Discrimination, Reparations, and the Mega-Rich

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In 1992 Kiden was a young Bari woman living in Juba. One day, militias arrived in her village and demanded that she and her family relinquish their land. Kiden complied, migrated to Khartoum, and sold tea by the side of the road, eventually boarding a train to Wadi Halfa, a boat to Egypt, and a Jeep to Israel. Once in Tel Aviv she managed to save over 40,000 dollars, and in 2012 flew back home to Juba, invested her money in small businesses, and made more money still. In 2013 she traveled to a land registry office where she obtained the deeds to the land she had once owned, and submitted them to a judge shortly after, successfully winning her land back.[[1]](#footnote-1)

The year that Kiden won her land back, Ellen Pao sued the venture capitalist firm Kleiner Perkins. She had joined Kleiner Perkins seven years prior, hired because of her degrees in engineering, law, and business, eventually leading the company’s expansion into China, and earning her over half a million dollars a year. Though she was successful, she was consistently overlooked for promotion, and evidence suggests this was because she was a woman. In 2012 she unsuccessfully sued Kleiner Perkins for $16 million dollars in lost earnings from gender-based discrimination.[[2]](#footnote-2)

Kiden and Pao had very different experiences. Kiden was seeking land she lost due to persecution, and Pao was seeking the money she never gained due to sexism. Kiden was returning to her childhood home and successful, and Pao was seeking compensation and unsuccessful. Though the two women’s experiences were different, they had something in common: both were wealthy individuals seeking assets they felt they had a right to, as a result of the discrimination they faced.

It is not clear that either woman had a right to the assets she sought. Neither was wronged more than other victims of discrimination, including other Bari refugees in South Sudan, and other victims of sexism in California. If they were not wronged more than others, it is not clear they had right to seek more money than others. Moreover, in obtaining more money than others, they accrued wealth above and beyond what they needed, while others – including other victims of discrimination – were left in poverty. If the very wealthy do not generally have a right to additional wealth, perhaps Kiden and Pao did not have a right to the assets they sought.

This suggestion is not merely academic. In the history of restitution, some states have denied refugees access to the property they lost, instead redistributing these assets to those in greater need.[[3]](#footnote-3) We might imagine a similar policy for discrimination lawsuits, limiting the money a given claimant could obtain, redistributing the rest to those in greater need. Under such a policy, had Pao won $16 million then this money could potentially be taxed at 100%, and redistributed to those living in destitution.

In this article, I first consider three common arguments against the above policies, and in support of giving the wealthy the assets they lost from discrimination. The Harm Argument holds that victims of wrongful discrimination face harm from this discrimination, and therefore have a right to reparations to counter this harm. The only way to counter this harm is to give victims assets they would have had, had they not been discriminated against. The Plans Argument holds that victims of discrimination experience an interruption in their life plans, and such an interruption can only be avoided with restitution or compensation. The Treatment Argument holds that victims are treated in a demeaning manner when losing assets because of discrimination, and so have a right to these assets.

I reject all three arguments in Sections 1-3, and raise a fourth in Section 4. When wealthy individuals are discriminated against because of their group membership, then poor members of the same group are disadvantaged. This is because, if poor members are aware they will likely face discrimination if they grow wealthy, then the money the invest now has lower expected yield than the money invested by members of the majority. To ensure the money they have now has equal expected yield, poor minority members must be certain that, if they are discriminated against when wealthy, they will be compensated for this discrimination. This provides one weighty reason to provide reparations to wealthy victims of discrimination. I respond to objections against this claim in Section 5.

Before I begin, a number of clarifications are in order. Throughout the article I shall refer to all disadvantaged groups as ‘minorities,’ including women and ethnic groups who are under-represented in a given position. I shall refer to restitution and compensation as ‘reparations.’ Kiden sought to repair the damage done when her property was taken, and Pao sought to repair the damage done when overlooked for promotion. I focus on reparations that are equal to assets lost as a result of discrimination, and put aside reparations that are intended not to be equal to assets lost, but equal to the assets required to live a decent life, or equal to the assets necessary for communities to be autonomous.[[4]](#footnote-4) An example of the latter would the Kenyan government providing the Kikuyu tribe limited land in the 1960s, land that was far less than the land the Kikuyu lost during colonialism, but enough for them to create a semi-autonomous community.[[5]](#footnote-5) Such reparations are more akin to redistribution, and needn’t entail the return of the precise land lost.

Similarly, I put aside reparations that only serve as a symbolic gesture of apology, or to compensate for psychological harm felt.[[6]](#footnote-6) If reparations were only apologies or compensations for psychological harm, then those who lost fewer assets would presumably receive the same reparations as those who lost more. If a janitor failed to be promoted due to discrimination and lost out on $1000 a year, he would presumably be owed the same compensation for apology and psychological harm as Pao, assuming the psychological harm and wrongdoing were equal. That is not what actually happens: those who lose more wealth from discrimination receive more money in reparations than those who lose less. Worryingly, those who lose more wealth from discrimination tend to be wealthier to begin with, and so in less need of the money they receive in reparations. My goal is to consider why this might be justified. More specifically, it is to consider why this might be justified when such reparations conflict with certain minimal duties of distributive justice.

When I write "minimal duties of distributive justice," I refer to the duties to ensure that the distribution of goods between the wealthy and poor is of a particular pattern. A government policy that granted assets to wealthy minority members, rather than distributing these assets to the poor, might disrupt such a pattern. Of course, there is disagreement over what a minimally just pattern entails. Some argue that this entails all having equal resources, welfare, or happiness.[[7]](#footnote-7) Others argue that this entails all having equal opportunity to resources, welfare or happiness.[[8]](#footnote-8) Still others hold that a just pattern entails prioritizing the welfare of the worse off, or all having a minimally decent standard of living, regardless of whether this increases inequality.[[9]](#footnote-9) While there is disagreement over what a just pattern entails, there is agreement across a range of scholars that the very wealthy have no right to additional assets that could be redistributed to those who lack a minimally decent life. My aim is to consider whether, if one accepts this minimal principle, one ought to support reparations for discrimination that conflicts with this principle.

When discussing discrimination, I shall generally assume that refugees losing their property due to their ethnicity are experiencing discrimination. Of course, they are not only experiencing discrimination: they are also experiencing violent displacement. But the particular wrong I am interested in is the wrong of losing property because of one’s ethnicity, a wrong that does not arise when all individuals lose their property to the same degree. Such a wrong would not exist, for example, if all Sudanese citizens in the 1980s and 1990s lost their land to the same degree. Given that this is not what occurred – and Kiden’s land was confiscate because she was Bari – I aim to consider why Kiden had a right to reparations for discrimination, just as I aim to consider whether Pao had a right to reparations for discrimination.

In addressing the conflict between distribution and reparations, I shall generally assume that distributive justice concerns the distribution of goods within a given society, in particular within a state. This is for simplicity, and nothing in my argumentation hinges on this assumption: if you believe that distributive justice concerns the distribution of goods globally, then my argumentation concerns the conflict between reparations and distributive justice globally. In other words, my focus is on whether the very wealthy – those in the top percentiles of both national and global wealth – ought to have access to reparations for discrimination, or whether the government ought to redistribute these assets to those with far less, whether those with far less are limited to the nation’s poor, or include the global poor.

1. Harm

According to the Harm Argument, those who are harmed from wrongdoing ought to be given reparations for this harm. If a wealthy individual is violently punched in the stomach, and as a result is forced to give up her money, she loses wealth in a manner that is wrong. She is therefore owed reparations for this wrong in the form of the assets she lost.[[10]](#footnote-10) Similarly, if a wealthy individual is wrongly discriminated against, and as a result loses money, she loses wealth in a manner that is wrong. She is therefore owed reparations to counteract the harms from this wrong. Kiden and Pao both experienced the wrong of discrimination, and both lost assets as a result of this discrimination, and so were owed reparations to obtain these assets lost. Of course, the wrong they experienced did not disappear with the reparations – the wrongness of discrimination is not reducible to its harms[[11]](#footnote-11) – but they at least avoided the harms arising from the wrong.

