

## Compensation for Historic Injustice: does it matter how the victims respond?<sup>1</sup>

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It is widely accepted that political communities owe duties of compensation to groups whom they have wronged in the past, and whose members continue to suffer today from the effects of that historic wrongdoing. Examples of this phenomenon are many and varied, ranging from the waging of unjust wars, the imposition of colonial or imperial rule on indigenous people, the economic exploitation of weaker nations by stronger ones, and the emission of greenhouse gases, causing global warming with seriously damaging consequences for vulnerable people. These cases differ in many respects, but the common factor is that there is an identifiable agent, or set of agents, whose wrongful actions in the past have caused an identifiable group in the present to have fewer resources than they ought to have – fewer resources than they would have enjoyed today had the wrongdoing not occurred. So they are owed compensation by the wrongdoers as a matter of corrective justice. The compensation, to be clear, is for the resource deficiency they are currently experiencing. They may also, independently and depending on the case, be owed reparation of a different type for the original wrongdoing – for example an apology, or some other kind of symbolic acknowledgement of what has happened in the past. I do not address other forms of reparation here, and I do not assume that material compensation is always going to be the most important demand put forward by victims of wrongdoing or their descendants. Nevertheless material compensation is often what such groups are claiming, and (rather less often) it is also what the perpetrators of wrongdoing have offered

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by way of reparation – the best-known example probably being the payments made from 1953 onwards by the Federal Republic of Germany to the victims of Nazi persecution, which by the end of the century totalled as much as 80 billion Deutschmarks.<sup>2</sup>

If we are to take paying compensation seriously as a matter of corrective justice – rather than as merely a symbolic expression of remorse for what has occurred in the past – then we face the difficulty of determining how much is owed. Compensation is meant to undo the effects of the wrongdoing and restore the victims as nearly as possible to the position they would have been in had the wrongdoing not occurred, but to calculate what needs to be paid, we need to identify that position. How is that to be done?

The answer that most commentators give is that we have to engage in counterfactual reasoning, using the best available evidence to determine what historical trajectory the group would have followed in the absence of the wrongful intervention. There are well-known problems involved in choosing the relevant counterfactual.<sup>3</sup> We have to imagine a world in which the wrongdoing we are targeting did not occur, but in other respects remains as close as possible to the actual world. But how should we characterise the ‘normatively correct’ relationship that should have obtained between the group that perpetrated the wrongdoing (henceforth the Ws) and their victims (henceforth the Vs)? Should the relevant counterfactual be a world in which the Ws never interacted with the Vs at all, or should it be a world in which W interacted with V, but on morally permissible terms – for example, engaged in trade relations with V, but now on terms that were fair rather than exploitative?

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<sup>2</sup> See the accounts in C. Pross, *Paying for the Past: The Struggle over Reparations for Surviving Victims of the Nazi Terror* (Baltimore: Johns Hopkins Press, 1998) and A. Colonomos and A. Armstrong, ‘German Reparations to the Jews after World War II’ in P. De Greiff (ed.) *The Handbook of Reparations* (Oxford: Oxford University Press, 2006). Payments were made for a range of harms, including bodily damage but also property, career, and other economic losses.

<sup>3</sup> For discussion, see J. Waldron, ‘Superseding Historic Injustice’, *Ethics*, 103 (1992), 4-28.; A.J. Simmons, ‘Historical Rights and Fair Shares’, *Law and Philosophy*, 14 (1995), 149-84; D. Butt, *Rectifying International Injustice* (Oxford: Oxford University Press, 2009), esp. ch. 4; D. Butt, ‘Inheriting Rights to Reparation: Compensatory Justice and the Passage of Time’, *Ethical Perspectives*, 20 (2013), 245-69.

Should it be a world in which Europeans never colonized America, or a world in which some colonization occurred but with the full and informed consent of the indigenous peoples?<sup>4</sup>

These are difficult questions to answer, but they must be tackled at some point if we are to establish what victim groups and their descendants are owed by way of compensation. For present purposes, I am going to assume that the relevant counterfactuals can be established in order to ask a different question, one that has not to my knowledge been discussed in any detail in the literature on historic injustice.<sup>5</sup> This is how the response of the victims of the wrongdoing, both during the time at which it occurred and subsequently, should factor in to our calculation of the compensation that is owed to them. For the impact of W's actions is unlikely to be completely 'automatic', i.e. occurring regardless of how V responded to those actions. Assume for the moment that the members of V were still left with certain choices to make: later in the paper I shall be exploring in some depth the reasons we might have for thinking that their agency would be impaired by the impact of the wrongdoing. It is then natural to ask whether their response was a reasonable one, or whether on the other hand they have compounded the loss they were made to bear by squandering their remaining assets or failing to take advantage of opportunities that were open to them. For example, when the arrival of settlers compels a group to abandon its traditional lands and move elsewhere, its members have to decide how best to respond to their new circumstances. Should they, for example, continue to try to raise the crops that they have traditionally raised, or should they aim to get their subsistence in some other way? Of course, this is not a choice they should have to make: it is forced upon them by the wrongful actions of the Ws. But given that they have to make it, we can raise normative questions about the decisions they reached. We can ask whether they responded in a reasonable way to the circumstances of injustice in which they found themselves.

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<sup>4</sup> Readers might wonder how the latter is conceivable, but here I am distinguishing *colonization* in its original sense – groups moving to settle collectively in a new territory – from *colonialism* understood as a relationship of control or domination between colonizers and indigenous peoples.

<sup>5</sup> It is touched upon briefly in G. Sher, 'Ancient Wrongs and Modern Rights', *Philosophy and Public Affairs*, 10 (1981), 3-17, reprinted in G. Sher, *Approximate Justice: Studies in Non-Ideal Theory* (Lanham, MD: Rowman and Littlefield, 1997).

Some readers may think, however, that this is not a question that we *should* be asking. They may say that it sounds like a classic case of 'blaming the victim'. The issue, however, is not one of moral blame. Although there is certainly a normative element in our assessment of the victims' response, the norm we are applying is a norm of prudence rather than morality. Of course, when we ask 'what could the Vs reasonably be expected to do in the circumstances in which they found themselves', we have to take care that the standard of reasonableness we apply is the appropriate one, taking into account the group's norms, culture and so forth, which may well be different from ours. This again is something to be investigated as we proceed.

Other readers may say that the only reason anyone could have for investigating how the victims have responded to injustice is in order to deny them the compensation they are owed. No doubt that sinister motive will sometimes be in play. But it is not the motive that drives this paper. It assumes that victims are indeed owed compensation for acts of historic injustice, but that the amount they are owed can only be established by identifying the relevant counterfactuals. As we know, one such counterfactual is how the world would have been had the injustice in question never occurred. What I am proposing is that we also need to identify a second counterfactual, namely how the world would be now if the injustice had occurred as it did, but its victims had responded to the wrong inflicted on them in a reasonably prudent way.

