

# HISTORIC INJUSTICE, GROUP MEMBERSHIP AND HARM TO INDIVIDUALS: DEFENDING CLAIMS FOR HISTORIC JUSTICE FROM THE NON-IDENTITY PROBLEM

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*Some claim “slavery did not harm the descendants of slaves” since, without slavery, its descendants would never have been born and a life worth living, even one including the subsequent harms of past slavery, is preferable to never having been born at all. This creates a classic puzzle known as the “non-identity argument,” applied to reject the validity of claims for historic justice based on harms to descendants of victims of historic wrongs: since descendants are never harmed by historic wrongs, they have no right to rectification. This conclusion is unintuitive.*

*This article explains the nature of harm involved in historic injustice, overcoming the hurdle the non-identity argument poses to historic justice claims. Historic injustice and the harms it generates are best understood as group harms. Claims for historic justice can be grounded in harms that currently living individuals suffer as a function of the harms their group or community presently suffers as a consequence of historic wrongs. One form of harm, “constitutive harm,” differs from the aggregative account of harm assumed by the non-identity argument and is immune to it. It is the type of harm people suffer as members of certain historically wronged groups and communities. Therefore, the constitutive harm people suffer in cases of historic injustice may serve as a basis for justifying claims for historic justice.*

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## INTRODUCTION

All claims for historic justice must overcome a common hurdle in the form of the "the non-identity argument," which denies that individuals can suffer harm as a consequence of historic prenatal events. For example, there are those who claim that "the descendants of slaves were not harmed by slavery"<sup>1</sup> because, had slavery never taken place, those particular individuals living today would never have been born.<sup>2</sup> As it is indisputable that most living descendants of slaves have a life that is worth living, it follows that they are better off living with the legacy of slavery than never having been born at all. More generally, the non-identity argument entails that an individual is not harmed by an event, such as an historic wrong, that is a necessary causal condition for his or her birth (or conception). In other words, a past wrong that is also a "but for" cause of the very existence of a person does not harm that person (assuming he or she has a life worth living).<sup>3</sup>

1. STEPHEN KERSHNER, *JUSTICE FOR THE PAST* 70 (2004).

2. *Id.*

3. The non-identity problem has been widely discussed in the literature. For some central contributions to this ongoing debate, see DEREK PARFIT, *REASONS AND PERSONS* 351-80 (4th prtg. 1989); Thomas Schwartz, *Obligations to Posterity*, in *OBLIGATIONS TO FUTURE GENERATIONS* 3-13 (R.I. Sikora & Brian Barry eds., 1978); Gregory S. Kavka, *The Paradox of Future Individuals*, 11 *PHIL. & PUB. AFF.* 93 (1982); James Woodward, *The Non-Identity Problem*, 96 *ETHICS* 804 (1986). Among the more recent significant

These non-identity argument implications that past events do not cause current harms invalidate the legitimacy of most claims for historic justice. Claims for historic justice are made in the present by living individuals and are based on harms those individuals currently suffer as a consequence of historic wrongs. According to the non-identity argument, historic wrongs never or seldom harm members of subsequent generations and therefore such claims are unfounded. In fact, according to the non-identity argument, historic wrongs such as slavery not only do not harm the descendants of the original victims of the historic wrong but also may benefit members of subsequent generations because those descendants are better off existing than not.

For some, including myself, claiming that historic wrongs do not harm members of subsequent generations and that most claims for historic justice are invalid is not only *prima facie* wrong but also offensive. Nevertheless, because claims for historic justice put a heavy burden on both the victims and those allegedly liable for the wrong, such claims must be justified. This is why the non-identity argument poses a considerable challenge to historic justice claims. This paper responds to that challenge.

The practical significance of the non-identity problem is amplified by the prevalence of claims for historic justice and reparations. For example, recently the Court of Appeals for the Seventh Circuit upheld a dismissal of several claims filed by descendants of slaves against large financial institutions for the harm those individuals claimed to have suffered as a result of those institutions' historic involvement in the slave trade and the slave economy in the U.S.<sup>4</sup> This case originated in nine separate suits filed by descendants of slaves in five different federal jurisdictions.<sup>5</sup> In another recent case the United States District Court for the Western District of Kentucky dismissed a claim for reparations on similar grounds.<sup>6</sup> Another example is a case in which the Court of Appeals for the Ninth Circuit upheld a lower court's dismissal of a claim for reparations brought against the United States government.<sup>7</sup>

Apart from litigation, over the past ten to fifteen years there have been many initiatives for acknowledging historic wrongs and their harmful effects on members of subsequent generations. For example, in 1993 the U.S. government apologized to the Native Hawaiians for the annexation

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contributions are Seana Valentine Shiffrin, *Wrongful Life, Procreative Responsibility, and the Significance of Harm*, 5 *LEGAL THEORY* 117 (1999); Jeff McMahan, *Wrongful Life: Paradoxes in the Morality of Causing People To Exist*, in *BIOETHICS* 445 (John Harris ed., 2001); Rahul Kumar, *Who Can Be Wronged?*, 31 *PHIL. & PUB. AFF.* 99 (2003).

4. *In re African-American Slave Descendants Litig.*, 375 F. Supp. 2d 721 (N.D. Ill. 2005) (rejecting several suits brought by descendants of slaves against companies who were involved in the slave trade for lack of standing, the political question doctrine and statutes of limitations), *aff'd as modified in* 471 F.3d 754 (7th Cir. 2006).
5. *In re African-American Slave Descendants Litig.*, 471 F.3d 754.
6. *Long v. United States*, No. 1:06CV-P176-M, 2007 U.S. Dist. LEXIS 68385, at \*9-13 (D. Ky. Sept. 14, 2007).
7. *Cato v. United States*, 70 F.3d 1103 (9th Cir. 1995) (affirming the dismissal of the appeal on the grounds of sovereign immunity).

of Hawaii;<sup>8</sup> in 1995 the Southern Baptist Convention apologized for sins of racism;<sup>9</sup> President Clinton contemplated apologizing for slavery;<sup>10</sup> Aetna Insurance Company apologized for slave insurance in 2000; and the University of Alabama apologized for slave labor in 2004.<sup>11</sup>

One of many international examples is the Waikato Raupatu Claims Settlement Act of 1995, wherein the British Crown apologized to the Maori people for the crimes following the colonization of New Zealand;<sup>12</sup> another is the annual “Sorry Day” in Australia, dedicated to remorse for the forced removal of Aboriginal children from their parents and placement in white families.<sup>13</sup> In fact, the newly formed Australian government recently announced its intentions to offer Australian Aborigines a formal governmental apology for past wrongs perpetrated against them.<sup>14</sup>

In exploring the non-identity argument, the main focus of the legal theory literature has been on the tort of wrongful life and other various bioethical (mainly procreative) dilemmas.<sup>15</sup> Nevertheless, in recent years there has been a growing interest in how this problem bears on historic justice claims.<sup>16</sup> This article contributes to that literature as well as to the general literature on the non-identity problem and historic justice.

The goal here is to construct an argument capable of defending claims for historic justice from the non-identity argument by conceptualizing a type of harm currently living individuals *can* suffer as a consequence of historic wrongs, the non-identity argument notwithstanding. The article proposes to focus on group membership as a way to understand historic injustice and the harms historic wrongs can generate, harms suffered by living individuals who are members of later generations of the historically wronged group. Claims for historic justice can be grounded in

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8. See ALFRED L. BROPHY, REPARATIONS PRO & CON 31 (2006); Eric A. Posner & Adrian Vermeule, *Essay: Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 696 (2003).

9. BROPHY, *supra* note 8, at 31.

10. *Id.* at 48.

11. *Id.* at 32.

12. Waikato Raupatu Claims Settlement Act 1995, Part 1 – Apology By the Crown to Waikato.

13. See *A Day to Honour the Stolen Generations*, CANBERRA TIMES, Apr. 7, 1998, at A12.

14. See Tim Johnston, *Australia to Apologize to Aborigines for Past Mistreatment*, N.Y. TIMES, Jan. 31, 2008, at A10.

15. For some recent examples, see Ronen Perry, *It's a Wonderful Life*, 93 CORNELL L. REV. 329 (2008); Justin Trent, *Health Care Law Chapter: Assisted Reproductive Technologies*, 7 GEO. J. GENDER & L. 1143 (2006); M.A. Roberts, *Supernumerary Pregnancy, Collective Harm, and Two Forms of the Nonidentity Problem*, 34 J.L. MED. & ETHICS 776 (2006); John A. Robertson, *Procreative Liberty and Harm to Offspring in Assisted Reproduction*, 30 AM. J.L. & MED. 7 (2004); Eric Rakowski, *Who Should Pay for Bad Genes?*, 90 CALIF. L. REV. 1345 (2002); Philip G. Peters, Jr., *Harming Future Persons: Obligations to the Children of Reproductive Technology*, 8 S. CAL. INTERDISC. L.J. 375 (1999); John A. Robertson, *Liberty, Identity and Human Cloning*, 76 TEX. L. REV. 1371 (1998).

