

## **A Justification of Compensation to the Descendants of Wronged Parties: An Intended Analogy**

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Claims to compensation for injustices committed against one's ancestors are not favored, either by law or morality, for defensible reasons. The first concern is that claims to compensation generally should relate to a specifiable injury suffered by the claimant. This specifiability is preferred (1) so that a causal relationship can be identified between the wrongful act(s) and the injury sustained, (2) so that the extent of the injury sustained can be measured and an appropriate compensation determined and (3) so that the compensation can be assessed against the party or parties responsible for the wrongful act(s).

The second concern pertains to intervening causal factors. When claims to compensation are derived from specifiable injuries suffered by someone other than the claimant, there is the profoundly complex issue of intervening causation. This complicates a determination of how and to what extent the injury sustained by the wronged party affected the injury of the party claiming compensation. For example, when the dependent of someone wrongfully killed claims financial support from the party responsible for the death, it is fairly non-controversial to award compensation in the amount of the wage earnings lost that would have supported the claimant but for the wrongful death. But it is problematic (because it is open-endedly speculative) to decide whether and how to award compensation for events in the dependent's life that might be explained (but not conclusively) in terms of the lost favorable influence of the deceased upon the dependent's maturation. Indeed, the further in time from the death such events occur, the harder it is to dismiss intervening factors, the choices of the dependent prominent among them, as significant contributors to an explanation of responsibility for the events. If we recognize liability for these events for which there are many influencing factors, the deceased's absence included among them, there is no crisp delineation of where that liability ceases. Someone

acutely affected by the dependent's activities, the offspring of that dependent, for example, might trace the inadequacies that they suffered on account of the inattentions of their parent (i.e., the dependent of the deceased) back to the party that caused the original death. All of which leads to the third concern, namely that the passage of time, as a matter of public policy, should be deemed as appropriate grounds to cut off theories of liability except in extraordinary circumstances.

It is notable that these three concerns which militate against compensation for injustices committed against a claimant's ancestor are grounded in situations of discrete wrongs and identifiable wronging and wronged parties. This bias is understandable: it is not sufficient to cite the overall context or generally prevailing attitudes (or the human condition, for that matter) and expect a remedy to be shaped for the effects of such amorphous conditions upon oneself. Disappointment is endemic and differences of opinion about the value of one's work produce or the reasonable compensation to which one is entitled for expending ability and effort are hardly persuasive reasons to redirect the status quo in order to better satisfy one's expectations. If a wrong is to be compensated, it must be a wrong that is acknowledged as such either explicitly or implicitly. If a contract is breached, then that breach constitutes an explicitly recognized wrong for which compensation can be demanded. If there is no actual contract but a course of dealing creates "reasonable" expectations on the part of a party to those dealings and those expectations are disappointed "unreasonably" by the other, that disappointment will likely be compensated as an implicit wrong. Connecting injuries sustained with discrete wrongful acts and wrongful actors is useful because it provides a means of segregating those injuries for which we can recognize a culpable cause from those injuries for which we cannot. The latter injuries are instead left in a category of cosmically intractable coincidences and brute bad luck or even, perhaps, God's providence.

Yet despite the social utility of making such connections between injuries sustained and discrete wrongful acts, it is not clear that such a relationship is a necessary precondition to awarding compensation for an injury. If a school system (consistent with then prevailing knowledge and standards) stigmatized children with a physical defect because it misinterpreted the defect as evidence of a cognitive dysfunction, its

eventual recognition of the error is clearly sufficient justification for a remedial learning program to assist those children whose misdiagnosis led directly to inadequate or inappropriate training. The wrong in this situation is clearly identifiable as misdiagnosis and misplacement within the educational system, but it is only in some respects identifiable as a discrete action attributable to a discrete set of wrongful actors. The school, acting through its administrators and councilors, committed the wrong but, indirectly, so did the theorists of education and the physicians and the scientists who created the possibilities for the misdiagnosis. Moreover, the wrongfulness of the actions was not known to those who perpetrated it, presumably at no fault of their own, acting in reliance upon accepted standards and practices. Indeed, the terms "misdiagnosis" and "misplacement" really stand in for an ongoing course of action where prejudicial attitudes and misguided dispositions colored the evaluation of every act of the children suffering the physical defect. The wrong suffered is discrete only because it can be encapsulated in conveniently abbreviating terms. Really, the wrong suffered was comprehensive and dynamic: it eludes an exact calibration of definitive summary. A wrong nonetheless is recognized as the cause of the injury and someone (or something) is identified and charged with the responsibility of compensating for that wrong.