To see what difference introducing this second counterfactual makes, let's denote the Vs actual level of resources in the present day as  $R_a$  and the level of resources that V would have in the relevant counterfactual world in which the historic injustice has not occurred as  $R_c$ . Then on the conventional approach the compensation owed by W to V is  $R_c - R_a$ . Now introduce the possibility that V has failed to respond to the injustice in a reasonably prudent way, and we have a second counterfactual to consider: the world in which the injustice has occurred, but the members of V have adapted their behaviour in a way that is judged to be reasonable. In that world the resources now available to them would be  $R_p$ . Then we can assess the compensation now owing to V not as  $R_c - R_a$  but as  $R_c - R_p$ . The proposal, therefore, is that we should calculate the compensation due by comparing the world in

which no historic injustice occurred with the world in which the injustice happened as it did in the actual world, but the members of V responded to it in a reasonably prudent way.

How will this affect the level of compensation owed? If the Vs have in fact behaved prudently during and after the period in which the Ws wronged them, then  $R_p = R_a$  and nothing changes. If on the other hand they have made bad decisions or failed to take advantage of opportunities that were open to them, then  $R_p > R_a$  and switching to the new proposal for calculating compensation will reduce the amount that the Vs can claim. But note that unless the standard of prudence is set so high that only a maximally effective response counts as prudence, it's also possible that the Vs have made unusually strenuous efforts to overcome the effects of the injustice the Ws inflicted on them, so that  $R_a > R_p$ , in which case the switch will increase the level of compensation that is owed.

But *ought* we to estimate the compensation that is owed to V in this new way? Obviously it complicates matters in two respects. First, we have to establish the normative standard by which to judge what would count as reasonably prudent behaviour on the part of the Vs. Then, employing that standard, we have to construct a second counterfactual to set alongside the first – the hypothetical world in which the injustice that actually occurred elicited a reasonably prudent response on the part of the Vs. Perhaps that counterfactual is a bit easier to construct than the counterfactual world in which the original injustice never happened, but it is still going to be an epistemically demanding exercise. So why make the task more difficult in these ways?

The answer is that the additional layer of difficulty seems unavoidable if we are going to assess the Vs claim for compensation as a claim of corrective justice. Here I am contrasting collective justice claims with other types of claim that the Vs might have. They might simply be asking for recognition of the injustice that has occurred and some form of apology, in which case the value of the resource bundle that is transferred to them may not be so important, so long as it is *significant* enough. Here it's the gesture that matters, not its exact size. Alternatively, the Vs standard of living might fall below the threshold that marks the lower limit of a decent human life, in which case they would have a remedial claim that the perpetrators of a historic wrong against them may have a special responsibility to

discharge.<sup>6</sup> In this case what matters is that sufficient resources should be transferred to get the Vs securely above that threshold. Valid corrective justice claims, in contrast, can be made by people who are currently quite well off, even if they get added urgency when the claimants are also poor by absolute standards. This applies, for example, to some of the Jews who had fled Nazi Germany and were eligible to receive reparations under West Germany's Federal Reparations Laws.

But even if the issue is one of corrective justice, not distributive justice, why should the victims' response be taken into account when calculating what they are owed? The wrongdoers are at fault for having imposed the loss, *ex hypothesi*. Why isn't it their responsibility to make good the damage they have caused, even if there is a counterfactual world in which they would have to pay less because the Vs have responded in a more prudent way? Why, given the circumstances, don't the Vs get a free pass, so to speak. Why are they being told that the amount of compensation that they receive will be conditional on the way that they have behaved – that they will be scrutinised and judged by some standard of reasonable conduct before payment is made?

To help answer these questions, I will briefly examine (in section II) how the issue of victims' responsibility is handled in Anglo-American tort law, before (in section III) exploring several disanalogies between the individual wrongdoer-victim relationship in a tort case and cases of historic injustice where the victims may appear to have behaved negligently – disanalogies that may undermine the argument for reducing the amount of compensation that is payable. I turn to tort law for illumination because it has to deal with real cases in which the amount of compensation payable by the wrongdoer is in dispute. According to the associated principles of 'contributory negligence' and 'mitigation of damages', the damages that the tortfeasor is liable to pay by way of compensation for his wrongdoing can be reduced, or even in the extreme case entirely eliminated, if it can be shown that the victim's negligence has contributed to the losses he or she has suffered. Although tort law is

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<sup>6</sup> This responsibility is unlikely to be exclusive, however. Remedial responsibility can be attributed on a number of different grounds, of which historic wrongdoing is only one, albeit often the most important where it applies. See my discussion in D. Miller, 'Distributing Responsibilities', *Journal of Political Philosophy*, 9 (2001), 453-71, and in D. Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007), ch. 4.

not guided solely by the aim of applying standards of corrective justice to the relationship between the two parties, I believe we can better understand both the rationale for holding victims responsible, and the standards of conduct to which they should be held, by first investigating the problem in this more restricted setting. Having done so, we can then ask whether the principles that apply in this context should also apply to much larger groups of people, one of which has wrongfully inflicted damage on the other, and where the second group continues to experience the effects of their historic loss.

By framing the issue of historic injustice in terms of relations between groups, I hope also to avoid the non-identity problem which is sometimes presented as a barrier to compensation claims of the kind we are investigating.<sup>7</sup> The problem arises because the particular people who might now be claiming compensation would not have existed in the counterfactual world in which the historic wrongdoing never occurred: by changing the course of history significantly, the wrongdoing also changed the identities of the people who would later be conceived. Whether this really is a barrier to individual compensation claims remains open to dispute. It has plausibly been argued, for example, that reparation can be claimed for an ongoing failure to compensate those born *after* the original act of injustice has occurred.<sup>8</sup> But the issue can also be avoided by switching the focus to groups, and arguing that when group W wrongs group V and subsequently fails to repair the wrongdoing, members of V can claim compensation by virtue of their membership in a wrongfully deprived group, regardless of the fact that the particular identities of the people now making up V would have been different had the wrongdoing not occurred.<sup>9</sup> Of course, this depends on being

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<sup>7</sup> See C. Morris, 'Existential Limits to the Rectification of Past Wrongs', *American Philosophical Quarterly*, 21 (1984), 175-82; S. Kershnar, *Justice for the Past* (Albany, NY: State University of New York Press, 2004), ch. 4.

<sup>8</sup> See B. Boxill, 'A Lockean Argument for Black Reparations', *Journal of Ethics*, 7 (2003), 63-91; G. Sher 'Transgenerational Compensation', *Philosophy and Public Affairs*, 33 (2005), 181-200; A. Cohen, 'Compensation for Historical Injustices: Completing the Boxhill and Sher Argument', *Philosophy and Public Affairs*, 3 (2009), 81-102; Butt, 'Inheriting Rights to Reparation'.

<sup>9</sup> The final aim of compensatory payments is of course to benefit wrongfully-treated individuals. In practice, when reparations are paid, they are paid collectively to the whole group, since it would be impossible to make the relevant counterfactual calculation at the individual level. This remains defensible so long as the injustice affects all group members in roughly the same way, and becomes less so if their life-plans begin to diverge sharply. A full account of reparative justice will need to

able to show that the groups in question have continued to exist over time, and also that they meet the conditions for being collective agents, such that we can hold members of W collectively responsible both for the original injustice and for failing to repair it, and on the other side hold members of V responsible for their ongoing response to the wrongdoing. In the cases I referred to at the beginning (unjust wars, colonialism, international trade and investment, greenhouse gas emissions), this is unlikely to be a problem on the W side, since the offenders will be nations organized politically as states. On the V side, however, we need to address the possibility that although the members of the relevant group can be identified, their collective agency either now or in the past has been severely impaired, such that ascriptions of responsibility become questionable. Investigating this possibility is one of the main aims of the paper.