16. See, e.g., Amy J. Sepinwall, *Responsibility for Historical Injustices: Reconceiving the Case for Reparations*, 22 J.L. & POL. 183 (2006); Leo Katz, *What to Compensate? Some Surprisingly Unappreciated Reasons Why the Problem Is So Hard*, 40 SAN DIEGO L. REV. 1345 (2003); Lukas H. Meyer, *Historical Injustice and the Right of Return*, 5 THEORETICAL INQUIRIES L. 305 (2004); Lukas H. Meyer, *Past and Future: The Case for a Threshold Notion of Harm*, in RIGHTS, CULTURE, AND THE LAW: THEMES FROM THE LEGAL AND POLITICAL PHILOSOPHY OF JOSEPH RAZ 143, 149-58 (Lukas H. Meyer et al. eds., 2003).

harms currently living individuals suffer as a function of the harms their group or community presently suffers as a consequence of historic wrongs. This is harm individuals suffer *as members* of historically wronged groups. The article argues that people may suffer “constitutive harm,” a type of harm that differs from the account of harm assumed by the non-identity argument, and that constitutive harm is immune to the non-identity argument. Furthermore, it is argued that constitutive harm is the type of harm people suffer when they suffer harm *as members* of certain historically wronged groups and communities.

The article begins with an introduction to the non-identity problem (section I) and brief outline of the article’s basic argument for dealing with this problem in the historic justice context (section II). It then explores the significance of groups in cases of historic injustice (section III) and explains how group harm can ipso facto harm members of that group (section IV). The discussion then turns to individuals, elaborating on the ideas of identity-forming attachments (section V) and on the concept of personal identity (section VI). Next is an exploration of identity-forming group attachment (section VII) and the value that harm to such groups can have to those formatively attached to such groups (section VIII). Finally, the concept of constitutive harm is introduced (section IX) and the entire argument consolidated (section X). The article then turns to some theoretical loose ends in the argument, namely distinguishing constitutive harm from other forms of harm (section XIa) and addressing the notion of group identity (section XIb). The final section (section XII) addresses some implications the argument has on rectification, responsibility, standing and statutes of limitation.

## I. THE NON-IDENTITY PROBLEM

According to the non-identity problem, an act that is a necessary condition for an individual’s birth (or conception) cannot harm that same individual. According to this line of reasoning there are at least two types of acts or choices we have in relation to future people<sup>17</sup>: “identity-neutral choices” or “same-people choices” and “identity-constituting choices” or “different-people choices.”<sup>18</sup> “Same-people choices” are choices that may affect a future individual for better or worse but do not determine the identity of that individual. In other words, had that act or choice not taken place, the individual would still have existed. In contrast, many current acts and choices determine, as causes in fact, the identity of future people. When they do, such acts function as “different-people choices” or “actions” – meaning that had people chosen differently, history would have taken a different course and different individuals, with different parents, DNA, history, memories, etc., would have been born.<sup>19</sup>

17. “Future people” are people who will be born in the future.

18. PARFIT, *supra* note 3, at 355-56. Parfit discusses three kinds of choices; here I am only interested in the two.

19. The multiplicity of “different-people choices” is explained by the fact that events have a growing causal ripple effect, which determines the identity of more and more future people as time goes by. For a discussion of this phenomenon in the

The non-identity argument holds that a wrongful “same-people choice” can subsequently harm those individuals affected by the choice, while “different-people choices” rarely harm individuals whose existence is causally determined by those very choices. If an individual has a life that is worth living, it follows that she is better off existing with the effects of past choices than never having been born at all.<sup>20</sup> That individual was not harmed by any of the “different-people choices” in her past because for her, existence is better than non-existence.

Another way to interpret the non-identity problem is to argue that “different-people choices” cannot *ever* make the people whose existence depends on those choices either better or worse off. According to this reading of the problem, existence is a precondition for personal value.<sup>21</sup> Personal value is predicated on the existence of the person for which something has value, the conditions of that person’s existence functioning as conditions for value to that person.<sup>22</sup>

Regardless of one’s stance on whether existence can benefit or harm one, both approaches to the non-identity argument yield a similar result: historic wrongs cannot (or can rarely) harm future people. The only practical difference between the two approaches is that the approach denoting value to being born or to existing allows for historic wrongs to harm future people who *do not* have a life worth living while the other approach does not. Seeing that in most cases of claims for historic justice the descendants of historically wronged people have lives that are worth living, the distinction between the two versions of the non-identity problem makes little practical difference.<sup>23</sup> The argument here focuses mainly on the first version of the problem, although the solution proposed below is applicable to both.

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context of historic justice, see Christopher W. Morris, *Existential Limits to the Rectification of Past Wrongs*, 21 AM. PHIL. Q. 175, 176-77 (1984).

20. For example, McMahan seems to read the non-identity problem in this way, since he accepts that being brought into existence can be good or bad for one. McMahan, *supra* note 3. See also Melinda A. Roberts, *Can It Ever Be Better Never to Have Existed at All? Person-Based Consequentialism and a New Repugnant Conclusion*, 20 J. APPLIED PHIL. 159 (2003).
21. To clarify, by “personal value” I mean to denote the value something has for a specific person. The personal value of something is not entirely determined by how one actually values it. There is an objective component to value, even value that is person-relative.
22. Narveson seems to take this approach to the non-identity problem. See Jan Narveson, *Future People and Us*, in OBLIGATIONS TO FUTURE GENERATIONS 30 (R.I. Sikora & Brian Barry eds., 1978); see also James S. Fishkin, *Justice Between Generations: Compensation, Identity, and Group Membership*, in NOMOS XXXIII: COMPENSATORY JUSTICE 85 (John W. Chapman ed., 1991).
23. Having a life that is worth living entails that one is better off living than never having been born at all. *When life is not worth living is controversial*, and some even take the view that *any* life is worth living. In my eyes, considering the types of lives people in fact have, most lives are worth living and lives that are not worth living are rare. Possible examples are the lives of babies involved in wrongful birth and wrongful-life claims who suffer severe ailments. See, e.g., Elizabeth Weil, *A Wrongful Birth?*, N.Y. TIMES, Mar. 12, 2006, § 6 (Magazine), at 48.

## II. THE ARGUMENT IN A NUTSHELL: GROUP HARM AS CONSTITUTIVE HARM TO INDIVIDUALS

The type of harm focused on here may be labeled a “status harm,” denoting that certain things are harmful for people as a function of who those people are. This is based on the fact that people’s attachments can implicate them, reflect on them and benefit or harm them, simply as a function of the attachment. As is later established, due to individuals’ attachment to a group, certain group harm can cause status harm to these individuals. In certain cases people may suffer this type of harm as a function of their identity. This last proposition is grounded in the idea of *identity-forming* group attachments, which entails that in certain cases current harm to a community is ipso facto harmful to the currently living members of that community. In addition, when individuals are *formatively* attached to their community or group, certain things that are either good or bad for the group are ipso facto of value, as a matter of identity, for those individuals who are formatively attached to the group. In such cases the historic wrong to one’s ancestors and subsequent harm to one’s group are bad for one who is formatively attached to that community as a matter of “who one is.” In this respect, suffering status harm is constitutive of people’s identity. Furthermore, such “constitutive harm” is not open to counterbalancing with setbacks and advancements of individuals’ other personal interests, such as the presumed value one has in one’s own existence, making this harm immune to the non-identity argument.

The conclusion is that certain harms to groups, which originate in past wrongs, are currently wrongful because they harm currently living individuals through those individuals’ identity-forming attachments to the harmed group. In such cases, the historic wrongs *continue* to harm the group, since the identity of the group is maintained throughout the generations. In turn, in each generation the group harm, originating in the historic wrongs, constitutively harms those formatively attached to the group (who are usually the members of the group). Thus, even though the historic wrong functions as a “different-people act” in the case of the individual group members, the persisting harm to the group, grounded in the historic wrong, is ipso facto harmful to these individuals in a way that is immune to the non-identity argument. Therefore, rectification of the wrong to the group is justified as a means of ending the harm to the group’s individual members.

What is novel in this approach is that it advocates for a different type of harm than that assumed by the non-identity argument, while staying within the parameters of harm to individuals. In this respect I do not argue that the non-identity argument is flawed, only that its account of harm is incomplete and therefore the problem it poses to claims for historic justice is not insurmountable.

## III. GROUPS AND HISTORIC INJUSTICE

Those who currently demand historic justice are usually descendants of the original victims of the historic wrong, claiming that *they* presently suffer harm as a consequence of the wrongs perpetrated against their an-

cestors, family, tribe or people and of the subsequent harms to their group or community. Such claims are always based on some type of connection between the original and current victims. For example, it is African Americans who feel directly wrongly harmed by slavery and its effects in a way that is different from how the legacy of slavery may harm other Americans, who do not descend from slaves or do not belong to the same group as descendants of slaves. Similarly, it is the current members of the Maori tribes who feel harmed by the wrongs perpetrated against the Maori tribes during the nineteenth century.<sup>24</sup> Descendants are harmed by historic wrongs in a way that is at least partially different from what is expressed by statements such as “the Holocaust deeply offends me as a human being and a moral person.” The line delineating different types of harms tracks the limits of group membership.<sup>25</sup>

Groups, in and of themselves, are not of “moral considerability.”<sup>26</sup> Therefore, historic injustice suffered by groups such as nations, tribes, peoples or families cannot ground historic justice claims. Morally grounding such claims requires demonstrating that the wrong to the group also harms individuals. This strategy remains within the contours of person-affecting ethics<sup>27</sup> and an identity-specific notion of harm – meaning that for something to be wrongful it must, at “the bottom,” harm a particular individual.<sup>28</sup> In other words, what matters morally is the well-being of individuals,<sup>29</sup> and where something is not bad for any individuals, it is

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24. On the legal background of the appropriation of Maori land in the nineteenth century, see PAUL MCHUGH, *THE MAORI MAGNA CARTA: NEW ZEALAND LAW AND THE TREATY OF WAITANGI* 67-81 (1991). For a general historical account, see MICHAEL KING, *THE PENGUIN HISTORY OF NEW ZEALAND* (2003).