There are two objections commonly raised to this harm-based argument. One is that we cannot give someone reparations for what they would have had were they not wronged, because we cannot know what someone would have had were they not wronged.[[12]](#footnote-12) But this objection is not relevant if we can guess, with high certainty, what a person would have likely had were they not wronged. If we can claim that Kiden and Pao would have likely had land and money were they not discriminated against, we can claim that they were owed reparations for these likely losses.

The second common objection to the harm-based argument is that it will have absurd implications. Imagine Maria is unjustly denied a job because she is a woman but, had she been hired, she would have taken the train to work at 9:00am on September 7th, a train that was derailed, killing all passengers inside. Maria is not harmed from the discrimination, given that she is alive as a result of the discrimination, and would otherwise be dead.[[13]](#footnote-13) If this is true, a harm-based theory of reparations seems to imply she is not owed reparations. This seems odd. It is odd not because she experienced a wrong and was not harmed – again, many instances of wrongful discrimination involve no harm[[14]](#footnote-14) – but because it seems she did experience a type of harm that warrants reparations.

This objection, I believe, can be avoided if we expand the scope of harm to include non-counterfactual harms. Non-counterfactual harms occur when an agent’s actions cause harm, and this harm would have occurred in the absence of the agent’s actions.[[15]](#footnote-15) If I steal your laptop, you experience harm even if someone else would have stolen your laptop had I not stolen it first. If I also wronged you in stealing your laptop, I ought to return the laptop even though you are not counterfactually worse off from my actions. Similarly, if a woman is denied a position because of her gender, she is harmed, even if she would have died had she not been hired. She is therefore owed reparations for the harm she experienced.

There is a third and more promising objection to the harm-based account. Even if a person has been wronged, and is harmed in being wronged, it does not follow they are owed reparations from the harm. This is because, in general, we cannot claim a person is owed reparations for the harm of losing assets they had no right to own, even if they experienced a wrong when losing these assets. Imagine I steal your laptop, and someone physically assaults me, taking the laptop in the process. Though I have been wronged and harmed, given that I have one less laptop in my possession, this particular harm is not the sort that ought to be rectified, because the laptop was not an asset to which I had a right. Instead, the laptop should be returned to you, assuming you are the rightful owner.

A similar claim could be raised regarding Kiden and Pao. If we think that Kiden and Pao had no right to the assets they lost from discrimination, then even if they were harmed from losing these assets, they had no right to reparations for this harm. One reason we might think Kiden and Pao had no right to the assets they lost is because nobody has a right to extreme amounts of wealth in a world where others lack basic necessities. If we think millionaires have no right to wealth they could easily give to others in desperate need, then Kiden had no right to land she could easily give away to those in desperate need, and Pao had no right to $16 million she could easily give away to those in desperate need. If they had no right to the money they lost from discrimination, they had no right to monetary reparations for the money the lost from discrimination.

Some have rejected this objection, arguing that we can ensure a fair distribution of goods while also providing reparations; it is just a matter of taxing the reparations of the wealthy. Kiden and Pao should be given their reparations, repairing the damage they faced, and these reparations could be taxed at 100% if this is what a fair distribution required.[[16]](#footnote-16) Moreover, to ensure that Kiden and Pao were not worse off because they were women, the government could tax members of the majority in a manner that ensured non-discrimination. For example, imagine the government established Kiden's wealth at $1.5 million without her land, and the land was worth $1 million, adding up to $2.5 million. If it determined she ought not re-obtain her property worth $1 million, then those worth $2.5 million ought to be taxed $1 million. Under such a policy, though Kiden would essentially be denied reparations when 100% of her reparations were taxed, she would not be disadvantaged compared to members of the majority, whose money would be taken as well. A similar policy could be implemented with victims of workplace discrimination. Imagine that Pao had won $16 million and this was taxed at 100%. If the state took 100% of $16 million currently untaxed amongst male executives, then Pao would not have been financially worse off from discrimination. She could therefore avoid the harm of wrongful discrimination without accessing assets to which she had no right.

While such a solution may be ideal, it may be difficult to implement in practice. It may be difficult for the government to effectively tax all South Sudanese of comparable wealth at the same rate, but relatively easier to ‘tax’ Kiden by not returning her land. It would be difficult for the US government to effectively tax all executives of comparable wealth at the same rate, given the tax loopholes utilized by wealthy executives, but relatively easy to tax those awarded money in anti-discrimination lawsuits. In such cases, we are again left with the argument that, if Kiden and Pao had no right to the wealth they sought in reparations, perhaps the government would be permitted to deny them these reparations, redistributing these assets to those more in need.

Perhaps the best version of the harm-based account is not that individuals have a moral right to reparations for the harm they faced, but that they should be given reparations for certain instrumental ends. One instrumental end is the creation of incentives to prevent future discrimination. Pao was incentivized to sue her former employer, thus giving her employer a reason to stop discrimination, because she knew there was a chance of gaining tens of millions of dollars. Kiden was incentivized to re-obtain her land, thus giving the government reason to stop discriminatory land distribution, because she knew she would be able to keep the land she re-obtained. Even if neither she nor Pao had a moral right to the assets they lost from discrimination, it was good that they had a chance of gaining the assets they lost from discrimination, to help prevent discrimination in the future.

This explanation, however, would not defend the return of assets lost from discrimination. It would merely defend the provision of money to incentivize lawsuits. This money may be worth more or less than the assets lost from discrimination. Imagine that Pao would have been incentivized to sue her employer if she would receive not $16 million, but $10 million. Or imagine that Pao would have been incentivized to sue her employer only if she could potentially receive $50 million, rather than $16 million. If the money necessary to incentivize lawsuits is less or more than the assets lost, this cannot provide a justification for reparations of the precise assets lost.

There is another version of the Harm Argument that faces a similar objection. According to some, reparations contribute to reconciliation and trust between the wrongdoer and victim.[[17]](#footnote-17) For example, if victims are not given financial compensation for the harm arising from a wrong, they may be unwilling to forgive the wrongdoer, and without forgiveness it is difficult to create trust between the wrongdoer and victim. Even if financial reparations are not sufficient for reconciliation and trust, they may be necessary. Moreover, in some cases reparations are necessary not to rebuild trust, but to create acknowledgement of the wrong, and it is far easier to express acknowledgment if the wrongdoer is willing to pay reparations for the harm arising from the wrong.

This explanation, though explaining why some reparations are owed, does not explain why the precise reparations owed are equal to the loss arising from the wrong. In many cases a victim will only begin to trust a perpetrator, or feel the wrong is acknowledged, if the reparations exceed the monetary loss incurred. Equally importantly, some victims may feel the wrongdoer and society can best acknowledge the wrong by redistributing money, rather than providing reparations equal to the loss incurred. For example, in 2018 Rashon Nelson and Donte Robinson were arrested while sitting at Starbucks, likely because they were black, and they both asked for $1 in compensation from the state, the remaining $200,000 distributed to program to support young African-American entrepreneurs. A year later Taylor Swift sued DJ David Mueller for sexual assault, asking for $1, with additional rewards donated to charities protecting women against similar assaults.[[18]](#footnote-18) In these cases we cannot claim that Nelson, Robinson and Swift were owed reparations equal to their losses to enhance trust and ensure acknowledgment of the wrong, for in all three cases the victims felt trust and acknowledgement could be best obtained through redistribution, rather than reparations equal to the loss they incurred.

2. Plans

There is another reason we might support reparations to wealthy victims of discrimination. The reason begins with the premise that humans often plan their lives with the assumption that a given state of affairs will persist. For example, a farmer toiling her land might presume the land she toils will remain in her possession, so that she can reap the benefits from planting. She would struggle to plan for the harvest if she did not know whether the land she toiled now would be hers tomorrow. There is something morally desirable in individuals being able to plan their lives and follow through on these plans. Planning enables autonomy, giving individuals control over their lives. Planning may also create certain utilitarian benefits, such as helping economies function.[[19]](#footnote-19) Finally, planning may contribute to the development of a routine, which can make various tasks easier to fulfil. It is often easier for a farmer to harvest her crops if she plans to wake up every day at 5am, prepare breakfast at 5:15, rev up the reaper engine at 6, take a break at 12, and so forth. If her surroundings remain the same, this regular routine is easier to follow, becoming a habit with time, and requiring far less will power to pursue.[[20]](#footnote-20)

If continuity matters for planning, and a person suddenly finds their lives altered from the status quo, something morally undesirable has occurred.[[21]](#footnote-21) This person has a right to compensation to ensure they return to the status quo ante so that they can continue their plans. Or, more specifically, they have a right to compensation to continue their plans if their plans were based on a reasonable expectation that the status quo would continue, or if they had a moral reason to believe the status quo ought to continue.[[22]](#footnote-22) For example, if a farmer had a reasonable expectation that the land under her feat would remain in her possession, or had a moral reason to believe it ought not be taken from her through racist and violent means, then the farmer is owed reparations if her land is unexpectedly seized through racist and violent means.