To end this section of the paper, let me re-emphasize that I am not attempting here to provide a comprehensive account of what is required to rectify historic injustice. There is a wide range of views about what part, if any, compensation in the sense I am using it – non-specific resource transfers to the groups who are currently suffering the effects of historic injustice – should play in the overall process of coming to terms with the past.<sup>10</sup> I assume only that paying compensation will *sometimes* be (part of) the process of making redress, so that investigating how compensation claims should be calculated is a worthwhile endeavour. In particular, I make no attempt to address the issue of supersession, which I take to be the issue of how the passage of time may alter circumstances in such a way that what originally counted as an unjust seizure of property or territory ceases to be so. I too am interested in what happens over time, but my focus is only on what the Vs have done in response to the injustice; no supersession is involved.<sup>11</sup>

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consider how collective payments should be distributed within the group, whether on a per capita basis or in some other way.

<sup>10</sup> See, for example O. O'Neill, 'Rights to Compensation', *Social Philosophy and Policy*, 5 (1987), 72-87; M. Minow, *Between Vengeance and Forgiveness* (Boston, MA: Beacon Press, 1998), ch. 5; R. Vernon, 'Against Restitution', *Political Studies*, 51 (2003), 542-57; D. Satz, 'Countering the Wrongs of the Past: The Role of Compensation' in J. Miller and R. Kumar (eds.), *Reparations: Interdisciplinary Inquiries* (Oxford: Oxford University Press, 2007); R. Kumar 'Why Reparations?' in J. Oberdiek (ed.), *Philosophical Foundations of the Law of Torts* (Oxford: Oxford University Press, 2014).



## II

In this section I explore how the issue of victim's responsibility has been handled in Anglo-American tort law. In doing so, I assume that the evolving body of tort law captures shared intuitions about what is fair when someone has sustained a loss by another's hand and the cost of repairing the loss has to be divided between them. Looking at the problem in this more restricted setting can provide answers to several questions, such as when the tortfeasor should be obliged to repair all of the loss irrespective of the victim's contribution to it, and what standard should be applied when judging whether the victim's actions count as negligent. There is of course debate about whether tort law in the form it now takes is the best way to deal with cases in which W causes V to suffer a loss: a scheme of social insurance that compensates V regardless of what W has done might be proposed as an alternative.<sup>12</sup> Nevertheless for the problem addressed in this paper, the tort law analogy seems to fit best, since there is no global institution currently in a position to compensate all of those who have suffered historic injustice, so no equivalent to social insurance as practised at national level. If any compensation is going to be paid, it will have to be by the perpetrators themselves – individual nation-states, or combination of such states.

I now sketch the relevant aspects of tort law (with apologies to those for whom this is already familiar ground). Given that W has negligently injured V's person or property, under what circumstances should V be held responsible for part of the injury such that the damages he can claim from W are reduced? Two doctrines are relevant here, and there is some disagreement about whether they should be regarded as wholly separate, or as companion doctrines that both give expression to the same underlying principle.<sup>13</sup> The first

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<sup>11</sup> Jeremy Waldron has recently made it clear that his supersession thesis (ST) was never intended to apply to compensation claims. He writes 'In principle, ST doesn't apply to compensation at all. It applies to restitution. I said nothing about compensation in the earlier papers because I assumed it was obvious on my account that compensation due in respect of past injustice could not itself be superseded.' J. Waldron, 'Supersession: A reply', *Critical Review of International Social and Political Philosophy*, 25 (2022), p. 450.

<sup>12</sup> It appears that outside of the Anglosphere tort law has tended to move in this direction. For a comparative overview covering France, Germany, Scandinavia and the UK, see K. Oliphant, 'Cultures of Tort Law in Europe', *Journal of European Tort Law*, 3 (2012), 147-157.

<sup>13</sup> For an attempt to bring them together, see Y Adar, 'Comparative Negligence and Mitigation of Damages: Two Sister Doctrines in Search of Reunion', *Quinnipiac Law Review*, 31 (2013), 783-842.

of these is 'contributory negligence' and here the main focus is on the role of the victim in the event that caused the damage – though the doctrine has also been applied in some cases to her subsequent behaviour. Thus if a speeding driver hits a pedestrian who has wandered into the road without paying attention, the pedestrian may be judged to have negligently contributed to her injuries; moreover (and regardless of whether she was negligent in causing the accident), if she fails to have the injuries treated in good time, as a result of which they are exacerbated, she will again be seen as negligent. Contributory negligence of any kind was once held to block payment of damages outright, but current tort law uses a principle of comparative negligence, whereby the costs of the wrongful event are apportioned between the two parties according to the degree of fault that each has displayed.<sup>14</sup> The formula used to make the apportionment varies between jurisdictions, but the general principle is that the victim's overall claim for compensation is reduced in proportion to the extent of her negligence compared with that of the wrongdoer.<sup>15</sup>

The second relevant doctrine is 'mitigation of damages'. Here the focus is exclusively on the victim's behaviour after the tort has occurred. He is said to have a 'duty to mitigate', i.e. to take steps to ensure that the resulting damage is minimized. If he does so, he can claim the costs of mitigation against the tortfeasor, and if the attempt to mitigate is unsuccessful, can claim compensation for the whole of the damage. But if he makes no such attempt, then the law will try to separate that part of the damage that is directly due to the wrongdoer's behaviour and that part that is due to the victim's neglect of his duty to mitigate. So whereas contributory negligence distributes costs according to relative degrees of fault, mitigation of loss does so on the basis of causal contribution: which parts of the damage can be attributed causally to W's behaviour, and which parts to V's negligent failure to mitigate?<sup>16</sup>

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<sup>14</sup> In the US the doctrine is accordingly now referred to as 'comparative negligence', whereas elsewhere the term 'contributory negligence' continues to be used; the substantive change is common to both.

<sup>15</sup> For a survey of the different rules that have been applied to divide damages under comparative negligence, see V. Schwartz, *Comparative Negligence* (Indianapolis, IN: A. Smith, 1974), ch. 2.

The effect of these doctrines is to reduce the compensation that W is required to pay to V in cases where W is ordinarily negligent: he has acted in a way that carelessly and wrongfully risks imposing costs on V or others like her, as for example does the speeding driver or the householder who leaves a trip hazard outside his property. Neither applies, however, in cases in which W either deliberately or culpably recklessly imposes costs on V.<sup>17</sup> Here V can claim the full costs of repair regardless. The rationale for drawing such a line is quite obvious. As one tort law theorist puts it, 'if a person intends to harm another, it does not seem fair to allow that person to argue that the victim did not take sufficient care to protect himself or herself from being harmed'.<sup>18</sup> This has clear implications if we are using tort law to throw light on victims' responses to historic injustice. If the argument for making the victim's claims to compensation sensitive to how they have behaved is one of fairness between the parties, that will not apply when the injustice takes the form of deliberate or culpably reckless wrongdoing. This will rule out many of the entries that appear in the conventional record of historic injustice: genocide, ethnic cleansing and slavery, for instance. So we have already reached our first conclusion: victims' claims to compensation should not be affected by how they respond when the injustice they have suffered is of this kind. I return to this issue at the beginning of section III.