25. For more on this, see Ori J. Herstein, *Historic Justice and the Non-Identity Problem: The Limitations of the Subsequent-Wrong Solution and Towards a New Solution*, 27 L. & PHIL. 505 (2008).

26. For a discussion of this term, see MARK H. BERNSTEIN, *ON MORAL CONSIDERABILITY: AN ESSAY ON WHO MORALLY MATTERS* (1998). In contrast, Charles Taylor argues that certain social goods can have value that is independent of the well-being of individuals. CHARLES TAYLOR, *PHILOSOPHICAL ARGUMENTS* 137-45 (1995). His is not the approach I take here.

27. For some the non-identity problem serves as a reason for moving away from person-affecting ethics. See PARFIT, *supra* note 3, at 351-454. For an account of the different possible approaches to morality and its relation to the well-being of people in the context of the non-identity argument, see McMahan, *supra* note 3.

28. In contrast, Fishkin proposes an identity-independent notion of interest as a basis for a solution to the non-identity problem. His proposal is based on a comparison of the well-being of a living individual with the presumed state of well-being of a different individual who would have existed had the historic wrong not taken place. It is stipulated that both individuals are members of the same group, which exists in the actual and the counterfactual world. The argument is that if the former individual is better off than the latter, it follows that the historic wrong to the group harmed the latter individual. Fishkin, *supra* note 22.

29. This moral principle denotes a normative orientation more than any normative content. It means that morality is concerned with what is good or bad for individual people; what counts as good or bad for people, or in other words how to assess people's well-being, is another matter on which I take no stand here. For an introductory discussion on different approaches to well-being, see SHELLY KAGAN, *NORMATIVE ETHICS* 29-41 (1998).

not morally bad.<sup>30</sup> Because of this, the moral justification for historic-justice claims must be grounded in harms to currently living and future individuals.<sup>31</sup> If *today* an historic wrong only harms a group but does not harm or otherwise adversely affect any individual person, then the historic wrong to the group is bad for no one and there are no moral grounds for demanding rectification for its effects.<sup>32</sup>

Therefore, any justification for historic justice claims must be grounded in how the injustice to the group affects individuals. The primary question then is whether historic wrongs that currently continue to harm a group also harm the currently living individual members of that group via the harms those wrongs currently cause the group. If they do, the historic wrong to the past members of the group and subsequent harm to the group and to currently living individuals may warrant rectification. My approach here is to explain how historic injustice to a group harms the individual members of that group in a way that is not susceptible to the non-identity problem.

In cases of historic injustice the subsequent harms and injustices the group suffers *in the present* as a consequence of the wrongs its members suffered in the past generate the harms to its currently living individual members. For example, the persisting injustices suffered by Native Americans during the formative centuries of the United States are still taken as a cause of the present relatively poor state of those communities and, by extension, the deprivation that members of those communities suffer today.<sup>33</sup> The historic and persisting injustices to the group and the ongoing harms that the group consequently suffers today harm the currently living individual members of that group, and justify claims for historic justice to those individuals.

The distinction between harm to a group and harm to individual members of that group requires some explanation. Even though a group is made up of its individual members, the group can be harmed without its individual members suffering any harm.<sup>34</sup> There are two ways to talk of “members of a group” – we can refer to a group’s members *de dicto* or *de re*. When referring to a group’s members *de dicto*, we refer to any individual who answers the description of “being a member of that group.” We do not refer to any *particular or specific* individual person. When referring to a group’s individual members *de re*, we mean to refer to the *partic-*

30. In this I take a person-affecting approach to ethics.

31. For purposes of simplicity I am putting aside the possibility of harming the dead. I do not, however, reject this notion. On the idea of posthumous interests, see, e.g., Thomas Nagel, *Death*, in *MORTAL QUESTIONS 1* (Canto ed., 1991).

32. There may be moral reasons, other than achieving historic justice, for mending the current poor state of the group, such as reasons of distributive justice. However, these reasons will not be grounded in historic justice and will not recognize the past wrongs as the normative reason for social action.

33. For an example of the effects of the erosion of Native American culture on its members as consequences of historic injustice and other subsequent developments, see JONATHAN LEAR, *RADICAL HOPE: ETHICS IN THE FACE OF CULTURAL DEVASTATION* (2006).

34. This derives from the fact that the identity of the group is not entirely dependent on the identity of its individual members. I address this *infra* in Part XIb.

ular individuals who are members of the group. Under the non-identity argument, an historic wrong may harm a group *de dicto*, entailing that the members of that group, whoever they may be, were made worse off by the historic wrong. For example, one could claim that the group of individuals called “Native Americans” is worse off today than it would have been had certain crimes not been committed against it in the past. This does not entail that, for example, any particular individual Native American living today was made worse off by these past wrongs, only that the group of individuals known as Native Americans was made worse off. In fact, due to certain historic wrongs committed against it, the group “Native Americans” may be worse off today than it would have been even though no particular currently living member of that group has suffered any harm as a consequence of the same historic wrongs. In our scenario, the Native Americans *de dicto* were made worse off while the Native Americans *de re* were not harmed, due to reasons of non-identity. In fact, they may have actually benefited from the historic wrongs.

Here I use the terminology of “harm” when referring to adverse effects on groups. I presume that groups have interests, and if harm is defined as a setback of interests<sup>35</sup> it follows that groups can be harmed. Nevertheless, it does not follow that groups are of moral considerability. The fact that groups can be made better or worse off does not entail that such effects on the group have intrinsic moral value.<sup>36</sup> As indicated above, the basic assumption of this paper is that only the interests of individual people have intrinsic moral value.<sup>37</sup>

As we saw, the non-identity argument challenges the very possibility of historic wrongs harming individuals born later in time, rejecting practically all claims for historic justice. One way to formulate the challenge the non-identity problem poses to claims for historic justice is to ask whether an historic wrong that is a “same-group act”<sup>38</sup> as well as a “different-people act” can harm the group’s individual members (*de re*), even when the existence of those individuals depends on the occurrence of the historic wrong. According to the non-identity argument a wrongful “same-group act” can subsequently harm that group; but if that wrong also functions as a “different-people act” it cannot harm most of the individuals attached to that group, since the non-identity argument holds that individuals who have a life worth living cannot be harmed by acts that determined their birth (or conception). Hence it seems that in such cases, although the group is harmed by the historic wrong – for its identity is maintained – none of its individual members are harmed. Because no in-

35. 1 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* 31-36 (1984).

36. Group harm may have instrumental or enabling moral value, deriving from its effects on the interests of individuals. In Part XIIa, *infra*, I explain why focusing on these types of relationship between group harm and individual harm does not help with confronting the non-identity problem.

37. Some prefer to talk of “damage” to groups as opposed to “harm.” Doing so does not affect my argument.

38. A “same-group act” is an act that may affect a group but does not determine the identity of that group. In other words, had that act not taken place the group would still exist.

dividual was made worse off by the historic wrong, there are no moral grounds for claiming the rectification of the historic injustice to the group.<sup>39</sup>

#### IV. HOW GROUP HARM CAN IPSO FACTO HARM INDIVIDUAL MEMBERS OF THE GROUP

Certain aspects of how a group is faring may ipso facto have value for the individual members of that group. In such cases, harm to a group may implicate, ipso facto, the group's members, set back their interests and harm them. In short, people incur such harm simply in their capacity as members of the group. It is harm that "goes" with their identity. In this respect, it is a status harm.

There is a distinction between social or collective dimensions and more private dimensions of people's identity.<sup>40</sup> The latter usually manifest in people's character and personal attributes (wit, warmth or charm, certain interpersonal relations and other attachments that have no social or collective aspect). Collective features of people's identity are often tied to belonging to a group of social significance, denoting, for example, social or political categories like being Swedish or Catholic. Categorizing certain components of a person's identity as social or collective and others as personal derives from contingent sociological facts, not from any logical category. For example, the fact that being black in the U.S. is a social or collective dimension of one's identity, whereas being red-haired is a private aspect of one's identity, has nothing to do with any essential "publicness" of being black or "privateness" of being red-haired.<sup>41</sup> Here I will

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39. Even taking an approach to morality in which wrongness does not depend on the well-being of individuals will not help with the problem at hand. Claims for rectification must be grounded in some wrongful harm to the claimants or, otherwise, the claimants have no moral grounds for the claim. Therefore, even if for reasons of virtue or deontology it was morally wrong to harm a group, this does not give rise to a claim for rectification to the descendants of those who were originally wronged. Therefore, if currently living (or future) individuals are not harmed by the historic wrongs to their community they have no moral basis for a claim based on those group harms.

40. K. Anthony Appiah, *Identity, Authenticity, Survival: Multicultural Societies and Social Reproduction*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 149, 150-52 (Amy Gutman ed., 1992). For more on the idea of individuals' collective identity, see KWAME ANTHONY APPIAH, *THE ETHICS OF IDENTITY* 65-70 (2005).

41. Whether attributes of one's identity are private or public (denoting an affiliation of social significance) is not necessarily determined by what society actively professes or deems private or public. Sometimes deeming something private in fact excludes groups from the public sphere by depoliticizing or privatizing them. In such cases the so-called "private" attribute of the person's identity is in fact a public one. An example is ascribing women with innate domestic virtues that make them best suited for being homemakers. Hence, what is socially significant and what is private regarding people's attributes and group affiliations is determined by the social reality and not by what society takes that reality to be. The critique of private/public distinction has received considerable attention in feminist theory. See, e.g., Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 *STAN. L. REV.* 1 (1992); WILL KYMLICKA, *CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION* 377-430 (2nd ed. 2002); SUSAN MOLLER OKIN, *JUSTICE, GENDER AND THE FAMILY* 110-33 (1989); CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 184-94 (1989).

mainly focus on social and collective aspects of people's identity. As indicated above, claims for historic justice arise in relation to aspects of people's collective or group identity. In fact, sometimes the social significance of the group affiliation derives from the historic injustice.