When Kiden made her life plans in Juba in the early 1990s, she made these plans based on the reasonable expectation that her land would remain in her possession, and had a moral reason to believe it ought not be taken through violent discrimination. When she suddenly lost her land, she could not continue the plans she had created based on these reasonable expectations. If we think there is value in being able to shape one’s life plans based on reasonable expectations, then an important value was set back for Kiden. She had a right to her land once again to continue her life plans. When Pao made her life plans in California in the 2000s, she made these plans based on the reasonable expectation that, if she was more successful than her colleagues at bringing in profits for Kleiner Perkins, she would be promoted before her colleagues, receiving a salary bump in the process. Even she knew she would face sexism, she had a good moral reason to believe sexism ought to be tackled, and so made life plans with the expectation it would. When this expectation fell through, then she could not continue the life she had planned.

There are a number of problems with the above argument. For one, as noted by Pablo Kalmanovitz, it is not relevant when the institutions of society have been so devastatingly destroyed that re-gaining one’s assets will not return one to the life plans they left behind.[[23]](#footnote-23) A refugee who is regaining a plot of land in Juba cannot reintegrate into the churches, mosques, shops, or clubs that surrounded her home prior to fleeing, and so cannot continue the plans dependent on these institutions. More importantly, even if there has been no such devastation, the plan-based argument is only relevant when victims are given swift compensation for their loss, allowing them continue the plans they created prior to the discrimination.[[24]](#footnote-24) Such swift reparations are rare,[[25]](#footnote-25) and when compensation takes time, plans fall apart. In Kiden’s case, swift reparations were not possible, because the Sudanese Civil War lasted for over a decade, and when she received her land back, she could not continue the plans she had begun when last occupying her land as a young girl. In Pao’s case, swift reparations would have been unlikely, because it can take years to prove gender-based discrimination. Had she received the $16 million she had requested, she could not continue the plans she had begun before the discrimination occurred. Nor would she likely want to, given that her earlier plans included continuing work for Kleiner Perkins, a plan she unlikely wishes to realize anymore. If neither Kiden nor Pao would be able or willing to continue the plans they started prior to the discrimination, neither woman’s reparations could be justified by appealing to the value of continuing plans they started prior to the discrimination.

More importantly, the claim seems to conflict, once again, with certain principles of distributive justice. If a very wealthy individual is able to create plans dependent on vast amounts of wealth, while a poor individual is not, it seems an injustice has occurred. This is because the wealthy and poor have unequal access to plans they can realize, or because the poor have unequal access to plans which can ensure a minimally decent life. If this is unjust, then we can correct for this injustice by redistributing assets to the poor, rather than giving assets to the wealthy. This might interrupt the wealthy’s life plans; but it is not clear they had a right to plans dependent on assets to which they had no right.

To see the force of this claim, return again to the stolen laptop. Imagine I pursue my life plans around the laptop I stole from you, and I am suddenly violently attacked by an assailant that steals ‘my’ laptop in the process. It does not seem that I have a right to obtain this laptop back, even though re-obtaining the laptop would help me realize my life plans. I have no right to realize life plans that were dependent on a laptop I stole, as this was not an asset I had a right to possess. If we take seriously the idea that the wealthy often have no right to the vast assets they lost, in the same way I have no right to the laptop I lost, then the inability to plan seems like a poor justification for reparations.[[26]](#footnote-26)

We could stop here, concluding that many victims of discrimination have no right to the assets they lost. Pablo Kalmanovitz, Anna Stilz, Jeremy Waldron, and others have reached versions of this conclusion, claiming that dispossessed individuals like Kiden have no right to all of the land they lost, assuming they can maintain a minimally decent life, while others cannot.[[27]](#footnote-27) Catherine Lu similarly concludes that, when individuals have been discriminated against in the past, they should not necessary be given reparations for all assets lost as a result. Doing so, she argues, simply privileges some above others, creating a new type of hierarchy that undermines the equality of basic liberty that justice demands.[[28]](#footnote-28) Even if one rejects the claim that equality of basic liberties is a demand of justice, one might still claim that the wealthy have no right to additional wealth when others lack basic necessities, and so no right to reparations for discrimination.

3. Demeaning treatment

We might avoid this conclusion my claiming victims of discrimination are owed reparations for the demeaning nature of discrimination. Discrimination is demeaning because victims are treated in a differential manner due to their ethnicity or gender. This is wrong because it fails to recognize victims as individuals with their own unique attributes, instead viewing them merely as members of a group.[[29]](#footnote-29) For example, if a prosecutor only arrests wealthy criminals of an undesired ethnic minority, the prosecutor treats these criminals as members of a group, rather than individuals who ought to be judged by their own character and actions. If a prosecutor acts impermissibly in targeting only minority criminals, then even if the criminals have no right to the wealth they steal, they have a right that others not stop them in a discriminatory manner.[[30]](#footnote-30) In other words, wrongfully targeting minorities can give them a right to their wrongful gains.

This general idea – that wrongful targeting can create a right to wrongful gains – has precedence in criminal law. Imagine a prosecutor barges into my home with no evidence I had committed any crime, and begins using physical violence against me, forcing me to reveal a laptop I had stolen, and the evidence that I had stolen this laptop. She then bags the laptop, brings it to the police station, and stands before a judge several months later, using the evidence she had obtained through violent means. If the prosecutor’s only evidence was obtained through violence, the evidence would likely be inadmissible, and she would fail in many jurisdictions to obtain a conviction.[[31]](#footnote-31) After the trial, she would be forced to return me the laptop I had stolen. This is true even though everyone knows, including the judge, that the laptop is stolen.

Just as a prosecutor is not permitted to use evidence obtained through violence, even if this evidence proves an individual committed a crime, a prosecutor is not permitted to arrest an individual because of their ethnicity, even if this individual committed a crime. And just as a prosecutor must return a stolen good to a thief if she learned of this good through violence, a prosecutor must return a stolen good to a thief if she confiscated this good through racism. At the very least, she has a weighty reason to do so.

This has relevance Kiden and Pao. If may be true that those who stole Kiden’s land were stealing land which Kiden had no right to own, and it may be true that the current South Sudanese government could transfer Kiden’s land to impoverished individuals who do have a right to this land. But just as a judge ought not rely on inadmissible evidence to return stolen goods to rightful owners, the South Sudanese government ought not rely on racist confiscation to give Kiden’s land to its rightful owners. Similarly, it may be true that Kleiner Perkins was denying Pao money to which she had no right, but it was denying her money in a manner that was impermissible, given its sexist nature. Were she to have won a lawsuit, and were the state to have redistributed the award to those in greater need, the state would be utilizing discrimination to redistribute to those in greater need. It would have a weighty reason not to do so, and so a weighty reason to allow her to keep the reparations she won.

There is a problem, however, with this argument. The argument rests partly on the faulty assumption that inadmissible evidence and discrimination are analogous: just as a state should return goods obtained through wrongful violence, a state should return goods obtained through discrimination. But the analogy fails. When a prosecutor returns stolen goods obtained through violence, she is returning goods she herself obtained through violence. Even when a judge returns the goods, rather than the prosecutor herself, the judge and prosecutor are both representatives of the state. In contrast, a government refusing to return property lost from discrimination may be distinct from the agent who engaged in discrimination. In the case of Kiden, it was the former Sudanese government which had taken her land, rather than the newly established state of South Sudan. If the new state is a separate agent from the one who wrongfully took her land, then the state is not utilising discrimination when refusing to return her land. In the case of Pao, it was Kleiner Perkins who was guilty of discriminated, and so we cannot claim the state itself would be utilizing discrimination in taxing awards that Pao won. If the state is not itself utilizing discrimination, it has a justification for its actions: Pao had no right to the money she sought, given her wealth, and given the needs of others. At least, this is a justification that many theories of distributive justice would endorse.