Thus, despite the preference for discrete wrongful acts and specific wrongful actors, there are situations where an overall pattern of abuse will suffice as the wrong with which to justify the award of compensation. The pattern of wrongful acts and wrongful actors is maintained for this elaboration but the threshold for acts and actors is modified to admit kinds of acts that tend to perpetuate a wrong rather than insisting upon a more exact causal explanation. But is this relaxed framework sufficiently flexible to accommodate injuries sustained by a present generation complainant that derive from a wrong suffered by a deceased ancestor? Although that situation mightily stretches the causal framework, the values that underlie the framework are preserved and so the framework persists as a means of gauging responsibility for the injury sustained and designing an appropriate remedy.

Returning to the situation of children with physical defects, if their defects were considered serious enough to render them incompetent and therefore ineligible for testate or intestate succession, and if recognition

of the misdiagnosis did not occur during their lifetimes but was delayed until the lifetimes of their grandchildren, those descendants should have at least a *prima facie* claim to reprobate the estate from which their ancestors were wrongfully excluded. The passage of time obviously complicates their claim. In many instances the assets of the estate from which they were excluded were negligible at the time of the exclusion or their condition when a claim is made upon them is inconsistent with a *de novo distribution*. In the easy case of an investment portfolio where only interest earnings are distributed to the beneficiaries, the descendants of a wrongfully excluded ancestor should be entitled to reprobate the estate and insist upon a redistribution that acknowledges their claim upon it through their ancestors.

Upon what grounds might we decline to acknowledge this claim to reprobate an ancestor's estate where the assets of the estate are considerable and intact? The claim apparently does not violate our specificity concern inasmuch as the injury suffered by the claimant does derive from a specific wrongful act, viz., the disinheritance. Similarly, there is no problem of intervening causal factors: the assets by stipulation are largely undiminished by the passage of time nor have they been transformed by the other beneficiaries into another form. The public policy in favor of cutting off liability on account of the mere passage of time presumably fails because the other two concerns are not violated. When we slip from this easy case, where the interest earnings of an investment portfolio are redistributed in order to include another claimant, to more complicated cases, where, for example, the assets have been substantially modified since the wrongful exclusion, our concerns reassert themselves. If a small business constituted the sole asset of the estate and the succeeding generations who have controlled that business have enlarged it exponentially, should the descendant of the wronged part take the same share in the significantly transformed business as he/she would have taken in the smaller business or should the claim be limited to the value of the business at the time of the wrongful exclusion (perhaps with allowances for inflation or adjustments that estimate the present value of a functionally similar business), or should some other equally tentative approach be taken? If some kind of discount approach is applied, a small business that has stumbled forward with little or no growth might not have a market value sufficient to pay off the claim of

the descendant even if it was liquidated. These several problems suggest others, all of which confirm the reasons offered to disfavor awards to the descendants of wronged parties. Even if the wrongful act can be identified, it can be extremely difficult to determine a present compensation for the ill defined injury suffered by the descendants of the wronged party. Intervening factors make it extremely difficult to judge the value of the benefit wrongfully denied. Yet it is objectionable to fashion a rule that acknowledges compensation for an instance of wrongful conduct where relief can be provided and denies compensation in another instance of the same kind of wrongful conduct because the provision of relief arouses these concerns. The wrongful act is the same: it is simply the complexity of fashioning relief that becomes the determinative factor and it seems a fairly arbitrary factor to use to make the decisive eligibility cut off.