Collective identities often come with personal values built into them,<sup>42</sup> so that having certain values is a matter of identity. Namely, certain interests of the group to which one is attached may have value for one simply as a function of one's identity. In such cases harms to my group can affect me, implicate me, reflect on me, make demands on me, and as such may ipso facto harm me. It is my culture, my country, my people, my language, my race, my family, my social role, my history and the history of my nation. If my community is harmed it often entails that it is my culture that is eroded, my country that is attacked, my people that are suffering or displaced or discriminated against or enslaved. Such occurrences often have value to members of groups simply as a function of their attachment to that group. In such cases individuals can ipso facto suffer harm or derive benefits as a function of how the group they are associated with is faring. Moreover, assigning such values to individuals' collective identities is largely a social matter, meaning that people do not always have a choice in the matter.

Sentiments that individuals have in relation to their communities are a good indication of how individual members can be implicated ipso facto by what happens to their community. We feel shame or take pride in certain failures or successes of our communities and of members of our communities, even when personally we have nothing to do with these failures or successes. For example, many Germans born after World War II share a certain personal sense of shame and accountability associated with the Holocaust, and for many of their Jewish contemporaries there is a corresponding sense of sorrow and victimhood.<sup>43</sup> Even if many do not have these exact emotions, it is safe to assume that many feel somehow personally implicated by this aspect of their people's history. Individual members of these two groups, born after 1945, have these emotions not because of any harm they directly suffered *personally* or any *personal* responsibility they share, but because they are somehow personally implicated or tainted by the past of their group as a function of their membership in that group.<sup>44</sup>

One example of how effects on a group or group action can affect and implicate individual members of that group is found in the literature examining the idea of collective guilt and responsibility in war. George Fletcher distinguishes between aggregative concepts and relational ones.<sup>45</sup> Whether an individual shares in the moral responsibility for the crimes of his or her collective depends on his or her contribution to the

42. APPIAH, *THE ETHICS OF IDENTITY*, *supra* note 40, at 24-25.

43. For a discussion on collective shame in such contexts, see George P. Fletcher, *The Storrs Lectures: 'Liberals and Romantics at War: The Problem of Collective Guilt,'* 111 *YALE L.J.* 1499, 1560-61 (2002).

44. ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 220-21 (2nd ed., Univ. of Notre Dame Press 1984) (1981).

45. Fletcher, *supra* note 43, at 1557.

acts culminating, in the aggregate, in the crime of the collective. In contrast, according to Fletcher, collective guilt, as opposed to individual responsibility, is a relational term. It attaches to people depending on “who they are” and not based on what they did or did not do. Not all members of collectives actively feel shame for the crimes perpetrated by their collective; some believe that because they are not personally responsible they have nothing for which to feel guilty. According to Fletcher’s analysis it seems that under certain circumstances they *should* feel guilty because they share in the collective guilt. The collective guilt attaches to individuals as a function of their collective identity, from which, as Fletcher points out, we cannot simply choose to detach ourselves:

We may be proud about the achievements of our people and our nation, but we do not want to acknowledge that we are personally touched by the crimes committed in our nation’s name. We grow up in a language, absorb a culture, learn its history, and then think that we can pick and choose between the things we like and the things we do not.<sup>46</sup>

Ronald Dworkin appears to make a similar point. He claims that while members of a group are not to blame for wrongs in which they had no personal involvement, even if those wrongs were perpetrated by their group, such individuals still bear special responsibilities due to the crimes committed by their collective.<sup>47</sup> These individual responsibilities that people have due to actions of others derive from what Dworkin refers to as a “deep personification of political and social community.”<sup>48</sup>

Jean Amery argues that collective shame for collective crimes and individual resentment for personal and collective victimhood are justified sentiments, even where those who should feel the shame bear no individual responsibility and those who harbor resentment did not suffer directly from the crimes.<sup>49</sup> In David Heyd’s account of Amery’s position he explains that even though “there is no justification for collective guilt, there is a place for collective shame, since guilt is a function of what we do while shame arises out of what we are; and what we are, our identity, is partly a collective matter.”<sup>50</sup>

Posner and Vermeule view the phenomenon of attributing harm or guilt to individual members of a group due to group harm or wrongdoing as a function of “moral taint.”<sup>51</sup> This occurs when members of a group feel tainted by the victimization or the action of their community, even when the individuals themselves are not directly involved in the

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46. *Id.* at 1567.

47. RONALD DWORKIN, *LAW’S EMPIRE* 172-73 (1986).

48. *Id.* at 173.

49. JEAN AMERY, *AT THE MIND’S LIMITS* 62-81 (Sidney Rosenfeld & Stella P. Rosenfeld trans., 1980).

50. David Heyd, *Resentment and Reconciliation: Alternative Responses to Historical Evil*, in *JUSTICE IN TIME* 185, 192 (Lukas H. Meyer ed., 2004). Notice that Heyd’s use of the term “collective guilt” is different from George Fletcher’s. The former uses the term to denote responsibility while the latter uses it to delineate an accountability that is coupled with a sentiment of personal shame for collective crimes, even where there is no personal responsibility.

51. Posner & Vermeule, *supra* note 8, at 710-11.

crimes or affected by the injustice to the group. Explaining the category of “moral taint” or “moral pollution,” Anthony Appiah points out that it does not attach to individuals due to their responsibility for causing the harm, but rather due to those individuals’ vicinity to the wrong that caused the harm or through a vicarious “involvement” in such a wrong. Moral taint attaches for reasons of status, attachment and association, not for reasons of responsibility or due to one’s own actions.<sup>52</sup>

Some have argued that individuals can divest themselves of the communal taint that attaches to them due to their communal affiliation by demonstrably (or even internally) distancing themselves from the crimes of their group or by condemning the crime.<sup>53</sup> This approach strikes me as naïve, for, as Appiah points out, moral taint is a function of one’s position and not of one’s actions, and therefore removing it is most likely more a matter of changing “who one is” than taking any particular action, such as condemning or distancing.

In addition, when thinking of group harms that are also ipso facto harmful to the individual members of that group, the mechanism of distancing oneself from the harm to one’s group or community by claiming that one is not personally harmed by the group harm or that it is in fact not a harm at all seems even less likely to succeed in removing one’s victimhood than it does in removing one’s moral taint or collective guilt. Moral taint and collective guilt are normative facts, and expressing or feeling moral indignation are normative acts which may have some normative effect on one’s collective guilt and moral taint, similarly perhaps to how an apology may affect the penalty one deserves. In contrast, harm is not a normative fact but a fact about one’s interests that has normative implications. Observations about one’s own well-being may be true or false but they do not, in and of themselves, affect the reality of one’s well-being.

How people feel towards their groups is an *indication* of the value they place on how the group is faring. People tend to feel shame or pride and think of themselves as victorious or defeated because on occasion they believe that the actions, harms and benefits of their group implicate them, reflect on them and make demands on them, and thereby make them individually better or worse off. However, the sentiments that individuals have in response to group harm or actions are not what make the harm to the group or the group actions good or bad for its individual members. Rather, it is the fact that in certain cases what is good or bad for the group, or certain actions of the group, are good or bad for the individual members of the group that makes it appropriate to feel negatively or positively implicated or affected by what happens to the group. Nevertheless, when people *feel* implicated, it is often a good indication that they are in fact implicated or otherwise affected.

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52. For further discussion of the concept of moral taint, see Anthony Appiah, *Racism and Moral Pollution*, in COLLECTIVE RESPONSIBILITY 219 (Larry May & Stacey Hoffman eds., 1991).

53. See Larry May, *Metaphysical Guilt and Moral Taint*, in COLLECTIVE RESPONSIBILITY, *supra* note 52, at 239-54.

Not everything one values actually has value for one and not every interest of a community has intrinsic (or extrinsic) personal value for its members. In fact, most of them do not. The fact that people can have a wrong or inappropriate emotional reaction to the fate or actions of their group demonstrates that these values are not subjectively generated. Sadly, there exist in the world exaggerations of loyalty to nations, tribes, sects, institutions, organizations and various religious and political dogmas. But sometimes, certain communal interests do have intrinsic value for the individuals formatively attached to that group. When they do, those communal interests become personal interests.

Not every group interest is ipso facto an interest of its individual members. Which group harms are ipso facto bad to individual members of the group depends upon, among other things, the nature of individuals' attachments to that group. For example, in some societies people are significantly attached as an alumnus to the college they attended. This can play a part in people's collective identity: for example, being a "Harvard Man." Under these circumstances the prestige of one's school may be something that has value for one for its own sake. In such a case setbacks to the school's prestige ipso facto harm one as its former student. In contrast, under such circumstances a change to the school's cafeteria menu does not ipso facto affect an alumnus, since the nature of her attachment to the school has nothing to do with the food sold in its cafeteria.

There is an additional reason why not everything that happens to the group has ipso facto value for its individual members as such. People are attached to groups or to significant aspects of groups *as a whole*. Subsequently, only those group interests that relate to the group or to significant aspects of the group as a whole can affect the individuals attached to that group as such. A setback to a group's peripheral interests may marginally affect the group as a whole through its effects on the group's more central interests. However, such an effect on the group as a whole is usually indeterminable and most likely negligible and cannot be claimed to be ipso facto bad to those attached to the group in any significant way. Only setbacks to significant group interests can be said to affect the group as whole and therefore be ipso facto harmful to those attached to it.