But this still leaves, regrettably, many instances of historic injustice to consider: cases in which victims have been badly treated by being deprived of resources, exploited, displaced,

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<sup>16</sup> For Goudkamp, this is a reason why the two doctrines should be kept separate, rather than one being subsumed under the other. See J. Goudkamp, 'Rethinking Contributory Negligence' in S. Pitel, J. Neyers and E. Chamberlain (eds.), *Tort Law: Challenging Orthodoxy* (Oxford: Hart, 2013).

<sup>17</sup> Patrick Tomlin has pointed out to me that, in the philosophical literature on self-defence, it is taken for granted that even a fully culpable attacker may only be resisted in a way that causes him least physical damage, so here V does have an obligation to reduce the cost that W must bear – wounding him rather than killing him if wounding is sufficient to prevent the attack – despite W's culpability. So why does the same not apply in the tort cases under review here? I am inclined to think that the least-cost rule applies in the self-defence case because W has a right to bodily integrity which V may only infringe to the extent necessary to protect her own rights. Compare the case in which homicidal W is driving his car towards V intending to run her over. If there are different ways in which V can disable the car (without injuring W), I do not think that she is obliged to choose the method that causes least damage to the vehicle.

<sup>18</sup> P. Cane, *The Anatomy of Tort Law* (Oxford: Hart Publishing, 1997), p. 59.

and so forth by Ws who pursue their own interests without due regard to the impact they will make on the Vs, but without the deliberate intention to cause harm. Should we hold the Vs to negligence standards in these cases? Is it fair to do so? We can return to tort law to look more closely at the rationale for apply contributory negligence/mitigation of damages to compensation claims. Is this simply motivated by efficiency concerns – encouraging victims to take steps to avoid being harmed, thereby reducing the number and the costs of accidents – or are there deeper reasons behind the practice? Why is it *fair* to ask the victim to bear part of the cost when it is the wrongdoer, and not the victim, who is in breach of a duty? If the wrongdoer hadn't acted as he did, there would be no costs to apportion.

Klar, for example, puts the case *against* applying contributory negligence by highlighting morally relevant asymmetries between W (here 'the defendant') and V (here 'the plaintiff'):

It is also clear that the positions of the two parties are quite different. The defendant's negligent conduct endangers others, which is clearly more egregious and worthy of sanction than conduct which only fails to protect oneself, but endangers no-one else. In addition, plaintiffs whose negligent conduct has failed to prevent or minimise their injuries already bear a heavy price – they must suffer these injuries. The consequences to a defendant of causing injuries to others are solely financial, if that.<sup>19</sup>

The key point here is that while both W and V are negligent, W's negligence consists in a failure to take sufficient care to safeguard the interests of others, whereas V's negligence consists in a failure to safeguard his own.<sup>20</sup> Although in both cases we can talk about 'faulty behaviour', the two types of fault are really incommensurable, critics suggest, and therefore, the idea of distributing costs according to the degree of fault that W and V

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<sup>19</sup> L. Klar, 'Contributory Negligence and Apportionment in Canadian Tort Law' in K. Barker and R. Grantham (eds.), *Apportionment in Private Law* (Oxford: Hart, 2019), p. 144.

<sup>20</sup> See Goudkamp, 'Rethinking Contributory Negligence' p. 326. Simons notes that although formally speaking tort law treats the two forms of negligence symmetrically, in practice courts often apply a lesser standard of care in the case of the victim: See K. Simons, 'Victim Fault and Victim Strict Responsibility', *Journal of Tort Law*, 8 (2015), 29-66.

respectively display, as the doctrine of comparative negligence requires, makes no sense on closer inspection.<sup>21</sup>

According to current legal doctrine, the criteria for judging conduct negligent should be the same for both wrongdoer and victim.<sup>22</sup> The standard in each case is what a 'reasonable person' can be expected to do, whether to safeguard others' interests or her own. Yet in practice, it seems, courts afford greater latitude to the victim, taking account of subjective factors when deciding whether she has behaved reasonably in the circumstances, such as personal phobias or lapses of attention that would not excuse the wrongdoer.<sup>23</sup> So applied tort law acknowledges some degree of asymmetry between W's negligence and V's, but still allows V's negligence to reduce the compensation she can claim from W. On what grounds can this be justified?

The first is simply fairness. A loss is going to occur, but the extent of that loss – the final injury suffered by V – depends on the behaviour of both W and V. Although W is morally at fault in a way that V is not (on the assumption that V has only a prudential and not a moral duty to protect himself from injury), both have behaved in a way that fails the 'reasonable person' test, and so it is fair to allocate the loss between them in a way that reflects the extent of their fault.<sup>24</sup> So even if W is held to a higher standard of behaviour than V, where

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<sup>21</sup> See G. Schwartz, 'Contributory and Comparative Negligence', *Yale Law Journal*, 87 (1978), 697-727, at pp. 722-723. Despite conceding non-equivalence, however, Schwartz goes on to present a fairness defence of contributory negligence, pointing out that there is a sense in which the victim's negligence harms the wrongdoer by increasing the costs he would be liable to pay.

<sup>22</sup> Goudkamp refers to this as the 'transferability thesis'. See Goudkamp, 'Rethinking Contributory Negligence', pp. 323-4 for evidence that this is prevailing view among legal scholars.

<sup>23</sup> Simmons, 'Victim Fault and Victim Strict Responsibility', pp. 36-38.

<sup>24</sup> Honoré explains this by appeal to a retributive principle that operates alongside the principle of corrective justice that requires W to compensate V. The retributive principle requires that the loss each party is made to bear should be proportionate to the gravity of the fault they have displayed. 'Putting these considerations together, the plaintiff's claim, when both he and defendant are at fault, should be reduced by an amount that results in plaintiff and defendant bearing a share of the loss roughly proportional to their respective faults, but not so as to impose on the plaintiff a loss disproportionate to his fault considered in isolation.' T. Honoré, *Responsibility and Fault* (Oxford: Hart, 1999), p. 90.

V can be shown to have been negligent he should be expected to carry some part of the overall loss. This aligns tort law with the general principle that where a person suffers a loss that she could easily have avoided by taking certain steps, she has no grounds for claiming compensation from others.

A second ground has a more communitarian character. It begins by assuming that each of us has a social responsibility to avoid creating costs for others if we can do so at little cost to ourselves. So, for example, in a society that operates a public health service, each person has a responsibility to take reasonable steps to stay healthy so as to avoid overburdening the system – such as agreeing to be vaccinated against serious diseases. It then extends this principle to the behaviour of tort victims. The extension is easiest to justify in the cases that fall under ‘mitigation of damages’ where the victim has to decide how to act after the original tort has occurred. If he fails to mitigate, the effect will be to increase the potential liability of the wrongdoer to pay costs. So, the suggestion is, he owes it to the wrongdoer to keep the costs down, provided the necessary repairs are easy to organize and their (lesser) cost can be recouped from W as part of the settlement.

