about. Understanding racial inequalities in the United States implies investigating how current inequalities can be traced back to structural causes in formal and informal institutions that themselves can be understood as legacies of slavery. If it were possible to instantiate my favorite distributive principle in the world as it is now, neutralizing these historic injustices would have been one of its most important targets. Since reparation for past injustices is one of its central elements, it cannot dislodge the distribution of perfect justice from my favorite distributive principle.

Wenar's suggested endorsement of Nozick's work makes his position even more puzzling. Nozick's entitlement theory, emphasizing the principles of justice in acquisition and transfer, argues that "justice in holdings is historical; it depends upon what actually happened."⁶⁵ Both a Dworkinian distributive principle—which I endorse—and a Nozickian distributive principle—which Wenar seems to endorse—suggest that the distribution of perfect justice cannot be determined without any knowledge of historic injustices that affect the current situation. The historic genesis of the current distribution is so important in both distributive principles that it seems unlikely that reparation policies would ever disturb the distribution of perfect justice.

7. Conclusion

For the last two decades, luck-egalitarianism has been widely acknowledged as the most influential theory of distributive justice. Critics of luck-egalitarianism

have argued that these debates have been dominated by highly ideal-theoretical and counterfactual disputes about the distinction between natural endowments and choice. The issue of socially generated inequalities, caused by structural barriers in society, has been ignored in these debates as issues of policy or implementation. For example, in his earlier work, Dworkin argued that affirmative action was an issue of policy not of egalitarian principle.

In this paper I have integrated reparations for slavery in the luck-egalitarian framework. It is an attempt to broaden luck egalitarianism by conceptualizing social endowments and emphasizing their importance in the luck-egalitarian framework. Luck egalitarianism seeks to mitigate inequalities that are caused by unchosen endowments. I have shown how slavery and its legacies generate structural barriers for African Americans in the United States and generate social endowments. Dworkin sees policies to level the playing field as an “integrated part” of his egalitarian theory.⁶⁶ My defense builds upon elements available within luck egalitarianism that have long been underexposed.

Thus, my proposed elaboration of social endowments is firmly based within Dworkin’s theory of distributive justice, but seeks to present a more comprehensive version of it. Moreover, such a more comprehensive egalitarian account provides a wider variety of egalitarian policies than only a straightforward redistribution of personal resources. There is a wide variety of causes of inequality, and policies mitigating these inequalities should be aimed at the cause of a specific inequality. Inequalities caused by natural endowments require different governmental interventions than inequalities caused by social endowments.

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Notes

¹ Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, MA: Harvard University Press, 2000), 81, 287, and 322.

² Will Kymlicka, *Contemporary Political Philosophy: An Introduction* (Oxford: Oxford University Press, 1990), 95.

³ For political contributions see James Forman, “Manifesto to the White Christian Churches and the Jewish Synagogues in the United States of America and All Other Racist Institutions,” in *The Case for Black Reparations*, ed. Boris Bittker (New York: Vintage Books, 1973), 159–75; Robert Westley, “Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?” *Boston College Law Review* 429 (1998): 429–76; Randall Robinson, *The Debt: What America Owes to Blacks* (New York: Dutton, 1999); Dalton Conley, *Being Black, Living in the Red: Race, Wealth, and Social Policy in America* (Berkeley, CA: University of California Press, 1999). For academic contributions see, among others, Alfred L. Brophy, “Some Conceptual and Legal Problems in Reparations for Slavery,” *N.Y.U. Annual Survey of American Law* 58 (2003): 487–556; Kyle D.