I have no formal test for telling what exactly constitutes a significant harm to a group as a whole or what type of group harm touches on people's attachments to their communities. But even in the absence of a bright line, I believe that cases of historic injustice fall well above the threshold. Historic injustice cases include severe group humiliation, cultural destruction, group delegitimization, group marginalization, population extermination, group exile and displacement, the effects of war or terrorism directed against a group or members of a group for being members of the group, racial persecution, cultural erosion and group discrimination. These types of group harm can have a deep and pervasive effect on a community's interests as a whole. In addition, such harms usually affect the aspects to which people are attached in the community and which give content to their identity as members of that group: the people, the culture, the customs, the religion, the language, the cities, the land and more. If in principle one accepts the notion that how one's commu-

nity or group is faring can ipso facto implicate oneself, then I think these examples would qualify as likely cases in which this happens.

The harm that attached individuals suffer as a function of harm to their group is in a sense a collective harm: members suffer the harm because they have a certain collective identity, and all similarly attached members of the group suffer the same harm as members of the group. When speaking here of individual *members* of a group, I refer to them as part of a class or as a type, not as particular individuals (I use the term in its *de dicto* meaning). For example, we say that the current effects the historic crimes of slavery have on the African American community today harm African American individuals. In this statement we do not directly refer to any specific individual but to anyone who answers this description, to whoever is part of that group.

In a recent article Caspar Hare suggests that the wrongness of certain different-people choices derives not from *de re* person-affecting reasons but from *de dicto* person-affecting reasons.<sup>54</sup> This means that, for example, deciding to have a child while one is suffering from a disease, such as measles, that may cause birth defects in the child rather than waiting with the conception until one is better may make things *de dicto* worse for the health of one's child. In this example the consequence of the ill mother's conduct is that the actual child that is born is less healthy than the child the mother would have had had she taken the doctor's advice and waited. For reason of non-identity the mother's decision did not harm the actual child that was born. However, it was *de dicto* worse for "her child." Often people do not have a duty toward *de dicto* categories of people. For example, a doctor who has a duty to help her patient cannot fulfill her duty by exchanging the patient she has for another healthier patient. She has a duty toward "her patient" *de re*, not *de dicto*. Nevertheless, sometimes people, due to their roles in life, have duties towards types of people. One such example, according to Hare, is the duty parents have to take into account the health of their children. First, Hare claims that not fulfilling this duty is wrong *simpliciter*. Second, the unique claim that the actual ill child has towards her parents derives from her status as their child, to whom the parents owe *de dicto* concern. James Fishkin offers a less developed but basically similar approach to justify claims for historic justice. He argues that, for reasons of non-identity, historic justice claims cannot be justified for person-affecting reasons; however, he points out that they may be justifiable on grounds of group-affecting reasons.<sup>55</sup> In this sense there is a duty to compensate the "members of a group" *de dicto* because "they" are harmed by the historic wrongs.

These suggestions get us only halfway towards a solution to the non-identity problem. Even if Hare's and Fishkin's approach can establish a duty of care towards types of future people, it does not establish harm to the actual individual people that were actually born. There are no victims under these schemes because no "one," using the term in its *de re* mean-

54. Caspar Hare, *Voices from Another World: Must We Respect the Interests of People Who Do Not, and Will Never, Exist?*, 117 ETHICS 498 (2007).

55. Fishkin, *supra* note 22, at 93-94.

ing, is adversely affected. The pure group-based approach attempts to hold on to a person-affecting ethos, but when viewed from the perspective of the actual person who is making the claim for compensation it falls short of justifying rectification in and of itself. Rectification requires that the group harm or the harm to a category of people also somehow be harmful to the actual individuals in question. Otherwise, we are no longer in the realm of person-affecting ethics, and where there are no individual victims, there is no one requiring rectification.

Building on categories Ronald Dworkin applies to the question of individuals' responsibility for collective acts helps in conceptualizing how group harm or harm to a class can ipso facto harm individuals.<sup>56</sup> Dworkin accepts that people's identity or agency can be tied in with certain collectives of which they are a part. Dworkin claims that in certain cases people become integrated in a community or collective, so that they are implicated and personally affected by the acts and conduct of the collective. Usually we view a person as both an *agent* and the *unit of that agent's concern*.<sup>57</sup> For example, if I do something bad I am implicated by *my* actions and should feel shame and remorse. In the case of people's significant communal attachments the collective becomes an agent of action while its individual members function as units of its concern.<sup>58</sup> For example, one may properly feel shame at the crimes committed by one's country or nation.<sup>59</sup> In the law not only shame or guilt but also actual liability and responsibility can be generated vicariously or through association.<sup>60</sup> For instance, relations of agency may allow an agent to generate contractual duties and liability in tort in her principal.

Dworkin explores the relation between individual and collective through the prism of responsibility and moral sentiments. He is inter-

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56. Ronald Dworkin, *Liberal Community*, 77 CAL. L. REV. 479, 492-99 (1989).

57. *Id.* at 492.

58. Dworkin points out that not every act performed within the collective or by members of the collective is a collective act. A collective's capacity to act as a collective (rather than as a group of individuals who happen to be members or organs of that collective) is limited to "the acts treated as collective acts by the practices and attitudes that create [and maintain] the community as a collective agent." *Id.* at 495. Dworkin is concerned with toleration of gay people and the practice of same-gender sex. The liberal state, as a collective agent, is not founded as a collective that has or can have sex. Having sex, of any kind, is not a collective action. The fact that some in the community practice gay relations does not constitute a collective act; hence it does not "taint" or implicate any of its intolerant individual members whose identity is formed by their membership in that community. One cannot argue that one's personality is somehow injured by such activity performed by other members of the community since such activities do not constitute a collective action. Dworkin adds that even in non-liberal societies such arguments against same-sex romantic relationships will have little credence, since it seems implausible to imagine sexual activity as a collective or communal act even in the case of a non-liberal state. *Id.* at 498. Dworkin's observation that having sex is categorically not a collective act is susceptible to the slippery action/omission distinction, and can be countered by viewing state toleration or legalization as a type of action and state omission from prohibiting conduct as a type of collective act characteristic of political collectives.

59. *Id.* at 493.

60. Joel Feinberg, *Collective Responsibility*, in COLLECTIVE RESPONSIBILITY, *supra* note 52, at 53.

ested in how a collective can, through its actions, implicate its members; my focus here is on communal harm and individual victimhood, not communal action and individual responsibility. Dworkin does not discuss how the collective's capacity for incurring harm can affect its individual members. Nevertheless, one can use Dworkin's analysis to construct an analogous scheme fitting the question of harm.

Usually a person as the bearer of interests is also his or her own unit of concern, meaning that adverse or beneficial effects on the interests of a person are harmful or beneficial to *that same person*. In other words, the person that is acted upon is also the party that is morally affected. In the case of certain harms to communities, people who are attached to the group function as the units of moral concern, while the group is the bearer of the relevant interests. When the group is harmed it is also, ipso facto, harmful to the group's individual members as members of that group. In such cases those concerned with the well-being of individuals must treat the communities of those individuals as bearers of interests that have inherent moral significance.

After arguing that certain things can have ipso facto value for individuals and that individuals can suffer harm simply as a function of their collective identity and group attachments, what remains is to demonstrate that such harm is immune to the non-identity argument. The first step in arguing this depends on showing that if certain values attach to certain collective identities, such values can *formatively* attach to the individual people who bear those collective identities. This happens when the harms that individuals suffer are a function of elements in people's collective identity that are formative of "who those individuals are." Before delving into an explanation of how this takes place, this article briefly explains what identity-forming attachments are and how the concept of "identity" is used here in thinking about identity-forming attachments.

## V. IDENTITY-FORMING ATTACHMENTS<sup>61</sup>

An attachment is a relation a person has towards a particular object (animate or inanimate), where the object is distinguished from other objects of a similar type and endowed with significant personal value.<sup>62</sup> Some attachments are voluntary, some are thrust upon us during life and others we are born into. People's attachments are often partially socially or culturally determined. Even when they are not, the range of attachments we can choose to form is usually socially or contextually given or naturally determined. Attachments are an important source of value to people and normally forming some attachments is unavoidable. The fact that particular things, such as one's house, friends, favorite café, city, ideology, etc., have unique value for one seems part of the human condition.

61. This section is influenced by JOSEPH RAZ, *VALUE, RESPECT, AND ATTACHMENT* CH. 1 (2001).

62. By "object" I merely mean a thing that is distinct from the subject that is attached to it, where "thing" is used in the most general way, to include anything from rocks to humankind.

*Identity-forming* attachments do not just entail that a particular object has value for an attached person. A person's identity-forming attachments determine, to a degree, the identity of that person. In other words, in such cases *being attached* to a particular object is part of "who the person is." Identity-forming attachments are an important source of value, values and character; some even claim that such attachments are a necessary condition for such things:

To imagine a person incapable of constitutive attachments such as these<sup>63</sup> is not to conceive an ideally free and rational agent, but to imagine a person wholly without character, without moral depth. For to have character is to know that I move in a history I neither summon nor command, which carries consequences none the less for my choices and conduct.<sup>64</sup>

If being attached entails an object having certain value for one, then being *formatively* attached denotes that the value that object has for one is a formative aspect of one's identity.