Whether we find this reasoning compelling may depend on how we view the relationship between wrongdoer and victim. Recall that we have already excluded from the scope of contributory negligence cases in which the wrongdoer shows a callous disregard for the welfare of the victim. We are considering cases where W’s behaviour is negligent, but of a kind that most of us are guilty of at one time or another. A person who is negligent in this sense does not forfeit any of her rights (other than the right not to pay compensation if the risks she imposes materialize). For example, we do not consider the victim’s negligence a reason for denying him the right to be rescued, in normal cases.<sup>25</sup> In tort cases, therefore, while the wrongdoer should be made to pay for the damage she has caused, the cost of doing so may be high, and so if the victim can reduce it by taking reasonable steps to mitigate, this is something he owes it to the wrongdoer to do. Failure to mitigate is not treated by the law as itself a form of wrongdoing (in that respect talk of a ‘duty to mitigate’

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<sup>25</sup> I have explored this in some detail in D. Miller, ‘Responsibility and the Duty of Rescue’, *Journal of Applied Philosophy*, 39 (2022), 313-26.

is misleading), but it is liable nonetheless to attract a penalty in the form of reduced damages.

That concludes my reconstruction of the general case for reducing the compensation payable to victims who are contributorily negligent or fail to mitigate damage. One further aspect of the victim's responsibility is worth exploring briefly before returning to cases of collective historic injustice. This is the question whether he can escape being judged contributorily negligent if he refuses to take cost-reducing steps because of some moral or religious objection to the actions he would need to perform. The general limits to the victim's responsibility that tort law recognizes have been summed up as follows:

If the effort, risk, sacrifice, or expense which the person wronged must incur in order to avoid or minimize a loss of injury is such that under all the circumstances a reasonable man might well decline to incur it, a failure to do so imposes no disability against recovering full damages.<sup>26</sup>

How, then, have courts decided cases in which on religious grounds a victim refuses to take steps to limit his injuries, such as refusing to accept a blood transfusion? It appears that they have generally not been willing to allow this as grounds for increasing the victim's damages: he will only be compensated for the injuries he would have sustained if he had accepted the transfusion or other such medical aid.<sup>27</sup> In other words, the 'reasonable man' test that is applied to decide whether sufficient mitigation has been attempted brackets off the religious belief; it is a generalised reasonable person, not, say, a reasonable Jehovah's Witness, who is appealed to in order to decide whether it is an excessive sacrifice for an injured person to receive a blood transfusion. Critics have argued that tort law should be reformed so as to take greater account of the victim's existing moral and religious

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<sup>26</sup> C. McCormick, *Handbook on the Law of Damages* (St Paul, MN: West Publishing, 1935), p. 133.

<sup>27</sup> See J. Parobek, 'God v. the Mitigation of Damages Doctrine: Why religion should be considered a pre-existing condition' *Journal of Law and Health*, 20 (2006), 107-38; M. Ramsay, 'The Religious Beliefs of Tort Victims: Religious Thin Skulls or Failures of Mitigation?', *Canadian Journal of Law and Jurisprudence*, 20 (2007), 399-427.

commitments when assessing mitigation of damages, but so far, it appears, it has been disinclined to do so.<sup>28</sup> This is clearly an issue that will need to be addressed as we move on to consider claims for compensation for historic injustice.

### III

These claims differ from conventional tort claims in a number of ways, and the task of this section is to see whether the differences are such as to make the analogy fail – so that the grounds on which doctrines of victims' negligence are applied in tort cease to apply here. The most obvious difference is that we are typically dealing with large groups of people on both sides of the injustice. On the side of the Ws, this has given rise to much debate about whether individual members of W today can justifiably be held responsible for injustices perpetrated by their ancestors, and therefore be held liable to pay compensation. I assume that this question can be answered positively and will not discuss it further here.<sup>29</sup> A second difference, however, is that whereas typical tort cases arise from a specific event, such as a car accident, the episodes of historic injustice that mainly concern us occur over lengthy periods of time. They usually involve policies systematically pursued by the Ws, such as expansionist territorial policies or aggressive trading policies. This makes it harder to apply the distinction that tort law makes between conduct that is ordinarily negligent and conduct that involves deliberate or culpably reckless harm to its victim. I have already argued that victims' responses should make no difference when they are subject to gross historic injustices such as invasive war or genocide whose perpetrators act with the deliberate intention of inflicting damage on their victims.<sup>30</sup> So if the analogue to contributory

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<sup>28</sup> Parobek, 'God v. the Mitigation of Damages Doctrine' and Ramsay, 'The Religious Beliefs of Tort Victims' both argue in this direction, but c.f. Simons, 'Victim Fault and Victim Strict Responsibility', p. 29.

<sup>29</sup> For a particularly good recent treatment, see A. Pasternak, *Responsible Citizens, Irresponsible States: Should Citizens Pay for Their State's Wrongdoings?* (Oxford: Oxford University Press, 2021). Earlier contributions include C. Kutz, *Complicity: Ethics and Law for a Collective Age* (Cambridge: Cambridge University Press, 2000); A. Stilz, 'Collective Responsibility and the State', *Journal of Political Philosophy*, 19 (2011), 190-208; S. Collins, 'Distributing States' Duties', *Journal of Political Philosophy*, 24 (2016), 344-366; H. Lawford-Smith, *Not in The Name: Are Citizens Culpable for Their States' Actions?* (Oxford: Oxford University Press, 2019).



negligence applies at all, it will be to cases in which wrongdoers act in their own interests and without sufficient regard to the interests of the people who will bear the impact of their behaviour, but without the intention to cause damage.

But are there any such cases? I suggest that what we will often find, looking at the historical record, are policies pursued by the Ws that qualify as negligent overall, though punctuated by specific events that amount to deliberately harmful or culpably reckless behaviour.

Consider, for example the case of colonization. Here the immediate aim of the settlers may simply be to acquire land to support themselves in a place that is regarded either as unoccupied, or as so sparsely occupied that the colonists can live alongside the indigenous people without unduly disrupting their lives; the negligence here lies in failing to understand the impact that the arrival of colonists will have on human communities whose territorial needs are very different from their own. To look at colonization in this way is not, however, to deny that its actual historical record in North America and elsewhere is also blighted by massacres and other events that straightforwardly count as deliberate wrongdoing. Or take the case of imperial rule that emerges out of a desire to stabilise what originally were trading relationships, which those who undertook them might have understood to be mutually advantageous, even if in fact they were not. Here again, the injustice (overall, and leaving aside specific episodes) involves a kind of negligence – a failure to consider, on the one hand, the material impact of establishing trade relations between a developed industrial economy and a subsistence economy, and, on the other hand, the corrosive cultural impact of the traders' presence in the society in question.