To see the force of this response, imagine that Azaria, a thief from a minority group, steals my laptop. Azaria is then targeted by Jim, a racist who steals the laptop because he hates members of Azaria’s ethnic group. If a prosecutor convicts Jim, she ought not return the laptop to Azaria. She ought to return to the laptop to me. It is true that Azaria was targeted through racism, but Azaria was not targeted from the prosecutor herself, and so we cannot claim the prosecutor acted through wrongful discrimination. The same principle holds for inadmissible evidence. If Azaria steals a laptop from me, and a violent individual named Jim forces Azaria to hand over the laptop, and Jim is convicted for his violence by a prosecutor, it seems the prosecutor should return the laptop back to me, and not Azaria. It is true that evidence of the theft is the result of violence, but the prosecutor did not engage in the violence herself, and so the evidence is valid.

Some might disagree, and argue that the prosecutor does have one good reason to give the laptop to Azaria, even though she is not the rightful owner. We ought to condemn injustice, and we struggle to do so if we refuse to give up the benefits arising from injustice.[[32]](#footnote-32) The prosecutor cannot truly condemn racism and violence if she also benefits from racist and violent men like Jim targeting minority thieves. Similarly, if South Sudanese society truly wished to condemn discrimination against minority tribes, it would struggle to do so if it also benefitted from this discrimination in the form of resources for the poor. If the state of California wished to condemn Kleiner Perkins for sexism, it would struggle to do so if it also benefited from the money she lost, helping improve the welfare of the worst off.

The problem with this objection is that, when an event includes right-making features, benefitting from the event needn’t preclude condemnation of the event’s wrong-making features. If Azaria steals my laptop, is attacked by racist Jim, and the police catch Jim and give me back my laptop, I am benefiting from an event with right-making features (Azaria lost a laptop to which she had no right), and this seems compatible with me condemning the event’s wrong-making features (Azaria being targeted in a racist attack). When Kiden and Pao lost assets, their experience included the wrong-making feature of discrimination and the right-making feature of losing assets to which they had no right. Given this latter right-making feature, if individuals benefit they can still condemn the wrong-making feature of discrimination. They can do this by stating, ‘We severely regret that we obtained benefits via discrimination. We wish we lived in a world where we obtained these benefits because of non-discriminatory actions but, given that this is not possible, we will keep these assets.’

There is a final argument in support of reparations, and this is relatively promising. If the wrong of discrimination is that it demeans minorities, and the reason it demeans minorities is that it disadvantages them compared to others, we can prevent such demeaning treatment if we ensure that wealthy minorities are not disadvantaged compared to others. Ensuring they are not disadvantaged entails returning them the assets they lost from discrimination. This argument is strong because, even if we ultimately conclude that the money should still be redistributed, we still have one reason not to do so.

I shall not object to this argument. It does provide one reason to give reparations to wealthy victims of discrimination. However, it is a relatively weak reason when the worst off in society include a substantial number of individuals from the same minority group. Such is the case in California, where a large number of women would have benefited had they obtained the reparations that Pao sought, and in South Sudan, where a large number of low-income Bari citizens would have benefited from some of the land that Kiden obtained. These poor minorities members also suffered from disadvantage due to their gender or ethnicity, and so had land and funds been redistributed to them, they too could avoid some of the demeaning disadvantage that comes with discrimination. Given that such poor minority members also have fewer resources, we might suppose that they ought to be given the funds that would otherwise be provided as reparations to the wealthy.

In the following section I suggest otherwise, arguing that poor minority members benefit in one important way when their wealthy co-minority members receive reparations.

4. The Investment Argument

This argument avoids the problems of the above justifications for reparations. It begins with the premise that the money we have is materially more valuable if its expected return is higher. For example, a dollar I can invest in a firm that is sure to profit is more valuable than a dollar which I do not invest at all, instead keeping under my mattress indefinitely.

Nearly every person’s dollars are, in this way, worth a slightly different amount. The dollars in my wallet are worth less than the dollars in my brother’s wallet, because my brother cares about investing in profitable businesses, and the dollar in my sister’s wallet is worth more than the dollars in my brother’s wallet, because my sister invests her money in job training that garners a higher salary.

One reason that a dollar may be more profitable for one person compared to another is that the first person is legally permitted to invest this dollar, while the second is not. If I am barred from investing my money in the stock and housing market, the dollar I hold is worth less for than the dollar my neighbor holds, if my neighbor can invest in the stock and housing market. Another reason that a dollar may be worth less is that, even if I do manage to invest the money in a profitable firm, I know that the government will not protect my profits from being stolen by others. If I know that my profits can be stolen and never returned, while my neighbor’s profits will be protected, then the dollars I hold are worth less than my neighbor’s.

This has implications for poor minority members likely to face discrimination. Each poor minority member knows that, if she invests in education, land, or a business, the expected return on investment is lower than the expected return of poor majority members, all else being equal. Her expected return could be lower because she is barred outright from investing money in education, land, or a business, while majority members are permitted to make such investments. Her expected return could also be lower if she is less likely to be promoted to the top echelons of a given industry. If the most money she can likely gain is lower than the most money a majority-member can obtain, then the average return she can obtain is lower than the average return a majority-member can obtain. She therefore holds dollars whose expected average return is lower than the dollars of a poor member of the majority.

The reason this type of discrimination is unjust is for similar reasons raised in the previous section: it treats minority members as members of a group, rather than individuals with their own unique characteristics and attributes, and this can be demeaning and dehumanizing. To counteract this injustice, governments should adopt certain polices. One potential policy is to try and eradicate discrimination in general. The South Sudanese government could ensure that all individuals do not lose their land because of discrimination and the US government could ensure that all individuals are not discriminated against because of their gender. Under such a policy, money could also be redistributed through taxation so that minimal duties of distribution were met.

In reality, such a policy will unlikely be effective in the near future. Given that discrimination will likely continue, the government should at least ensure that poor minorities’ dollars are not worth less due to expected discrimination. This is possible by promising poor citizens that any money they do not gain in the future due to discrimination will be compensated for or returned. Under such a policy, if poor individuals grow wealthy from their investment, and then lose out on further wealth because of discrimination, they can obtain the assets they did not gain due to discrimination they face. The government would be providing reparations not for the wealthy victims alone. Rather, the government would be providing reparations so that poor minorities have assurance that, if they grow wealthy, they will not be disadvantaged from discrimination. Poor minorities have a right to this assurance because, in the present, they have a right to dollars that do not have lower expected return due to discrimination.

Consider this logic in the case of Pao. Even if Pao receiving reparations would disadvantage the poor in one way, it would advantage them in another, providing good reason to support reparations. The US government has good reason to assure poor citizens that, if they invest money in education, and find themselves overlooked for promotion because of their gender, they can obtain compensation for the money they do not gain from the discrimination they face. Only then will their investments not yield lower expected returns due to discrimination, and so only then would their dollars have similar value to their peers from the majority. A similar logic is at play for property taken in a discriminatory manner. Even if Kiden receiving reparations would disadvantage the poor in one way, it would advantage them in another, providing good reason to support reparations. The South Sudanese government had good reason to assure poor citizens that, if they invested money in land, and found their land taken because of their ethnicity, they could obtain this land back. Only then would their investments not yield lower expected returns due to discrimination, and so only then would their dollars not have lower value due to discrimination.