In this hypothetical situation of children wrongfully excluded from their share in an estate several generations before their birth, the question then can be posed whether society should intervene to correct that prior injustice where the estate is no longer available to fund the correction? Let us assume first that the society in question is fairly well advanced so that it already guarantees certain services as a matter of right to its citizens. This assumption is necessary for two reasons: first, the society in question must generate sufficient revenue so that the provision of services to its citizens is not an unrealizable goal and, second, the concept of social redistribution schemes should be unacceptable, condemned, for example, as objectionable seizures of private property. The force of the question here is whether, given an existent scheme of social services funded by a redistribution of resources (even if they are primarily private resources), that scheme should attempt to provide compensation to present day claimants where a proposed estate redistribution is fatally muddled because of the depleted condition (or exhaustion) of that estate's resources?

The question cannot be answered before more information about the nature of the original wrong and the circumstances of the current claimants are addressed. If the claimants are presently prosperous beyond the norm of society, it would be unreasonable to bestow further benefits upon them. Despite the wrong perpetuated against their ancestors, the taint of the wrong has been attenuated by the passage of time. There is

strong circumstantial evidence that the original wrong did not effect a disabling injury upon succeeding generations. The same reasoning would seem to apply to claimants whose present economic conditions fall around the norm. Although they may have had to struggle against greater odds than they would have, had they had access to their ancestor's wrongfully deprived assets, they have apparently prevailed. A claim to social resources to make up for their greater struggle would entail a shift of social resources, intended to benefit those who are more needy than the norm, to individuals who are otherwise ineligible for those resources.

The claimants who are markedly below the norm and are descended from others who were similarly below that norm in a largely uninterrupted chain back to the originally wronged party have an entirely different claim to make. They suffer a present injury and there is a causal connection, however subject to objection about intervening causation, back to the original wrong. Because there has been no significant break in the situation *vis a vis* the norm, the burden of proof therefore lies with those arguing that responsibility for the present state of affairs has shifted to intervening causes. Such causes do complicate an attempt to exhaustively explain the present state of affairs as an effect of the original wrong, but the persisting subnormal condition creates a presumption that the impact of the original wrong has not been superseded by intervening causes.

This measurement of a present condition against a norm presumes that the original wrong effected a significant detriment to the wronged party. If the original wrong was trivial (for example, the deprived estate share would have been meager), even if a subnormal condition has persisted for the descendants of the wronged party, the triviality of the wrong proves an insufficient motivation to explore a causal connection to succeeding generations. If the original wrong was substantial (for example, the estate share would have been considerable), it is probable that the injury flowing out of the wrong significantly affected the condition of the wronged party. And the recognition of this significant impact upon the wronged party then funds the presumption about the permanence of the injury caused when succeeding generations remain at subnormal levels. Without a noticeable first effect, the chain of derivative effects trails off inconclusively. The presence of a dramatic contrast between the conditions that the wronged party should have held and the

condition imposed upon him/her triggers the presumption about a persisting taint upon succeeding generations.

The question remains why society should assume a role in compensating the present day claimants whose conditions *vis a vis* the norm can be traced to a qualifying, extensive past wrong suffered by an ancestor. In the hypothetical situation relied upon here, the original wrong depended upon a context to have its effect. The wrong stemmed from particular acts, but the acts were endorsed by a prevailing professional community and that community's mistake was compounded by the deference that society allowed to the profession's judgment. The original injury cannot be attributed to an isolated wrongful act but rather depends upon a fuller context to explain the sharpness and the severity of the injury sustained. If a single actor had wrongfully deprived another of his/her share in an estate several generations ago, the descendants of that wrongfully deprived party should pursue the actor or his/her descendants for a remedy. But if the wrongful act was endorsed by law and morality at the time of its occurrence as the kind of act that was proper and fair and if the actors who perpetuated the wrong were identifiable only partially, i.e., the social context both encouraged them and reinforced the effects of their actions, then responsibility for the wrong done cannot be restricted to specific actors but rather implicated society generally. Assuming then that a wrong committed against an ancestor was of this kind, and assuming further that the wrong made a significant impact upon the wronged party when it occurred and that the impact has not been overcome by succeeding generations, society is justified in providing compensation to the descendants of that wronged party. This justification prevails despite the otherwise governing concerns that disfavor such delayed compensation strategies.