These cases are admittedly controversial, since the intentions of the perpetrators may be contested. Although I shall continue to use examples drawn from the history of colonialism in particular, others might wish to restrict the analysis that follows to behaviour that unequivocally counts as negligent. The emission of greenhouse gases by industrial nations,

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<sup>30</sup> By excluding these cases I am also going to set aside the issue of whether victims may be owed compensation for the costs they incur by undertaking acts of resistance against their oppressors. For the argument that the oppressed have not only a reason but also a duty to resist, see B. Boxhill, 'The Responsibility of the Oppressed to Resist Their Own Oppression', *Journal of Social Philosophy*, 41 (2010), 1-12; C. Hay, 'The Obligation to Resist Oppression', *Journal of Social Philosophy*, 42 (2011), 21-45; A. Vasanthakumar, 'Recent Debates on Victim's Duties to Resist Their Oppression', *Philosophy Compass*, 15/2 (2020), 1-8.

leading to global warming that seriously harms people living in the global South certainly meets this description, at least after the point at which the causes and effects of climate change were scientifically established. So do cases of trade relations between independent nations that create significant levels of hardship on one side, even though they were undertaken in the expectation that they would be mutually advantageous.

Consider next the question whether the victims of historic injustice qualify as group agents capable of acting together to mitigate the effects of the injustice they have suffered.<sup>31</sup> Tort law treats victims as responsible agents with the capacity, if not always the will, to take steps to avoid or lessen the impact of the damage inflicted on them. Can the same be said of those who have suffered historic injustice? Consider cases in which a collective loss occurs as a result of a series of isolated individual acts. For example, the land that an indigenous group occupies and on which it depends for its existence as a community might be sold off parcel by parcel to colonizers, and each sale might be a rational choice on the part of the individual group member who makes it. To prevent its effective dissolution, the group needs to decide collectively which, if any, parts of its land should be treated as transferable to outsiders. But in order for that happen, the group must be able first to reach a decision, and then exert sufficient authority over its individual members to ensure compliance. That is one necessary condition for its being a group agent. There is no need to go further here and stipulate features of the group that might be desirable but are not essential to its agency, such as making its decisions through democratic deliberation. A group that acts on the commands of a headman can count as a group agent so long as the rest of the group recognize the headman's authority and for the most part comply willingly.

Why might the group agency condition fail in the case of groups that are suffering, or have suffered, from historic injustice? One plausible reason is that, among the other harms that

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<sup>31</sup> I shall not here investigate all of the conditions that are necessary for a group to count as a group agent. They can be more or less demanding, depending in particular on the rationality requirements that are applied to the group's processes for taking decisions and acting upon them. For an influential, but fairly stringent specification, see C. List and P. Pettit, *Group Agency: The Possibility, Design and Status of Corporate Agents* (Oxford: Oxford University Press, 2011). My own looser view is given in D. Miller, *Is Self-Determination a Dangerous Illusion?* (Cambridge: Polity, 2020), ch. 3.

they have inflicted, the Ws have undermined the previously prevailing system of authority that would have enabled the Vs to act collectively. For example they may have co-opted a traditional leader to serve as their henchman – a common feature of imperial rule – or they may have forced the Vs to relocate to different territory, in the process breaking down the social relationships that had enabled the group to co-ordinate.

As an example of the latter, consider the forced removal of the Cherokees from Georgia to what is now Oklahoma in the 1830s, often referred to as 'The Trail of Tears'.<sup>32</sup> The pressure applied by the state of Georgia divided the Cherokees between hardliners who believed that on no account must they abandon their ancestral lands, and pragmatists who came to think that removal was the only way in which their nation could be preserved. When the leaders of the second faction, known as the Treaty Party and headed by John Ridge, arrived in the West, they accepted the system of government established there by previous Cherokee settlers. But they were soon challenged by the larger hard-line group led by John Ross, and condemned for having sold land in Georgia, with three prominent leaders including Ridge himself being executed according to a tribal law that forbade the unauthorised sale of Cherokee land. The bitter divisions between the two factions that resulted from these events lasted for decades. As one historian puts it:

Unification of the Cherokee Nation provided illusory. Disorder continued for years, something like a Corsican vendetta raging between the Ross and Ridge adherents, with a mournful succession of murders. The Ridge faction killed their oppressors without warrant of law, the Ross supporters committing 'similar excesses, sometimes in the name of the law. Life and property were not safe and a state almost of civil war existed'.<sup>33</sup>

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<sup>32</sup> In what follows, I draw upon G. Jahoda, *The Trail of Tears* (London: Allen and Unwin, 1975), ch. 11; T. Wilkins, *Cherokee Tragedy: The Ridge Family and the Decimation of a People*, 2<sup>nd</sup> ed (Norman, OK: University of Oklahoma Press, 1986), chs. 13-14; W. McLoughlin, *After the Trail of Tears: the Cherokees' Struggle for Sovereignty 1839-80* (Chapel Hill, NC; University of North Carolina Press, 1993), ch. 1; T. Perdue and M. Green, *The Cherokee Nation and the Trail of Tears* (New York: Penguin, 2008), chs. 6-7.

<sup>33</sup> Wilkins, *Cherokee Tragedy*, pp. 342-3.

A further consequence of their internal division was that the Cherokees were unable to present a united front in negotiations with the federal government – essential if they were to receive the financial compensation they were owed for the costs associated with their removal – since each faction sent its own delegates to Washington, allowing successive administrations to play them off against each other, meanwhile withholding payment.<sup>34</sup> Although a treaty signed in 1846 brought a period of relative stability, the outbreak of the Civil War reignited the sectarian divide, with partisans of the Ridge and Ross factions enlisting on opposing sides. Indeed ‘a legacy of hatred smoldered on for generations, coloring Cherokee history even after tribal government was superseded in 1907 by formation of the State of Oklahoma’.<sup>35</sup>

I have cited the case of the Cherokees to illustrate how historic injustice, here in the form of the forcible appropriation of a people’s inherited territory and their physical displacement, can fracture its victims’ institutions of self-government in such a way as to render them largely incapable of collective action. Under these circumstances, it is question-begging to ask whether the victims ought to have responded differently, since their capacity to respond, collectively, has largely been destroyed by the wrongdoers themselves. So this will give us a class of cases in which the hypothetical responses of victims – what they might have done had they been able to act as a group agent – is irrelevant to our judgement about what they are owed by way of reparation.<sup>36</sup>

There are other ways in which the impact of the Ws might cause the victim group to act in ways that are detrimental to its own interests, even after the actual wrongdoers have left the scene. Consider by way of example Fanon’s diagnosis of the psychologically debilitating

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<sup>34</sup> McLoughlin, *After the Trail of Tears*, ch. 1.

<sup>35</sup> Wilkins, *Cherokee Tragedy*, p. 344.