- Logue, "Reparations as Redistribution," *Boston University Law Review* 84, no. 5 (2006): 1319–74.
- ⁴This paper was the second paper in a series entitled *What Is Equality? Part I-IV*, reprinted as the first four chapters of *Sovereign Virtue*. When citing these articles, I will give the page references in *Sovereign Virtue* only. Dworkin's claim that the choice-endowment distinction is the key distinction in luck-egalitarianism can be found in Dworkin, *Sovereign Virtue*, 287.
- ⁵*Ibid.*, 6.
- ⁶Arguments in these sections draw on a coauthored paper: Roland Pierik and Ingrid Robeyns, "Resources versus Capabilities: Social Endowments in Egalitarian Theory," *Political Studies* (forthcoming).
- ⁷This emphasizes the strong similarity between natural and social endowments. Both generate inequalities though the interaction between two components: a personal attribute and a social structure in which this attribute provides comparative advantages or disadvantages. In the case of a natural endowment the two are the medical impairment and the social environment that is more or less adapted to that impairment, e.g., the inability to walk and a wheelchair-unfriendly infrastructure. In the case of a social endowment it is a physical appearance and a social structure with embedded stereotypes, e.g., dark skin color and a racist environment.
- ⁸Iris Marion Young, "Equality of Whom? Social Groups and Judgments of Injustice," *Journal of Political Philosophy* 9, no. 1 (2001): 1–18, at 9; Jean Hampton, *Political Philosophy* (Boulder, CO: Westview Press, 1996), 191–92.
- ⁹Dworkin, *Sovereign Virtue*, 65–119.
- ¹⁰*Ibid.*, 70.
- ¹¹*Ibid.*, 147–62.
- ¹²The principle of *authenticity* ensures an individual's freedom to "engage in activities crucial to forming and reviewing the convictions, commitments, associations, projects, and tastes that they bring to the auction and after the auction. It ensures the participants' opportunity to form and reflect on their own convictions, attachments, and projects, and an opportunity to influence the corresponding opinions of others, on which their own success in the auction in large part depends." The principle of *independence* excludes bids in the auction that are motivated by prejudice. After all, "a political and economic system that allows prejudice to destroy people's lives does not treat all members of the community with equal concern," and hence violates equality of resources. *Ibid.*, 158–61.
- ¹³*Ibid.*, 345–46.
- ¹⁴Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), 22; *Freedom's Law: The Moral Reading of the Constitution* (Cambridge, MA: Harvard University Press, 1996), 155.
- ¹⁵For Dworkin's distinction between issues of "policy" and "principle" see Dworkin, *Taking Rights Seriously*, chap. 9; Ronald Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985), chaps. 14 and 15; Dworkin, *Freedom's Law: The Moral Reading of the Constitution*, chap. 6.
- ¹⁶Dworkin, *Freedom's Law: The Moral Reading of the Constitution*, 155; *Taking Rights Seriously*, 22; Andrew Altman, "Policy, Principle, and Incrementalism: Dworkin's Jurisprudence of Race," *The Journal of Ethics* 5 (2001): 242–54.
- ¹⁷Dworkin, *Taking Rights Seriously*, 22–23.
- ¹⁸Samuel Scheffler, "What Is Egalitarianism?," *Philosophy & Public Affairs* 31, no. 1 (2003): 38. See for similar critiques Elisabeth Anderson, "What Is the Point of Equality?," *Ethics* 109 (1999): 288; Altman, "Policy, Principle, and Incrementalism," 254–55; Young, "Equality of Whom?"; Anne Phillips, "Defending Equality of Outcome," *The Journal of Political Philosophy* 12, no. 1 (2004): 1–19.
- ¹⁹Dworkin, *Sovereign Virtue*, 285–303; G. A. Cohen, "On the Currency of Egalitarian Justice," *Ethics* 99 (1989): 906–44; Matt Maltravers, "Responsibility, Luck, and the Equality of What Debate," *Political Studies* 50 (2002): 558–72; Andrew Williams, "Dworkin on Capability," *Ethics* 113 (2002): 23–39.