There are degrees of attachment and there is no clear line between "regular" attachments and identity-forming attachments. However, there are clear cases of both. For example, a tentatively held desire for some object, which clearly does not constitute an attachment, let alone an identity-constitutive attachment, can gradually become more and more central to one's aims and definitive of "who one is," and even turn, in extreme cases, into an obsession, overriding all other reasons for what one does.<sup>65</sup> In such cases we can say that at first the attachment derived from a desire for some object that did not play a role in defining one's identity. Later, as the role the object plays in one's life grows, one may gradually become a person who is partially yet still significantly defined by his desire for (and finally obsession with) the object. In such cases, the relation one develops towards that object is a significant part of one's identity.

## VI. "WHO ONE IS": THE CONCEPT OF IDENTITY IN IDENTITY-FORMING ATTACHMENTS

By "identity" I mean the answer to "Who am I?" or "Who one is?" In explaining how attachments relate to identity, Joseph Raz points out . . . that when talking of 'identity' [we] do not mean the term in the sense in which it fixes the limits to the continuity of an object, or an object of a kind: is this pile of timber which made up Theseus' boat Theseus' boat still? We mean the identity revealed in answers to the question who am I? I am a man, an academic, a father, etc. These make me who I am. It is the identity that identity politics is about which is, in part, determined by our past actions and decisions. It is the identity which leads one to say: 'Here I

63. Mentioning communities such as family, national history, community, nation, people, citizenship of a republic.

64. MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 133-74, 179 (2d ed. 1998).

65. *Id.* at 56.

stand, I can do no other', in the knowledge that one could if one wanted to, and yet one is speaking the truth.<sup>66</sup>

One's identity-forming attachments are attachments that contribute to forming "who one is," even though they are *in principle* detachable from one. "Who one is" expresses a notion of personal identity in which we are often interested in practical philosophy<sup>67</sup> and identity politics and in which we are less interested in the context of the metaphysical debate concerning the persistence of personal identity through time and change.<sup>68</sup> It is one's identity in the sense of one's constituting values, interests, attachments and social roles – those things that make one into "who one is."

In principle we can shed our formative attachments. For example, it is possible for me to stop being an Italian (having an identity forming attachment to Italy, Italian culture, etc.) and still remain myself.<sup>69</sup> However, such transformations are slow, gradual, and rarely fully attainable,<sup>70</sup> usually ending in a considerable transformation of "who a person is."<sup>71</sup> This seems especially true in the case of groups such as nations, families, tribes, etc., which also happen to be paradigm examples of the type of groups that suffer historic injustices.

Regardless, the fact that it is possible (by choice or otherwise) to detach from an object to which one is formatively attached and still in some sense retain one's identity does not mean that, as long as such attachments are in place, one's identity, in the sense of "who one is," is not partially defined by those attachments. Therefore, in what follows, when discussing aspects of people's identity using terms such as "defining," "inherent," "formative," "foundational" and "constitutive" I do not assume that personal identity is made up of an unchangeable core or essence; I do not advocate a concept of identity predicated on a strong distinction between people's essential and contingent attributes. Rather, I use these terms to denote degrees of importance and centrality that one's attachments, interests and ends have in forming one into the "person one is." These terms are used to denote extremes on a continuum stretching from the central to the peripheral, not a dichotomy between the essential and the contingent. By way of metaphor, if our identity is a river I take "who we are" to denote the bedrock or the bottom of that river: stable in relation to the motion of the flowing water giving the river its shape and

66. RAZ, *supra* note 61, at 33.

67. By "practical philosophy" I mean the field of philosophy often divided into moral, political and legal philosophy. For a discussion of the concept, see JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 10-11 (Oxford University Press 1999) (1975).

68. For seminal contributions to the debate on personal identity, see *PERSONAL IDENTITY* (John Perry ed., 1975); *PERSONAL IDENTITY* (Raymond Martin & John Barresi eds., 2003).

69. By "Italian" I am not referring to the juridical definition of an Italian citizen but to a member of the Italian nationality and culture.

70. Joseph Raz & Avishai Margalit, *National Self-Determination*, in *ETHICS IN THE PUBLIC DOMAIN* 110, 125, 129-30 (Joseph Raz ed., 1994).

71. For an account of such a process in the context of national attachment, see YAEL TAMIR, *LIBERAL NATIONALISM* 26-28 (1993).

course, but still susceptible to erosion and change by the currents in the waters above it, which stand for one's more fleeting attributes.

Considering the fact that our lives are finite and that we are all destined to die, and taking into account the relevant stability of societies and communities and their centrality in the formation of people's identities, as well as that from a certain stage of maturity we often change slowly and attach very strongly, it is safe to view "who one is" as fairly stable. When we do shed our identity-forming attachments we can remain the same person in the sense that our personal identity will persist over time (retaining, for example, our memories and body). However, in terms of "who we are," such a transformation may entail that the meaning of our life and our sense of self, place in society, trajectory, life story, basic values, etc., have radically changed. In this sense, one is no longer the person one was.

In the case of identity-forming group attachments, while the self remains distinct from the object to which one is formatively attached (being Mexican in the sense of "who one is" does not make one into "the Mexican nation"), the *attachment* to that object captures a place of primacy in the identity of that person. Ignoring the attachment would be ignoring "who the person is." For example, it seems almost meaningless to speak of Nelson Mandela as not a South African or as not a black South African. Clearly he could have been born or brought up elsewhere, and perhaps there is a counterfactual in which even now Mandela can shed this attachment, but in reality he is South African and has a formative attachment to that particular collective. Not acknowledging this ignores "who he is."

Obviously not every attribute we have determines "who we are." In fact, most of our values, goals, tastes, attachments and qualities are contingent and often transitory. Viewing people as clusters of properties, as they are viewed here,<sup>72</sup> entails that the properties forming "who we are" are the most central, stable and significant aspects of ourselves. Our more peripheral attributes can fluctuate and change without affecting our identity in the sense of "who we are."

## VII. IDENTITY-FORMING *GROUP* ATTACHMENTS

One way in which people's collective identity as members of a group can be formed is through immersion in that group. By absorbing the available characteristics of a certain group – language, customs, history, interests, status roles, values, norms, aspirations, projects, categories of thought, social roles, language, and aesthetics, to mention just a few – individuals are formed into the type of people they are, taking on a collective identity that often corresponds to the type of collective identity of members of the community in which they are immersed. The various at-

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72. This view ties in to a long philosophical tradition that takes a non-substantive view of personal identity. This tradition spans from David Hume's *Treatise of Human Understanding*, to RICHARD RORTY, *Postmodernist Bourgeois Liberalism*, in 1 OBJECTIVITY, RELATIVISM AND TRUTH, *PHILOSOPHICAL PAPERS* 197, 199 (1991), through PARFIT, *supra* note 3, at 199-350, to ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 27-70 (1981), and encompasses numerous others in between.

tributes we absorb from the group become part of us.<sup>73</sup> They become our costumes, our language, our history, our values, etc., and form us, in time, into members of that group. For example, if one acquires the history, tastes, language, associations, values, aesthetics, categories of thought and norms of a French person, then one often becomes French. Even if one does not become a member of the group due to some excluding attribute, like being of Algerian descent and hence not “fully French,” such immersion still usually produces a formative attachment to that group.

Charles Taylor offers a more subtle explanation of how social affiliation can form identity that is not based on simple immersion and absorption. Taylor argues that the self is *always* orientated towards a normative framework that gives meaning, coherence and context to one’s life.<sup>74</sup> According to Taylor, “who we are” is a product of having a certain network of values and meaning that we absorb from our environment<sup>75</sup> that functions as a “language”<sup>76</sup> of meaning, standards, values or categories. Our identity is formed and becomes intelligible, to us and to others, within the values, loyalties, commitments, norms, etc., which apply to us within a given framework. Such frameworks determine “who one is” and do not merely influence one as if one was already “there” before engaging with any framework of norms and meaning. In this sense the framework is categorically prior to the identity of individuals, to “who they are.”<sup>77</sup> People do not exist as full individuals outside any framework of value and meaning.<sup>78</sup> In Taylor’s terms, a particular individual does not exist as that particular individual (in terms of “who one is”) outside the framework in which that particular individual’s identity “makes sense.”

Consider what we mean by *identity*. It is who we are, ‘where we’re coming from.’ As such it is the background against which our tastes and desires and opinions and aspirations make sense. If some of the things I value most are accessible to me only in relation to the person I love, then she becomes integral to my identity.<sup>79</sup>

Without our formative framework, in detachment or outside of it, we do not only lose something that has value *to us*; we lose our sense of self, our place in the world, our values and relations to others. In short, with the

73. See, e.g., WILL KYMLICKA, *LIBERALISM COMMUNITY AND CULTURE* 175-77 (1989). For a short account of this process from a communitarian perspective, see Sean Sayers, *Identity and Community*, 30 J. SOCIAL PHIL. 147, 154-57 (1999).

74. CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 3-52 (1989).

75. “Environment” may comprise culture, nation, country, people, family, neighborhood, etc.

76. Taylor offers a broad account of the term “language,” using the term to denote a wide range of forms of expression and self-definition, such as art, love and gestures. See Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 25, 32 (Amy Gutmann ed., 1994); see also CHARLES TAYLOR, *THE ETHICS OF AUTHENTICITY* 33 (1992).

77. TAYLOR, *supra* note 74, at 30-31.

78. TAMIR, *supra* note 71, at 35-36.

79. Taylor, *The Politics of Recognition*, *supra* note 76, at 33-34.

loss of the framework our identity is also (partially) lost. Hence, our identity, “who we are,” is formed by such frameworks. Put differently, our attachment to such frameworks is formative.