Note that this theory is not derived from the general right all individuals have to equal opportunities. We might think, for example, that if poor minorities can expect to face discrimination, they lack equal opportunities to their majority peers, both wealthy and poor. This is not my argument, because I am not committed to the claim that there is a general right to equal opportunities; perhaps there is and perhaps there is not. Rather, I am claiming that there is good reason to ensure that poor minorities are not demeaned because of their minority status, and they are demeaned if the dollars they hold are of lesser value due to the discrimination they will face. They can avoid this demeaning de-valuing of their dollars if they are promised reparations for assets lost from any discrimination they will face. And because it is the poor who are protected, we needn’t claim that reparations are justified to protect wealthy minorities regardless of the effects on the poor. It is precisely because of the effects on the poor that the reparations are especially justified.

It is also important to note that this theory does not always provide a decisive reason for providing reparations to wealthy victims of discrimination. It merely provides one weighty reason, a weighty reason which will sometimes face competing considerations.

One competing consideration is related to the other interests of the poor. Though allowing the wealthy to obtain reparations increases the average expected return of poor minorities’ dollars, it also means they have fewer dollars compared to redistribution. They would have more dollars if the South Sudanese government redistributed Kiden’s land to Bari members currently impoverished, and the state of California redistributed lawsuit winnings to low-income women facing destitution. In such a world poor Bari citizens and women would be better off in one respect – they would have more actual money than non-Bari members and men – and worse off in another – each dollar they held would have a lower expected yield compared to the dollars held by non-Bari members and men. We would then be faced with the question of which sort of value – the number of dollars, or their expected return – is more important.

In cases where the poor lack the most basic needs, and are living hand-to-mouth, we ought to prioritize the number of dollars, and institute redistribution rather than reparations. This is because, if the poor are so poor that they lack money to invest, it does not seem to matter than the money they could invest would have higher expected return. Moreover, it seems that the value of ensuring very basic necessities is greater than the value of ensuring that poor minority members have money with equal expected return as the money of majority members.

But when the poor are not quite so poor, and do have some income which they can invest, we have good reason to provide reparations to the wealthy, rather than redistribution to poor. This is true even if the redistribution would be for poor minority members in particular. Were reparations to be redistributed to poor minorities, this would create differential treatment between poor minority members and poor majority members. Poor minority members would be disadvantaged in that each dollar would be worth less, but advantaged in that they would have more dollars compared to poor majority members. It is generally wrong to provide a disadvantage to the minority in one domain, even if they are given an advantage in another. For example, it would be wrong to admit minority applicants to university with lower grades on their entry examinations, thus giving them an advantage, while also requiring that only minority members undergo an interview, thus giving them a disadvantage. The differential treatment would be wrong even if each minority member was not all-things-considered disadvantaged.[[33]](#footnote-33) The same logic is at play with reparations. If Pao won $16 million, and this was redistributed to poor women, then women would be advantaged in one way – they would have slightly more money than poor men – but disadvantaged in another – they would have dollars with lower expected yield compared to the dollars of men. If such differential treatment is wrong, then it is better to allow Pao to keep her $16 million. Only then can the advantages and disadvantages held by poor women and men be on par.

There is another competing consideration. Sometimes the interests of poor individuals likely to face discrimination must be weighed against the interests of poor individuals likely to face other disadvantages.

Consider, for example, poor individuals without skills. Such individuals are likely gain lower salaries compared to poor individuals with skills. They therefore hold dollars with lower expected yield compared to the dollars of poor individuals with skills. Poor individual without maths skills, for example, holds dollars with lower expected yield compared to those with math skills. If we think this is unjust, it makes sense to redistribute from those good at math who earn a lot to those bad at math who earn less. If Pao and Kiden were successful partly because of their maths skills, it would make sense for the government to tax any reparations they received at 100% and redistribute these reparations to those with who made less money because of their fewer skills. But in doing so, poor minority members’ dollars would have lower expected yield: a poor woman in California who was good at math would hold dollars with a lower expected yield compared to a poor man in California who was good at math, even though a poor woman who was bad at math would hold money with the same expected yield as a poor woman who was good at math.

We are therefore faced with a dilemma: either poor minorities are protected from discrimination, by ensuring their dollars do not have lower expected yield because of discrimination, or poor unskilled individuals are protected from inequality, by ensuring their dollars do not have lower expected yield because of their lack of skills.

I do not have a solution to this dilemma, but if one values the type of equality described above, a compromise could be reached. This might involve taxing some of Kiden and Pao’s reparations, redistributing the taxes to the unskilled, and allowing Kiden and Pao to keep the rest. Regardless of whether one adopts such a compromise, it remains the case that any reparations remaining in the hands of Kiden and Pao are justified by appealing not to the rights of Kiden and Pao, but the rights of poor minority members.

5. Objections

There are, broadly speaking, four potential objections against the Investment Argument.

5.1 The poor have no right to unjust gains

One objection is that, if poor minorities are less likely to grow wealthy because of discrimination, but growing wealthy is unjust, then we would not want to promise the poor that they will be given reparations if they face discrimination while wealthy. To see the force of this argument, imagine that minorities in a society are more likely to have property they steal stolen from others, and so less likely to grow wealthy from theft. We would not want to promise a minority member that, if she steals my laptop, and Jake steals it from her, the police will return the laptop to her rather than myself. It is true that this minority member is worse off because she cannot grow as wealthy as majority thieves, but we would not want to avoid this state of affairs by assuring her that she will have access to any laptop she steals. This is because she has no right to the laptop she steals.

Here is why this objection falls. The initial puzzle I presented presumed that the wealthy have no right to their wealth because of distributive concerns: they ought not receive wealth when the poor are in need of more valuable resources. If the concern is that the poor are in need of more valuable resources, but poor minorities’ resources become more valuable if wealthy minorities access reparations, there is one less reason to suppose the wealthy have no right to reparations. The same conclusion could be reached in the case of the laptop if the same distributive value were at stake. The same distributive value would be at stake if we presumed that theft is only wrong because it undermines poor individual’s access to resources. In such a world, if Azaria steals my laptop, after which the laptop is stolen by Jack because he is racist against Azaria, the police should only return the laptop to Azaria if this somehow increased the resources of the poor. One way this might increase the resources of the poor is if Azaria is poor and I am not. Another way this can help the poor is if, though Azaria is wealthy, returning the laptop to him increases the value of the dollars which poor individuals hold. This might be the case if poor members of Azaria’s minority group hold dollars with lower expected return-on-investment because, if they invest money in starting a gang which steals laptops, they are more likely to have the laptop stolen by others.

Of course, in reality we often view theft as wrong for other reasons. But in the dilemma I presented the only reason the wealthy would have no right to reparations is that their resources ought to be redistributed to the poor. The way to defend reparations, then, is to demonstrate that reparations help with redistribution to the poor. Given that reparations to the wealthy redistribute resources to the poor, by increasing the value of their dollars, we have good reason to provide reparations to the wealthy.

5.2 When discrimination ends

There is a second objection. Some might claim that the Investment Argument is inapplicable when minorities no longer face discrimination. If we learned that women in venture capitalist firms and Bari citizens in Juba no longer faced discrimination, then poor women and poor Bari citizens would no longer hold dollars with yield lower due to discrimination. If so, there would be no justification for providing reparations to individuals who are wealthy today, and experienced discrimination in the past. Doing so could not be justified by appealing to the importance of protecting poor minorities, because there is no reason to believe they will face discrimination in the future.

In such cases, we still have reason to adopt a general rule of providing reparations to the wealthy. If all are aware reparations for discriminatory losses are provided even if discrimination ends in the future, then all individuals today can be more confident that their dollars do not have lower expected yield because of discrimination. For example, imagine that a woman at 2017 is applying for a job in a venture capitalist firm, and currently has very little money, each dollar having a lower expected yield because of expected discrimination. She may grow wealthy in the near future, in 2019, and also will likely experience discrimination in being promoted further. She is also aware that no reparations for discrimination will be provided if she seeks reparations for discrimination at 2045, if discrimination against women will cease in 2045. Assuming it will take her until 2045 before she can successfully build up a case against her employer, she can expect to receive no reparations for the discrimination she might face in 2018. If this is true, then in 2017 her money has lower expected value compared to a man’s: she knows that she may not make as much money as a man, and will not receive reparations if she only files a lawsuit when discrimination is no longer prevalent.

In other words, for poor members of minorities to be confident their money does not have lower expected yield due to discrimination, they must be confident that reparations will be provided for discrimination, even if discrimination will cease by the time they seek reparations.