- ²⁰ Ronald Dworkin, "Replies to Endicott, Kamm and Altman," *Journal of Ethics* 5 (2001): 267.
- ²¹ Ronald Dworkin, "Sovereign Virtue Revisited," *Ethics* 113 (2002): 137.
- ²² This implies that Dworkin's egalitarianism is broader than a straightforward redistributive theory, as the name "equality of resources" could suggest.
- ²³ I don't claim that it is impossible within a Dworkinian framework to provide such remedial measures. I only claim that, despite his own views to the contrary, it has not yet done so.
- ²⁴ Logue, *Reparations as Redistribution*, 1348–52.
- ²⁵ A preeminent example of such an institutional approach is, of course, John Rawls, *A Theory of Justice*, rev. ed. (Oxford: Oxford University Press, 1999).
- ²⁶ Robert K. Fullinwider, "The Case for Reparations," *Philosophy & Public Policy Quarterly* 20, no. 2/3 (2000): 6.
- ²⁷ When *Brown v. Board Of Education* was decided on May 17, 1954.
- ²⁸ Brophy, "Some Conceptual and Legal Problems," 508; Kaimipono Wenger, "Causation and Attenuation in the Slavery Reparations Debate" *University of San Francisco Law Review* 40, no. 2 (forthcoming).
- ²⁹ Martin Gilens, *Why Americans Hate Welfare: Race, Media, and the Politics of Antipoverty Policy* (Chicago: Chicago University Press, 1999), 3.
- ³⁰ Keith N. Hylton, "Slavery and Tort Law," *Boston University Law Review* 84, no. 5 (2006): 1209–55 at 1236–37.
- ³¹ But for a critique of this position see Eric Posner and Adrian Vermeule, "Reparations for Slavery and Other Historical Injustices," *Columbia Law Review* 103 (2003): 742; Herbert Gutman, *The Black Family in Slavery and Freedom, 1750–1925* (New York: Random House, 1977).
- ³² Hylton, *Slavery and Tort Law*, 1227–28.
- ³³ Posner and Vermeule, "Reparations for Slavery," 742.
- ³⁴ Logue, *Reparations as Redistribution*, 1349–50.
- ³⁵ Thomas M. Shapiro, *The Hidden Cost of Being African American: How Wealth Perpetuates Inequality* (New York: Oxford University Press, 2004), 60–84.
- ³⁶ Conley, *Being Black, Living in the Red*.
- ³⁷ Brophy, "Some Conceptual and Legal Problems," 498.
- ³⁸ Rawls, *A Theory of Justice*, 47–48.
- ³⁹ *Ibid.*, 48. The distinction between legal coercive and informal social institutions parallels the distinction between state and a people. In a democracy we can assume an overlap between the values underlying both.
- ⁴⁰ *Cf. ibid.*, 7.
- ⁴¹ Douglass North, *Institutions, Institutional Change, and Economic Performance* (Cambridge: Cambridge University Press, 1990), 3.
- ⁴² Thomas Nagel, "Justice and Nature," *Oxford Journal of Legal Studies* 17, no. 2 (1997): 303.
- ⁴³ *Cf. Rawls, A Theory of Justice*, 48.
- ⁴⁴ Rebecca M. Blank, Marilyn Dabady, and Constance F. Citro, eds., *Measuring Racial Discrimination* (The National Academic Press, 2004), 25–26.
- ⁴⁵ Young, "Equality of Whom?" 16.
- ⁴⁶ And redistribution of resources is only one of the policies available. *Cf.* Jonathan Wolff, "Addressing Disadvantage and the Human Good," *Journal of Applied Philosophy* 19, no. 3 (2002): 207–18.
- ⁴⁷ Phillips, "Defending Equality of Outcome," 10–13. Moreover, this intuition is strengthened if one takes into consideration that the inequalities also affect African-American children: they are more likely to die as infants, to be born into poverty, to be uninsured, etc. Logue, *Reparations as Redistribution*, 42.
- ⁴⁸ Phillips, "Defending Equality of Outcome."
- ⁴⁹ But similar arguments can be made for other vestiges of slavery.
- ⁵⁰ This section draws on Roland Pierik, "Conceptualizing Cultural Groups and Cultural Difference: The Social Mechanism Approach," *Ethnicities* 4, no. 4 (2004): 523–44.
- ⁵¹ Gilens, *Why Americans Hate Welfare*, chap. 6.

- ⁵²Thomas Nelson, Michele Acker, and Melvin Manis, "Irrepressible Stereotypes," *Journal of Experimental Social Psychology* 32 (1996): 14.
- ⁵³Myron Rothbart and Majorie Taylor, "Category Labels and Social Reality: Do We View Social Categories as Natural Kinds?," in *Language, Interaction, and Social Cognition*, eds. Gün Semin and Klaus Fiedler (London: Sage, 1992), 11–36, at 26.
- ⁵⁴Logue, *Reparations as Redistribution*, 1324.
- ⁵⁵For an overview of these cases see Hylton, *Slavery and Tort Law*, note 1.
- ⁵⁶Logue, *Reparations as Redistribution*, 1324.
- ⁵⁷*Ibid.*, 22.
- ⁵⁸Leif Wenar, "Reparations for the Future," *Journal of Social Philosophy* 37 (2006): 396–405, sec. II.
- ⁵⁹Brophy, "Some Conceptual and Legal Problems," 505; Posner and Vermeule, "Reparations for Slavery," 702.
- ⁶⁰Kok-Chor Tan, "Colonialism, Reparations and Global Justice", in *Reparations*, eds. Jon Miller and Rahul Kumar (Oxford: Oxford University Press, forthcoming).
- ⁶¹The second part of the sentence is essential in my normative argument, making it a Dworkinian position instead of a Rawlsian one. Rawls's difference principle defends egalitarian policies for the worst-off in society, regardless of the reason why they are worst-off. For Dworkin's egalitarianism it is essential to know how the inequality came about, because only inequalities that are caused by unchosen circumstances are morally relevant.
- ⁶²Wenar, "Reparations for the Future," 401–02.
- ⁶³*Ibid.*, 402.
- ⁶⁴*Ibid.*
- ⁶⁵Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974), 150–64, at 152.
- ⁶⁶Dworkin, *Sovereign Virtue*, 147–62.