<sup>36</sup> Someone might ask whether in the circumstances envisaged here, where the people’s capacity to act as a group agent has been undermined, it is still possible for the Ws to pay compensation, since there is no longer an agency to receive it on the part of the group. In practice it is likely that the group will eventually reconstitute itself as a group, but were this not to happen, a second-best solution would be to make payments to its individual members, assuming that they can be identified.

effects of colonial rule on its subjects, and assume that what Fanon says is correct.<sup>37</sup>

Particularly where the division between settlers and natives is also a racial one, as in the African case, the colonized, Fanon claims, suffer from a 'dependency complex'. As black people, they idealise and seek to emulate the whites, while also realising they can never in fact become white themselves. As he puts it:

When the native confronts the colonial order of things, he finds he is in a state of permanent tension. The settler's world is a hostile world, which spurns the native, but at the same time it is a world of which he is envious. We have seen that the native never ceases to dream of putting himself in the place of the settler – not of becoming the settler but of substituting himself for the settler.<sup>38</sup>

Fanon argues that the only way to escape from this mentality is through violent struggle in the course of which the colonized will come to reject the beliefs and values that make up the colonial world-view in its entirety. (The alternative is that the colony becomes formally independent, but the 'national bourgeoisie' simply take over the positions of power abandoned by the colonialists, so the structure of colonial rule remains intact.) However there is no reason to think that beliefs formed in the course of violent struggle will be a reliable guide when post-colonial institutions and policies have to be adopted. For example, suppose it is indeed the case that private property, the rule of law and an open economy are key determinants of a society's wealth, as economic historians such as Acemoglu and Robinson argue,<sup>39</sup> but these are rejected by the recently decolonized as institutions that only serve the interests of the settlers; then they may choose to adopt alternative institutions and practices that perform badly, and make the economic legacy of colonialism even worse than it needs to be.<sup>40</sup>

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<sup>37</sup> See F. Fanon, *Black Skin, White Masks*, trans C. Markman (London: MacGibbon and Kee, 1968); F. Fanon, *The Wretched of the Earth*, trans C. Farrington (London: Penguin, 2001).

<sup>38</sup> Fanon, *The Wretched of the Earth*, p. 41.

<sup>39</sup> D. Acemoglu and J. Robinson, *Why Nations Fail: The Origins of Power, Prosperity and Poverty* (London: Profile Books, 2012).

If Fanon's diagnosis is correct, therefore, the experience of colonial rule may lead to two forms of distorted consciousness, each with own damaging effects: first, while regime is still in place, failed attempts by its victims to emulate the behaviour of the colonizers; then second, when it is removed, a wholesale rejection of the institutions and practices that the colonizers had introduced, even when these might (perhaps with some modification) have been beneficial to them. So here the prior behaviour of the Ws is at least in part responsible for the way in which the Vs respond to the wrongdoing. In contrast, in normal tort cases, the victim is regarded as being wholly independent of the tortfeasor. His choice of how to respond to the wrong that has been inflicted on him – whether prudently or imprudently – is his alone. W is not held responsible for V's poor decisions if that is what ensues. Of course colonial rule is only one form of historic injustice – and Fanon's diagnosis may not generalise even to all instances of colonialism – so this is not yet a comprehensive reason for rejecting the proposal canvassed in section I, namely that we should compute the compensation owed to a victim group as  $R_c - R_p$  rather than as  $R_c - R_a$ . However we have already unearthed two reasons to be cautious. Before talking about the historic responsibility of victims of injustice, we need to make sure a) that they had the collective capacity to respond to their condition as victims; and b) that their responses were not distorted by the effects of the injustice itself, for example in the manner implied in Fanon's analysis.<sup>41</sup>

This also opens up the wider question of the standards we should use when judging whether victim groups have responded in a reasonable way to their circumstances, however that response is to be explained. As we saw, tort law asks what a 'reasonable person' would have done in order to judge whether a victim has behaved negligently. We also saw that

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<sup>40</sup> For example, many African countries, including Fanon's own Algeria, chose following independence to adopt some version of 'African socialism' which was later abandoned after having failed to generate economic growth. For an overview, see E. Akyeampong, 'African socialism; or, the search for an indigenous model of economic development?', *Economic History of Developing Regions*, 33 (2018), 69-87.

<sup>41</sup> To be clear, Fanon himself would not have regarded the beliefs that may emerge in the course of anti-colonial struggle as distorted, since he shared the radical social vision of some of those involved, but I do not share his confidence that a political upheaval in the course of which existing false beliefs are repudiated necessarily leads to true ones being embraced.

there has been some debate as to whether this reasonableness test should take into account commitments such as religious beliefs that would rule out taking actions that other people might be expected to take – receiving certain forms of medical treatment for injury, for example. However for understandable practical reasons, the law has been wary of making such adjustments. Victims are judged in the light of prevailing social norms that set standards for what a person can reasonably be expected to do by way of avoidance or mitigation. When we turn to assess the collective response of a victim group, however, we will often be looking at people whose shared culture and its accompanying social norms are markedly different from those of the wrongdoers. This will have implications for what counts as reasonable behaviour in the aftermath of the wrongdoing. As an example, consider a Muslim society that has freed itself from colonial exploitation. Suppose its economic recovery is slowed by the fact that it adheres to the Islamic prohibition on lending money at interest. Since the norm prohibiting usury is one of the central elements in Islamic doctrine, it would be wrong to judge this behaviour as unreasonable and apply a counterfactual in which the society develops using banking and other money-lending practices modelled on those developed in the West. A fortiori, it would also be wrong to apply a counterfactual in which the society abandons Islam altogether. We should assume that adherence to Islam is one of the ties that binds it together and allows it to function as a collective agent. At the same time, we should not assume that the societal doctrine it follows is completely inflexible and admits of no creative interpretation at all. Nor should the interpretation offered by conservative leaders go unchallenged. An Islamic society that stagnated because some ayatollah had announced that the use of computers was sinful and should therefore be banned would have a reduced claim for compensation from its erstwhile colonizers.

Judgements of this kind, about whether the norms followed by victim groups are reasonable by independent standards, are clearly fraught with difficulty. Further difficulties may arise when we examine how gains and losses are distributed inside the victim group. Consider the following example: a society whose agriculture has traditionally been organized on the basis of collective property-holding continues with this practice following decolonization. Western economic advisors point out that economic growth would be faster if farms were privatized, making it possible for the economic damage inflicted by the colonial regime to be

repaired more quickly – in other words  $R_p > R_a$ . However their advice is rejected on social grounds: the concern is that privatization, even if economically efficient overall, would remove the element of mutual insurance contained in the collective arrangement, and leave some villagers vulnerable to becoming destitute.<sup>42</sup> There is no parallel to this in tort cases in which the victim is a single person and the only question is whether she has acted in a reasonable way to avoid or lessen the damage she has suffered. Groups cannot be held negligent for seeking to protect the interests of their individual members. A response on the part of the group that imposed severe risks on some of its members can be ruled out as unreasonable even if the response would have been maximally beneficial to the group as a whole.

It is important to underline here that what we are investigating are responses to *injustice*. The Ws have unfairly damaged the Vs in such a way that the Vs are now deprived of resources that they should have had:  $R_a < R_c$ . We are asking whether they should have behaved differently, so that their reparative claim would be smaller. But clearly, if that different behaviour would have involved the unjust treatment of a sub-group of V – say the villagers who become destitute – injustice has not been repaired but merely shifted between groups: the Vs collectively have behaved unjustly in their attempt not to demand more than they can justly claim from the Ws. This is not how the Ws can reasonably expect the Vs to behave. Even though they are entitled to ask whether the Vs have acted prudently, the standard of prudence must be set so as to exclude imposing unfair costs or undue risks on individual members of the group.

#### IV

Let's take stock of the discussion so far. We have been considering cases in which victim groups appear to have responded sub-optimally to the injustices they have suffered when measured by some standard of reasonable prudence. They find themselves at  $R_a$  when they might have been at  $R_p$  had they behaved differently. The Ws are claiming that the compensation they are required to pay is  $R_c - R_p$  and not the larger amount  $R_c - R_a$ . I have

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<sup>42</sup> Ref Friedman?



looked at four challenges to that claim – four reasons why the Vs could not be expected to reach  $R_p$ .