5.3 Advantage alongside disadvantage

There is a third objection to the Investment Argument. The argument seems inapplicable when poor individuals are likely to face both discrimination and advantage. There is some evidence, for example, that Asian-Americans are more likely to be hired in tech firms, but less likely to be promoted to managerial positions in tech firms, due stereotypes that Asians are not good at managing.[[34]](#footnote-34) If a given Asian-American experiences unfair advantages alongside discrimination, she can expect yields from her investment in education which is the same as the yields of those unlikely to face either advantage or discrimination. If this is true, then we cannot defend reparations for wealthy Asian-Americans by claiming poor Asian-Americans would otherwise hold dollars with lower expected yields.

Even if there is evidence that a minority group faces both advantages and discrimination, and their dollars do not have lower expected yield from discrimination, the Investment Argument still justifies reparations. Individuals facing both advantage and discrimination hold dollars with different sorts of values compared to the dollars held by the majority. If an individual is more likely to be hired, but less likely to be promoted, then her dollars are worth more in one sense – they are more likely to yield employment – and less in another – they are less likely to yield great wealth. In other words, her dollars yield an advantage in one way and a disadvantage in another. It may be wrong, as noted above, to provide a disadvantage to a minority in one domain, even if they are given an advantage in another.[[35]](#footnote-35) To avoid this wrong, the government could ensure that, should anyone face discrimination in the future, they will be given reparations for this discrimination. Assuming this will counteract both the advantages and disadvantages any one group obtains, then the dollars of all individuals will not have lower expected yield due to discrimination they will face.

A similar objection, and similar response, arises in case where all individuals in society face discrimination, but in different sectors. Imagine that Group A is discriminated against in sector X, Group B is discriminated against in sector Y, and Group C is discriminated against in sector Z, but Group A has an unfair advantage in sectors Y and Z, Group B has an unfair advantage in sectors X and Z, and Group C has an unfair advantage in sectors X and Y. [[36]](#footnote-36) There is some evidence of this in South Sudan. Bari citizens are more likely to be sold land compared to Nuer and Dinka citizens, but less likely to be hired in employment compared to Nuer and Dinka citizens. In such a scenario, it may be that nobody is worse off from discrimination. All individuals who are poor may therefore hold dollars whose return is not lower due to discrimination, precisely because all face discrimination. We therefore cannot claim that the wealthy should be given reparations to ensure poor individuals do not hold money with lower yield due to discrimination they expect to face.

We can respond to this objection by again appealing to the way dollars hold different values. If dollars held by poor Bari citizens have higher expected value when invested in land, and lower expected value when invested in education, and if one can be wrongly discriminated against when advantaged in one domain and disadvantaged in another, then poor Bari citizens can be wrongly discriminated against. The way to counter this wrong is to provide reparations to Bari who face discrimination in any given domain, including wealthy Bari individuals who face discrimination in any domain. Similarly, if poor Dinka citizens hold dollars that have higher expected return when invested in education and lower return when invested in land, and so are advantaged in one domain and disadvantaged in another, they are wronged. The harm from this wrong can be avoided by providing reparations to all Dinka citizens who face discrimination in any given domain.

5.4 Minorities born wealthy

There is a final objection. We might suppose that, if we care about ensuring that poor minorities are not disadvantaged, then we ought only to promise poor minorities that they will receive reparations if they grow wealthy and face discrimination. We needn’t promise those who were born wealthy the same reparations should they experience discrimination. Promising those born wealthy the same reparations will not help the poor compared to redistributing these reparations to the poor.

The above objection overlooks the ways that those born poor may one day give birth to those born wealthy. If the poor might have children born wealthy, and their children will be unable to access reparations for discrimination, then their children will be disadvantaged because of discrimination. If their children will be disadvantaged then they will be disadvantaged as well. At least, they will be disadvantaged if they have an interest in their children not being disadvantaged compared to other wealthy individuals. The only way to ensure that the poor are not disadvantaged in this manner is to ensure not only that they will receive reparations if they grow wealthy and face discrimination; we must ensure that their children will receive reparations if their children are born into wealth and face discrimination.

For example, when Kiden was still poor, she had pounds in her pocket that could be invested in various ventures, and hoped to grow wealthy, after which she would leave money she made to her son upon death. If her son was born wealthy, and would likely face discrimination during his life, his dollars would have lower expected return compared to the dollars of those born to wealthy members of the majority. Therefore, when Kiden was poor she would be disadvantaged compared to poor members of the majority. Poor individuals of the majority would know that, if they grew wealthy, they could bequeath their savings to their children, and their children would inherit dollars with higher expected return. To ensure this unequal value does not occur, we must promise the poor that, if they grow wealthy and their children are born wealthy, their children will receive reparations for any discrimination they face.

The above argument, it is worth emphasizing, is relevant even if one is opposed to inheritance more generally. In the world we live in, there is no 100% inheritance tax, and parents can expect to give money to their children. Poor parents are aware that, if their children will face discrimination, the dollars their children inherit will have lower expected return compared to dollars held by children unlikely to face discrimination. In order to ensure that their children’s dollars do not have lower expected return due to discrimination, governments must assure all that, if one’s children will face discrimination, they will be given reparations for the loss from this discrimination.

6. Conclusion

When Kiden was forced to give up her land, she lost land due to discrimination. When Ellen Pao was overlooked for promotion, she failed to obtain money due to discrimination. We might suppose that Kiden and Pao had a right to the wealth they lost. But in obtaining wealth they lost, they were re-obtaining wealth which they never had a right to own. They never had a right to own this wealth if we feel individuals have no right to vast amounts of wealth that others are in desperate need.

I considered three arguments against this claim. The first argument focused on harm: victims of discrimination are harmed from wrongdoing, and individuals have a right to compensation for harms from wrongdoing. This argument ought to be rejected. Individuals do not generally have a right to reparations for harm if the harm involves the loss of assets for which an individual has no right. The second argument related to planning: victims of discrimination may suddenly find their lives altered, and so are unable to realize their life plans. Reparations can help a person continue the plans they began prior to the discrimination. This argument ought to be rejected as well, on similar grounds: individuals do not have a right to realize life plans which are dependent on assets to which they have no right. Finally, I considered the claim that even if individuals have no right to wealth they lost, they have a right to wealth lost from discrimination. Just as it is wrong for the state to use inadmissible evidence to prosecute a thief, even if the thief has no right to the goods she stole, it is wrong for the state to use discrimination against minorities, even if the minorities have no right to the wealth they lost. This explanation, too, is limited. Even though Pao and Kiden lost assets due to discrimination, the state would not have been the agent using discrimination had it refused to provide them reparations.

I presented a final and more promising argument. It began with the premise that individuals have dollars with lower value if their dollars have lower expected return-on-investment. One way that an individual can hold dollars with a lower expected return is if they are members of a minority that expects to face discrimination in the future. If a poor member of the Bari tribe can expect to face discrimination in the future, including if she grows wealthy, than the maximum money she can obtain from investments is lower than the maximum money that non-Bari members can obtain, and so the value of her money is lower. If the poor are wronged when they hold dollars with lower value due to discrimination, we ought to counter this wrong. One way to counter this wrong is to promise poor individuals that, if the ever face discrimination in the future, and lose out on assets as a result, they will receive reparations equal to the worth of these lost assets. Only then will the dollars they hold now not hold lower value due to discrimination they will face later.

Unlike other arguments supporting reparations, this theory explains why the wealthy have a right to reparations even in a society where the poor are much worse off, and why they have a right to reparations equal to the wealthy they lost. Only by ensuring reparations equal to wealth lost can we ensure that poor minority members are not disadvantaged compared to poor majority members.