People may see their identity as defined partly by some moral or spiritual commitment, say a Catholic, or an anarchist. Or they may define it in part by the nation or tradition they belong to, as an Armenian, say, or a Québécois. What they are saying by this is not just that they are strongly attached to this spiritual view or background; rather it is that this provides the frame within which they can determine where they stand on questions of what is good, or worthwhile, or admirable, or of value. Put counterfactually, they are saying that were they to lose this commitment or identification, they would be at sea, as it were; they wouldn't know anymore, for an important range of questions, what the significance of things was for them.<sup>80</sup>

Identity-forming frameworks and attributes are not free-floating; they are a product and an integral aspect of actual communities and collectives. They derive from and are a part of a certain social context, community or culture (or some combination of such entities). While identity-forming mechanisms are categorically distinct from the collective or culture in which they exist, framework and community are so intertwined that it is hard to imagine one detached from the other. This is why being formatively attached to a framework of meaning, seeing that we do not exist as “who we are” outside of it, usually entails that one is also formatively attached to the community or culture of which the framework is a function. The same seems true for aggregations of identity-forming attributes one absorbs from one's community and which are parts of or are dependent on that community. It is hard to imagine being attached to one and not the other. In this respect, we acquire a collective identity as belonging to groups and communities through our identity-forming attachments to them.

Another explanation of the source of identity-forming attachments is MacIntyre's position that the unity of a particular personal identity “resides in the unity of a narrative which links birth to life to death as narrative beginning to middle to end.”<sup>81</sup> Through an organizing narrative, otherwise unrelated facts come to form a specific individual identity. One is positioned in a story that forms one into the “person one is”: belonging to this group, having that history, etc. A self outside the structure of narrative is an empty abstraction. There is no intelligible answer to the question “who one is” without a narrative that traces the identity of that person in history; a story that forms a single personal life-story by unifying various facts as relevant to that person and excluding many other facts as irrelevant. In this sense one way in which life-organizing narratives determine our identity is by assigning us certain attachments. Collective identities, for example, being Palestinian or African American, are often central or essential themes in the narratives that function as life-

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80. TAYLOR, *supra* note 74, at 27.

81. MACINTYRE, *supra* note 44, at 205.

organizing scripts that make one into “who one is.”<sup>82</sup> Attachments to such collectives are formative of our identity because our affiliation with the group is a central aspect of our identity, according to the narratives or the identifying categories that make us into “who we are,” and because outside these categories we are no longer “who we are.” We are not given or assigned such memberships or collective identity, as if we were “there” to acquire them before they were given to us; we are formed as the sort of people that have them, and in this sense having them is part of “who we are.”

[W]e all approach our own circumstances as bearers of a particular social identity. I am someone’s son or daughter, someone else’s cousin, or uncle; I am a citizen of this or that city, a member of this or that guild or profession; I belong to this clan, that tribe, this nation. Hence what is good for me has to be the good for one who inhabits these roles. As such, I inherit from the past of my family, my city, my tribe, my nation, a variety of debts, inheritances, rightful expectations and obligations. These constitute the given of my life, my moral starting point. This is in part what gives my life its own moral particularity.<sup>83</sup>

While not all memberships function as identity-forming attachments (since identities can maintain coherence and meaning without them), those that do are often practically indelible aspects of “who we are.”<sup>84</sup> In saying that a person, as part of “who she is,” is a member of a group or is attached to a community in a formative way,

[C]ommunity would describe not just a *feeling* but a mode of self-understanding partly constitutive of the agent’s identity. On this strong view, to say that the members of a society are bound by a sense of community is not simply to say that a great many of them profess communitarian sentiments and pursue communitarian aims, but rather that they conceive their identity – the subject and not just the object of their feelings and aspirations – as defined to some extent by the community of which they are a part. For them community describes not just what they *have* as fellow citizens but also what they *are*, not a relationship they choose (as in a voluntary association) but an attachment they discover, not merely an attribute but a constituent of their identity.<sup>85</sup>

We see now why formative attachments are often less a matter of choice as much as a matter of identity. Many times “[o]ne cannot choose to belong. One belongs because of who one is. One can come to belong to such groups, but only by changing, e.g. by adopting their culture, changing one’s tastes and habits accordingly – a very slow process indeed.”<sup>86</sup>

Aspects of a person’s collective identity can also derive from the social meaning given to a certain fact about that person, associating her with a

82. APPIAH, *THE ETHICS OF IDENTITY*, *supra* note 40, at 21-23.

83. MACINTYRE, *supra* note 44, at 220.

84. SANDEL, *supra* note 64, at 64-65, 168-73.

85. *Id.* at 150.

86. Raz & Margalit, *supra* note 70, at 117.

certain group. This can remain true regardless of a person's will or experiential contact with the group. For example, that an adopted child's biological parents have red hair does not seem to be an identity-defining quality of that person. It is a fact that probably does not affect the child's identity and certainly does not take part in the child's social or collective identity. In MacIntyre's terms such a fact does not play a significant role in how one's life story is constructed – there is no significant social meaning assigned to that fact. In contrast, that one was born Jewish but was raised as a Catholic from infancy by a Catholic Polish family during World War II, hiding his true identity, can form one's identity by connecting one to a group with which one is otherwise unrelated. Unlike finding out about one's parents' hair color, finding out one's ethnic origin can radically alter one's self-image and identity. The reason for this is that, in certain societies and under certain circumstances, ethnic origin is a very significant fact about "who one is." Such facts about one's personal history (which may stretch into one's prenatal past) can attach one to a group in a way that significantly implicates one's social identity.<sup>87</sup>

There are several possible approaches to and explanations of identity-forming mechanisms. This article does not purport to account for them in any systematic or comprehensive way. But the idea that identity, specifically collective or social identity, is formed and molded through social affiliation, interaction and immersion is hardly new.<sup>88</sup> Often how others respond to us, treat us and perceive us influences our self-image and identity.<sup>89</sup> Group affiliation and social roles<sup>90</sup> play a crucial part in form-

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87. From the perspective of how one perceives oneself, identity-forming attachments are discovered in such cases. One does not slowly evolve into one's role, one simply learns "who one is." Sometimes discovering potentially identity-forming facts about oneself may not define one but rather open the possibility for "identity renewal" – where an individual chooses to take on the identity of his ancestors. See TAMIR, *supra* note 71, at 28-30. Occasionally, however, such discoveries redefine one's identity regardless of one's choice. One finds oneself formatively attached to a group as a function of finding out a fact about oneself. Sometimes "I find myself part of a history and that is generally to say, whether I like it or not, whether I recognized it or not, one of the bearers of a tradition." MACINTYRE, *supra* note 44, at 221. One's biography and consequently one's ascribed role in society can form one's identity in a way one is not free to object to or to change. In such cases identity is a matter of social fact, not individual choice. In this sense our collective identity, and hence to a degree "who we are," is socially determined. See, e.g., APPIAH, *THE ETHICS OF IDENTITY*, *supra* note 40, at 69-70.

88. Modern thinkers of radically different traditions endorse, *mutatis mutandis*, this general proposition. For a perspective from radical feminism, see CATHERINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 40 (Harvard University Press, 1989), and Catherine A. MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for a Theory*, 7 SIGNS: J. WOMEN IN CULTURE & SOC. 515 (1982); for a liberal perspective, see RAZ, *supra* note 61, at 10-40, and Raz & Margalit, *supra* note 70, as well as Dworkin, *supra* note 56; for a communitarian perspective, see SANDEL, *supra* note 64, at 179, TAYLOR, *supra* note 74 and MACINTYRE, *supra* note 44; for a Structuralist perspective, see Louis Althusser, *Ideology and Ideological State Apparatuses, in LENIN AND PHILOSOPHY AND OTHER ESSAYS* 123, 127 (Ben Brewster trans., 1971); for a post-structuralist account, see JUDITH BUTLER, *EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE* (1997).

89. For a critical account of this identity-forming mechanism, see, e.g., Frantz Fanon's critical account of colonialism and how it can impose its own condescending and

ing us into “who we are,” and while *acknowledgment* as a member of a group is not a necessary condition for forming an identity-forming attachment with a group, they often go together.<sup>91</sup> Charles Taylor explains the process of identity formation as a function of a “dialogue” and an interaction between an individual and society and the individual and her “significant others.”<sup>92</sup> Identity is also largely a matter of how we differ from others: in many ways “who we are” derives from understanding who we are not.<sup>93</sup> We can become members of one group through our detachment or estrangement from another oppositional group. Our identity can also be a function of how we fit into a general scheme of social identification.<sup>94</sup> Through identity-forming mechanisms, such as social roles, acknowledgment, difference and dialogue, we acquire our collective identities, our life-organizing narratives, our framework of meaning, etc.

As far as our collective identity goes, we are usually formatively attached to objects such as nations, religions, occupations, families, tribes, social classes, language-speaking communities, cultural communities, etc. These types of groups produce and maintain “the background against which our tastes and desires and opinions and aspirations make sense.”<sup>95</sup> Within these groups, people’s character, values, norms, sentiments, “place in the world,” self-image, social identity, ways or patterns of thinking<sup>96</sup> (and generally their identity) are formulated and maintained; these groups inhabit people’s culture and frameworks of meaning and value. It is to these groups that we become formatively attached through our life-organizing narratives. Not surprisingly these are also the type of groups usually involved in cases of historic injustice.