1. The treatment experienced by the Vs at the hands of the Ws has destroyed their capacity to act as a group agent, which they would need in order to reach  $R_p$ .
2. The treatment experienced by the Vs at the hands of the Ws has inflicted psychological traumas that prevent them from adopting the institutions and policies that would lead to  $R_p$ .
3. In order to reach  $R_p$ , the Vs would need to contravene a moral norm or principle that is deeply embedded in their culture, and not open to revision.
4. In order to reach  $R_p$ , the Vs would need to adopt policies that risk exposing some of their number to severe injustice.

It's plausible that in many actual cases of historical injustice, one or more of these reasons will apply, so claims that the Vs compensation should be reduced to  $R_c - R_p$  should be dismissed. This is particularly the case when the injustice is ongoing, or has only recently ceased. When it is further in the past, reasons 1 and 2 in particular are less likely to apply to the more recent behaviour of the Vs. Accepting this narrowing of scope, it is still worth examining cases in which none of the four extenuating factors obtains: the Vs have collective agency, they are not traumatised, but they have a shared culture that prevents them from reaching  $R_p$ , a culture that they could choose to adapt without violating a fundamental belief (so 3 does not apply) and without the risk of internal injustice (so neither does 4).

My starting point is a view that I share with, among others, John Rawls, namely that inequalities between groups and between societies can be unobjectionable when they arise from cultural differences; in other words, a collective cannot claim compensation if they are materially worse off than a second collective just because they have a different culture that leads, for example, to their being less economically productive over time.<sup>43</sup> Although this

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<sup>43</sup> See J. Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), §16; D. Miller, 'Justice and Global Inequality' in A. Hurrell and N. Woods (eds.), *Inequality, Globalization and World Politics* (Oxford: Oxford University Press, 1999). I have offered a qualified defence of Rawls on this

view faces certain objections (in particular it entails that later generations can justifiably be worse off than their contemporaries simply because of decisions that their predecessors made and for which, therefore, they themselves were not responsible), I will take it for granted here and not attempt to reply to objections. My interest is in whether the principle of collective responsibility that can justify inter-group inequality in general *also* applies when what is at stake are claims to compensation. To see whether it does, we need to return to the reasons that I proposed in section II to explain why it was reasonable to hold victims responsible for their failures to mitigate under tort law.

The first of these involved an appeal to fairness. When V fails to take reasonable steps to prevent or mitigate his loss, both he and W are to some extent negligent. So although W as the wrongdoer bears primary responsibility for the overall loss, it is fair for V to assume some part of it in the form of reduced damages. However this fairness claim looks most plausible when the two parties are equally able to bear a share of the loss – for example, they are two individual car drivers, and there’s no general reason to think that the careless driver who causes the collision will be in a better position than the owner of the damaged car to pay the repair bill. Tort law does of course also apply where we should expect the parties to be unequally placed in this respect – such as employers and workers in industrial accident cases – but in such cases it may recognize a duty of care on the part of the stronger party that precludes finding the victim contributorily negligent.<sup>44</sup> In the cases of historical injustice that concern us, it is very unlikely that there will be rough equality between the Ws and the Vs – indeed it will be the Ws’ stronger position that has enabled them to colonize, exploit or otherwise inflict harm on the Vs. So the fairness rationale for holding negligent victims responsible for part of the loss is going to be very much weaker, since in these cases it conflicts with a rival principle of fairness: the principle that where costs are unavoidable, they should be allocated in such a way that they fall mainly or entirely on the shoulders of those who are best able to bear them.

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question in D. Miller, ‘Collective Responsibility and International Inequality in *The Law of Peoples*’ in R. Martin and D. Reidy (eds.), *Rawls’s Law of Peoples: A Realistic Utopia?* (Oxford: Blackwell, 2006).

<sup>44</sup> For a case involving a worker on a building site, see Goudkamp, ‘Rethinking Contributory Negligence’ pp. 315-16.

The second rationale I described as communitarian in character, appealing as it does to the responsibility we have not to increase the burden that falls on others' shoulders when it is easy for us to do so. Although you have carelessly damaged my car, if I can reduce the hefty bill you would have to pay by taking timely reparative action now, I should do so. That makes sense if we are neighbours or fellow-citizens with general social responsibilities to one another. But generally speaking the relationship between the Ws and the Vs in cases of historic injustice is not of that kind. Their interests are likely to be conflictual, for example if the Vs are or have been a colonized people, or they are the weaker parties to a trade negotiation. Under these circumstances, although the Vs will still have prudential reasons to mitigate the effects of the injustice, they will not have moral reasons arising out of their relationship with the Ws. Moreover the idea that V owes it to W to reduce the overall amount of compensation that needs to be paid makes sense on the assumption that W will actually pay up. In tort cases the law should provide a sufficient level of assurance that this will happen. But when we move to cases of historic injustice, the default position is that the Ws will deny their liability (the payments made by West Germany to Holocaust victims stand out as an exception) and there is of course no mechanism – no International Reparations Court with enforcement powers – for making them pay.

Does it then follow that the answer to my title question is an unequivocal No: the victims of historic injustice should never be held to account for the way they have behaved? That conclusion is too strong. We have found that there are several reasons why the Vs could not be expected to behave in ways that might at first sight seem to be prudent in response to injustice. We have also seen that the justifying reasons that can be appealed to in support of the doctrines of contributory negligence as used in tort law don't apply in many instances of historic injustice. Nonetheless there will be other cases where these disclaimers appear not to hold. Typically they will be cases in which the Vs form a politically organized group that is not dominated by the Ws and has the capacity to make real choices. For example if an oil tanker registered in state A founders and discharges its oil on the shores of state B, the compensation paid to B (including for clean-up costs) may depend on whether B has taken reasonable steps to contain the disaster. Or consider a small island state threatened by sea level rise as a result of climate change. The rich states chiefly responsible for global warming may propose adaptation measures that involve some

changes in the islanders' lifestyle (though without radically disrupting their culture). If the islanders decide collectively to reject these proposals, and as a result their island later becomes uninhabitable, they cannot, at the bar of justice, claim to be fully compensated for the costs of their relocation (they might still have a needs-based claim, but recall that throughout this paper I have been treating claims for compensation as claims of corrective, not distributive, justice).

So the question is one that *should* be asked, even though in many cases it can swiftly be answered in the negative. Victims of historic injustice can also be collective agents (if not at the time when the injustice was inflicted, then subsequently), and where they are, it makes sense to examine their responses in order to see how  $R_a$  might differ from  $R_p$ .<sup>45</sup> Then, if we can calculate  $R_p$  with a reasonable degree of accuracy, we can ask whether the compensation they are due should be adjusted to  $R_c - R_p$ . Insisting on  $R_c - R_a$  as the correct measure of compensation no matter what seems to involve either a blanket denial of victims' agency or an unstated assumption that all cases of historic injustice are of the gross kind that makes doctrines of contributory negligence inapplicable.

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<sup>45</sup> For some thoughts about the pathologies that can result from ignoring the agency of victims, see C. Lu, *Justice and Reconciliation in World Politics* (Cambridge: Cambridge University Press, 2017), ch. 2.