The above theory, it is worth emphasizing, is limited to cases involving discrimination. It provides no justification for reparations to counter other wrongs, such as physical assault or theft. Imagine that Kiden had lost her land not because she was Bari, but because of general state-supported violence against all, or imagine that Pao had been overlooked for promotion not because she was a woman, but because she was physically assaulted on the street, suffering from head injuries that made her unable to work. In these cases, providing them reparations would, in one way, help the poor: the poor’s expected return of each of their dollars could increase, because they would be certain that, if they invested money in a given field, their profits would be protected by violence and assault. But the number of dollars they hold would also decrease compared to a world where the government redistributed reparations to the poor. There is no reason to believe the first policy is preferable to the other and the Investment Argument provides no reason to suppose it is. This is because the Investment Argument focuses on the importance of ensuring that poor minority members’ are not demeaned, and they are demeaned if they hold dollars of different value due to the discrimination they will likely face. It is not clear if anyone is demeaned in a world where the wealthy cannot obtain reparations for other sorts of wrongs. If one feels that the wealthy still ought to obtain reparations for other sorts of wrongs, another theory is required.

1. Personal Interview, Juba, 26 December 2012. [↑](#footnote-ref-1)
2. Ellen Pao Vs. Kleiner Perkins Caufiled and Byers LLC, Complaint from Ellen Pao, available at <https://s3.amazonaws.com/s3.documentcloud.org/documents/1672582/pao-complaint.pdf>; Jessica Bennett, ‘Ellen Pao is Not Done Fighting,’ New York Times 8 September 2017, accessed on 27 November 2017 at <https://www.nytimes.com/2017/09/08/style/ellen-pao-gender-discrimination-silicon-valley-reset.html> [↑](#footnote-ref-2)
3. Michael Heller and Christophoer Serkin, “Revaluing Restitution: From the Talmud to Postsocialism,” Michigan Law Review (97)(6)(1999) at 1402; Hal Lehrman, “The New Germany and Her Remaining Jews: Reporters Notebook,” Commentary Magazine, 1 December 1953, accessed on 18 April 2017 from https://www.commentarymagazine.com/articles/the-new-germany-and-her-remaining-jewsa-reporters-notebook. [↑](#footnote-ref-3)
4. Will Kymlicka, *Multcultural Citizenship: A Liberal Theory of Minority Rights*, at 220; Christopher Kutz, ‘Justice in Reparations: The Cost of Memory and the Value of Talk,’ Philosophy and Public Affairs 32(3)(2004):277-312 at 283 [↑](#footnote-ref-4)
5. Marcel Rutten, ‘Land Reform in Africa: Lessons from Kenya,’ in (eds) A.L. Naerssen, M. M. E. M. Rutten, and A. Zoomers, The Diversity of Development: Essays in Honor of Jan Kleinpenning, Assen: Van Gorcum. [↑](#footnote-ref-5)
6. Jeremy Waldron, ‘Superseding Historic Injustice,’ Ethics 103(1)(1992):4-28 at 6-7; Kutz ibid at 279-280. [↑](#footnote-ref-6)
7. Ronald Dworkin, "What is Equality? Part I: Equality of Welfare," Philosophy and Public Affairs 10(3)(1981): 85-246; "What is Equality? Part 2: Equality of Resources," Philosophy and Public Affairs 10(4)(1981): 283-345. [↑](#footnote-ref-7)
8. Richard J. Arneson, “Equality and Equal Opportunity for Welfare,” Philosophical Studies 56(1)(1989):77–93; G.A. Cohen, “On the Currency of Egalitarian Justice,” Ethics 99(1989), pp. 906–944; Shlomi Segall, *Equality and Opportunity*, Oxford: Oxford University Press 2013. [↑](#footnote-ref-8)
9. Harry Frankfurt, "The Moral Irrelevance of Equality," Public Affairs Quarterly 14(2000):87-103; Liam Shields, *Just Enough: Sufficiency as a Demand of Justice*, Edinburgh University Press 2016; Martha Nussbaum, “Aristotelian Social Democracy,” in (eds) R. B. Douglas, Gerald M. Mara, and Henry Richardson, *Liberalism and the Good*, New York: Routledge 1990: 203–252. [↑](#footnote-ref-9)
10. Robert Nozick, *Anarchy, State and Utopia*, Oxford: Blackwell 1974 at 152-153; Judith Jarvis Thomson, ‘Preferential Hiring,’ in (ed) William Parent, Rights, Restitution, and Risk, Cambridge: Harvard University Press 1986 at 149; Gerald F. Gaus, ‘Compensation and Equality,’ in (eds) John Chapman, *Nomos XXXIII*, NYU Press 1991; Perry, ‘On the Relationship Between Corrective and Distributive Justice,’ in (ed) J. Horder, Oxford Essays in Jurisprudence, Oxford: Oxford University Press 2000 at 269; Kurtz ibid at 300; Dennis Klimchuk, ‘On the Autonomy of Corrective Justice,’ Oxford Journal of Legal Studies 23(1)(2003):49-64 at 50. [↑](#footnote-ref-10)
11. Some, such as Rawls, seem to imply that discrimination can be wrong even if an individual is not materially harmed, but loses self-respect, which can be essential for obtaining various goods. If this is true, then an individual’s self-respect might continue to be undermined even if they obtain reparations. Others claim, with compelling examples, that discrimination can be wrong even if an individual experiences no harm at all, including no reduction in their self-respect. See Benjamin Eidelson, ‘Treating people as Individuals,’ In: Deborah Hellman and Sophia Moreau (eds.), *Philosophical Foundations of Discrimination Law*, Oxford: Oxford University Press 2013 at 205; Mollie Gerver, ‘Paying Minorities to Leave,’ Politics, Philosophy and Economics (forthcoming); Deborah Hellman, *When Is Discrimination Wrong?* Cambridge, MA: Harvard University Press 2008 at 27-35; John Rawls, *A Theory of Justice,* Revised Edition, Cambridge: Harvard University Press 1999, 155-56 and 386 cited by Catherine Lu, ‘Delivering the Goods and the Good,’ in (ed.), David Cyzenhaus and Mayo Moran, *Calling Power to Account: Law, reparations, and the Chinese Canadian Head Tax Case*, Toronto: Toronto University Press, 147-164 at 154; Adam Slavny and Tom Parr, ‘Harmless discrimination,’ Legal Theory 21(2)(2015): 100–114. [↑](#footnote-ref-11)
12. Rodney C. Robert, ‘The Counterfactual Conception of Compensation,’ Metaphilosophy 37(3-4)(2006):414-428 at 416 and Waldron ibid at 8-14. [↑](#footnote-ref-12)
13. Robert ibid. [↑](#footnote-ref-13)
14. See footnote 11. [↑](#footnote-ref-14)
15. There are different formulations of causation that allow for an agent to cause an outcome in this way. See Frank Jackson, ‘What Effects?’ in (ed.) Jonathan Dancy, *Reading Parfit*, Blackwell Wiley 1997; Michael McDermott, Influence vs. Sufficiency, *The Journal of Philosophy* 99(2)(2002)84-101; David Lewis, ‘Causation as Influence,’ The Journal of Philosophy 97(4)(2000):182-197. [↑](#footnote-ref-15)
16. As Anderson notes, ‘compensatory damages for lost income in the law of torts are subject to income taxes.’ If this is true, and Kiden and Pao had no right to the money they gained in reparations, then their reparations could simply be subject to 100% taxation. See Elizabeth Anderson, ‘Compensatory Justice,’ in (ed.) John Chapman, *Nomos XXXIII*, NYU Press 1991. [↑](#footnote-ref-16)
17. Pablo De Greiff, *The Handbook of Reparations*, Oxford: Oxford University Press 2008 at 466 cited by Catherine Lu, *Justice and Reconciliation in World Politics*, Cambridge University Press 2017 at 243. [↑](#footnote-ref-17)
18. Claudia Rosenbaum, ‘The Taylor Swift Butt-Grabbing Trial is About to Start and This is How We Got Here,’ Buzzfeed, 5 August 2017, accessed on 6 May 2018 from https://www.buzzfeed.com/claudiarosenbaum/taylor-swift-trial-what-to-know?utm\_term=.oaY2glYg2#.ijPgp6xpg; Two Black Men Arrested at Starbucks Settle with Philadelphia for $1 Each,’ The Washington Post, 3 May 2018, accessed on 6 May 2018 from https://www.washingtonpost.com/news/business/wp/2018/05/02/african-american-men-arrested-at-starbucks-reach-1-settlement-with-the-city-secure-promise-for-200000-grant-program-for-young-entrepreneurs/?noredirect=on&utm\_term=.413037cf3753 [↑](#footnote-ref-18)
19. Robert Goodin, “Compensation and Redistribution,” Nomos 33, Compensatory Justice, 1991: 143-177 at 53-57 [↑](#footnote-ref-19)
20. Cara Nine, ‘The Wrong of Displacement: The Home as Extended Mind,’ The Journal of Political Philosophy (Forthcoming) [↑](#footnote-ref-20)
21. Anna Stilz, “Nations, States, and Territory,” *Ethics* 121 (2011): 572–601 at 582–87; Anna Stilz, ‘Occupancy Rights and the Wrong of Removal,’ Philosophy and Public Affairs 41(4)(2013):324-356 at 336-341; Cara Nine, ‘The Wrong of Displacement: The Home as Extended Mind,’ The Journal of Political Philosophy (Forthcoming). [↑](#footnote-ref-21)
22. It is not enough, as Goodin notes, to claim that an individual has a right to reparations to continue plans formed with reasonable expectations, because one can reasonably expect to be wronged. If a farmer expects to have her land taken because of her ethnicity, we cannot claim the theft disrupted her reasonable expectations, as she expected her land to be taken. In such cases the farmer would be wronged because she had reason to believe the status quo – access to her land – ought to not be disrupted due to discrimination. See Robert Goodin, “Compensation and Redistribution,” Nomos 33, Compensatory Justice, 1991: 143-177 at 53-57; Jeremy Waldron, ‘Superseding Historical Injustice,’ Ethics 103(1)(1992):4-28 at 18; Stephen Perry, ‘On the Relationship Between Corrective and Distributive Justice,’ in (ed. Jeremy Horder), Oxford Essays in Jurisprudence, Fourth Series, New York: Oxford University Press 2000), pp 237-263. [↑](#footnote-ref-22)
23. Section 4 in Pablo Kalmanovitz, "Corrective Justice vs. Social Justice in the aftermath of War," in (eds.) Morten Bergsmo, César Rodríguez Garavito, Pablo Kalmanovitz and Maria Paula Saffon, *Distributive Justice in Transitions* , Torkel Opsahl Publisher, International Peace Research Institute, Oslo 2010. [↑](#footnote-ref-23)
24. Goodin ibid at; Waldron ibid at 18-19; at Kutz ibid at 295. [↑](#footnote-ref-24)
25. For example, reparations to holocaust survivors, and to sex slaves of the Japanese wartime army, took decades to reach the courts. See Michael J. Bazyler, ‘The Holocaust Restitution Movement in Comparative Perspective,’ Berkeley International Law Journal 20(1)(2002):11-44 [↑](#footnote-ref-25)
26. I am not claiming here that the poor’s rights to redistribution can take priority over the wealthy’s right to reparations. I am claiming that if the wealthy have no rights to reparations if they lost wealth to which they have no right. For claims similar to the former, See Kutz ibid at 295-296 and Dennis Klimchuk, ‘Autonomy of Corrective Justice,’ Oxford Journal of Legal Studies 23(1)(2003):49-64 at 63. [↑](#footnote-ref-26)
27. Jon Elster, ‘On Doing What We Can: An argument against post-Communist restitution and retribution,’ East European Constitutional Review 1(2)(1992):15; Kalmanovitz 2010 ibid; Kutz ibid at 301-302; Stilz 2013 at 353-354; Waldron ibid at 24-28. [↑](#footnote-ref-27)
28. Catherine Lu, ‘Delivering the Goods and the Good,’ in (ed.), David Cyzenhaus and Mayo Moran, *Calling Power to Account: Law, reparations, and the Chinese Canadian Head Tax Case*, Toronto: Toronto University Press, 147-164 at 155-159. [↑](#footnote-ref-28)
29. Deborah Hellman, *When Is Discrimination Wrong?* Cambridge, MA: Harvard University Press 2008; Benjamin Eidelson, ‘Treating People as Individuals,’ in (eds) Deborah Hellman and Sophia Moreau, *Philosophical Foundations of Discrimination Law*, Oxford: Oxford University Press at 205. [↑](#footnote-ref-29)
30. Indeed, a version of this logic may be at play in the United States. Throughout the 19th century prosecutors would often accept bribes from Irish gangsters and avoided arresting them, later accepting bribes from Jewish gangsters in the early 20th century, followed by bribes from the Italian mafia in the mid-20th century. The practice stopped in the 1970s, when African-Americans began dominating crime, and today prosecutors are far more likely to arrest African-Am­ericans compared to White Americans committing the same crimes. Even if prosecutors are arresting some Black Americans who really did commit an injustice, if they are arresting them because of their ethnicity, they are treating them in an impermissible manner. If they are treating them in an impermissible manner, they ought to avoid such arrests until discrimination ends. See Malcolm Gladwell, ‘The Crooked Ladder: The criminal guide to upward mobility,’ The New Yorker, 11-18th August 2014 [↑](#footnote-ref-30)
31. More generally, even evidence if relevant for determining if an individual likely committed a crime, it may be that we ought not use this evidence. See H.L. Ho, *A Philosophy of Evidence Law: Justice in the Search for Truth*, Oxford: Oxford University Press 2008 ch. 5 and 6. [↑](#footnote-ref-31)
32. Fulliwider suggests that, if we voluntarily benefit from injustice, this makes us complicit in the injustice, and we therefore have a duty to compensate to the victims. Thompson similarly argues that benefits can give us a duty of compensation to victims. Butt builds on these arguments, claiming that the reason we ought to provide compensation is to condemn the injustice. See Fulliwider, ‘Preferential Hiring and Compensation,’ in (ed.) Steven M. Cahn, The Affirmative Action Debate (New York: Routledge 2002), 68-78 at 75; Judith Jarvis Thomson, ‘Preferential Hiring,’ 152; Butt 2007 at 143. [↑](#footnote-ref-32)
33. Others have noted that discrimination can be wrong even if no agent is harmed, raising similar cases of those who are disadvantaged and advantaged because of discrimination. See Slavny and Parr ibid at 100–114; Gerver ibid; Hellman ibid at 27-35; Eidelson ibid at 205. [↑](#footnote-ref-33)
34. Some claim, for example, that positive stereotyping helps Asian-American students at school, garnering them higher grades. Others have noted that Asian Americans also face a ‘bamboo ceiling,’ where they lose out on promotion to less-qualified white candidates. If Asian Americans are advantaged in education and hiring, and then disadvantaged at the promotion stage, then the money they hold before discrimination needn’t have lower expected yield due to expected discrimination. It will have equal expected yield due to a combination of unfair advantage and unfair discrimination. For more on discrimination and advantage amongst Asian-Americans, see Jennifer Lee and Min Zhou, *The Asian American Paradox*, New York: Russel Sage Foundation 2015; Deborah Woo, *Glass Ceilings and Asian Americans*, Walnut Creek, Lanham, New York and Oxford: Alta Mira Press 2000; Buck Gee, Denise Peck and Janet Wong, ‘Hidden in Plain Sight: Asian American Leaders in Silicon Valley,’ Ascend: Pan Asian Leaders 2015, accessed on 25 November 2017 at <https://c.ymcdn.com/sites/ascendleadership.site-ym.com/resource/resmgr/Research/HiddenInPlainSight_Paper_042.pdf> [↑](#footnote-ref-34)
35. As noted in the example I raised earlier, it would be wrong to arbitrarily admit minority applicants to university with lower grades on their A-levels, thus giving them an advantage, while also requiring that only minority members undergo an interview, thus giving them a disadvantage. [↑](#footnote-ref-35)
36. This possibility has been raised in the context of gender-based discrimination. We might imagine a world where men are discriminated against in some spheres, and women in others, such that nobody is worse off from discrimination. See Kasper Lippert-Rassmusen, *Born Free and Equal? A philosophical inquiry into the nature of discrimination*, Oxford: Oxford University Press 2013 at 21 and Anca Gheaus, ‘Gender Justice,’ Journal of Ethics and Social Philosophy 6(1)(2012):1-24 at 9-10. [↑](#footnote-ref-36)