We become formatively attached to the community and to the corresponding “background” of meaning it sets up *as a whole*; we are not similarly attached to the numerous parts of which the whole is made up. While one may attach to a specific aspect of the more abstract object to which one is *formatively* attached, one is usually not formatively attached to those more concrete and specific building blocks. For example, being attached to one’s national flag and having a strong emotion when seeing it does not mean that one is *formatively* attached to it, even if one’s attachment to the flag plays a role in forming one’s formative attachments to one’s country or nation. Under such circumstances if one stops caring about the flag, one can clearly still retain one’s identity as a member of that nation.

In principle one’s *specific* attributes or qualities can change, including those that *contribute* to forming one’s social identity, but that does not mean that *in aggregation* these types of qualities or aspects do not *add up*

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dismissive image on the self-image of the colonized people. FRANTZ FANON, *THE WRETCHED OF THE EARTH* (1963).

90. MACINTYRE, *supra* note 44, at 220.

91. Raz & Margalit, *supra* note 70, at 115.

92. Taylor, *The Politics of Recognition*, *supra* note 76, at 32-37; TAYLOR, *THE ETHICS OF AUTHENTICITY*, *supra* note 76, at 33.

93. See, e.g., Taylor, *The Politics of Recognition*, *supra* note 76.

94. See Althusser, *supra* note 88, at 157.

95. Taylor, *The Politics of Recognition*, *supra* note 76, at 33.

96. For more examples, see Raz & Margalit, *supra* note 70, at 129-30.

to making one into “who one is” – a member of this community or at least someone who is formatively attached to it. For example, we can learn to think in other terms, speak in another language or dialect, learn different styles of dress and mannerism, accept new values and norms, adopt a richer history and even discard a group’s history as our own. But shedding *some* of these traits or aspects of them seldom dissolves one’s attachment to the community as a whole or changes one’s social role as a member of that community. One usually remains a member of that group, as a matter of “who one is,” regardless of such changes. Tweaking one’s framework of meaning or slightly retelling one’s life story does not alter one’s identity or dissolve one’s attachments. Shedding an identity-forming attachment, however, entails going through a much more radical, broader and usually gradual change.<sup>97</sup>

In summary, people’s identity is partially formed through social immersion, interaction and identification. People usually have a collective identity *as members* of the community they are immersed in, and through the process of forming this identity people become attached to their communities as a matter of “who they are.” These aspects of people’s identities often form their social identities. This process does not always take place; not all individuals become formatively attached to the groups of which they are a part. I only claim that this can happen and often does happen in the case of the type of communities mentioned above, which often suffer historic injustice.

#### VIII. IDENTITY-FORMING GROUP ATTACHMENTS AND THE VALUE OF GROUP HARM

The polarity of the value (good or bad) of how an object is faring can shift for the person who is formatively attached to that object.<sup>98</sup> This remains the case regardless of the fact that people’s identity-forming attachments and corresponding collective identities are fairly stable. Hence, even though changes in the community or in circumstances usually do not sever people’s identity-forming attachment to the group, changes in the group or in background circumstances can affect the value that the interests of the group and the value of being a member of the group have for the individual members of the group. In other words, how harms to one’s group ipso facto affect one may change even if the fact that certain group harms have ipso facto some value for one remains fairly stable. For example, people are often formatively attached to their communities as moral, political, social and cultural beings. Changes of moral, political, social and cultural significance in the group can often change what it means for an individual to be part of the group. This can happen without necessarily changing the fact that being a member of that group is a significant aspect of “who one is,” and therefore has value to one. What changes is the nature of the value, not that the group has value. For example, being German in 1910, 1919, 1933, 1945 and 1989 meant radically different things and had radically different personal value for members of

97. For one account of such transitions, see TAMIR, *supra* note 71, at 13-34.

98. See Appiah, *Identity, Authenticity, Survival*, *supra* note 40, at 159-62.

that group (even for the same person). However, members still kept membership as a significant aspect of “who they are.” In such cases, while it is not likely a mistake to deny that one’s community has value for one, the nature of that value or the meaning being a member in the community has for one may change, and with it the ipso facto value that harm to that community has for one.

Moreover, that something has ipso facto value for one as a function of “who one is” does not mean it has positive value for one (in addition, self-identification should not be confused with approval).<sup>99</sup> For example, that a black South African and a white South African were both formatively attached to the South African Apartheid community or society does not mean that the nature of the attachment, its implication on their identity and the value this community had for each one of them was similar.<sup>100</sup> Significant harms or setbacks to the Apartheid regime and society, a key aspect of the South African community at one point, may have been ipso facto good for the former person and ipso facto bad for the latter person. Being formatively attached denotes that the object of the attachment has value for the attached person as a function of “who that person is.” That being attached can have negative value for one does not mean one is not attached. We can reflect on the value of our attachments, but simply realizing that an attachment is bad rather than good for one does not sever one’s attachment. This may be one reason why many people often wish to change their society for the better rather than leave it and try to replace it with another. The nature of the attachment determines not only whether one is affected by harms to the group but also whether one is affected for better or worse.

#### IX. THE SOLUTION: “CONSTITUTIVE HARM”

The non-identity argument holds that as long as current members of historically wronged groups have a life that is worth living, identity-determining past acts and events, such as historic wrongs, do not harm them. Hence, it seems that even if in principle certain harm to a group is ipso facto bad for its members, in most cases they are still better off, on balance, having some of their communal interests set back by group harms than never having existed at all.<sup>101</sup> In contrast, I argue that when a

99. RAZ, *supra* note 61, at 35 n.20.

100. For a critical account of Communitarian politics as uncritically accepting the (positive) value of “traditional” attachments such as family and nation, see Marilyn Friedman, *Feminism and Modern Friendship: Dislocating the Community*, in COMMUNITARIANISM AND INDIVIDUALISM 101 (Shlomo Avineri & Avner de-Shalit eds., 1992).

101. According to the non-identity argument, that some people today strongly consider historic wrongs and current subsequent group harms to be personally harmful, as they do in cases of historic injustice, does not mean they are right. As mentioned before, people do not always realize what their overall interests are. It is true that the state of one’s community can affect one’s well-being. For example, a group history of victimhood and oppression can infuse its members with a sense of personal inferiority and a low self-image. In such cases people may only see the harm they suffer from an historic wrong and remain blind to how it benefited them. It is true that the way people perceive their own state of well-being and interests can play a significant independent role in influencing their actual state of well-being (on the

certain event is bad for one as a function of “who one is” (in the sense elaborated above), this setback or damage cannot be balanced against the gains that that same event may bestow through furthering one’s other interests, leading to the conclusion that such events do harm. Such harm is not subject to a cost/benefit analysis in relation to how one’s other personal interests are faring; it is qualitatively different from harm caused by setbacks to one’s contingent or non-formative interests. I call this type of harm “constitutive harm”<sup>102</sup> and demonstrate that the non-identity argument applies a conception of harm that is incompatible with “constitutive harm.”

In both philosophy and the law, harmfulness and harm are usually determined counterfactually. In assessing the harmfulness of  $y$  to  $Q$  we ask whether  $Q$  would have been better or worse off had  $y$  not taken place.<sup>103</sup> If  $Q$  is worse off for  $y$  taking place, it follows that  $y$  harmed  $Q$ . This is the conception of harm and harmfulness assumed by the non-identity argument.<sup>104</sup> Furthermore, the non-identity argument takes an aggregative approach to harm, calculating harm as the *overall* effect an event has on a person.<sup>105</sup> If harm is a setback of interests,<sup>106</sup> then, under the aggregative approach to harm, in order to assess whether  $y$  harmed  $Q$ , one must view  $y$ ’s effects on  $Q$  on balance, taking into account how  $y$  affected all of  $Q$ ’s commensurate<sup>107</sup> interests.<sup>108</sup> Consequently, an event is

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connection between identity and community and the adverse implications group harm can have for individuals, see, e.g., WILL KYMLICKA, *LIBERALISM COMMUNITY AND CULTURE* 175-76 (1989)). However, when there is no real personal loss on balance, the non-identity argument implies that it is best to simply inform people of their miscalculation, pointing out to them that in the final analysis they may in fact benefit from the past wrongs that currently harm their community. It is possible that people are prone to adopt social narratives as personal identity; however, sometimes they are better off not doing so. This argument is very patronizing. Nevertheless, it is the answer the non-identity argument offers to people’s strong sense of victimhood.

102. “Constitutive harm” is a function of identity; it is not to be confused with “constituting harm,” which is harm that creates one’s identity.
103. For examples of counterfactual approaches to harm, see Lukas H. Meyer, *Past and Future: The Case for a Threshold Notion of Harm*, in *RIGHTS, CULTURE, AND THE LAW: THEMES FROM THE LEGAL AND POLITICAL PHILOSOPHY OF JOSEPH RAZ* 143, 147-48 (Lukas H. Meyer et al. eds., 2003); JOSEPH RAZ, *THE MORALITY OF FREEDOM* 414 (1986); FEINBERG, *supra* note 35, at 51-55; JOEL FEINBERG, *Wrongful Life and the Counterfactual Element In Harming*, in *FREEDOM AND FULFILLMENT: PHILOSOPHICAL ESSAYS* 3, 6-7 (1992).
104. See, e.g., Meyer, *supra* note 103; George Sher, *Compensation and Transworld Personal Identity*, 62 *THE MONIST* 378 (1979). Sher approaches the common view of harm from the perspective of assessing compensation and points out that the non-identity problem exposes the limitation of this standard view.
105. See, e.g., FEINBERG, *Wrongful Life and the Counterfactual Element*, *supra* note 103, at 4-5.
106. See 1 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* 31-36 (1984); JOEL FEINBERG, *SOCIAL PHILOSOPHY* 27 (1973).
107. I narrow the aggregative account of harm to the aggregation of people’s commensurable interests simply because some interests are incommensurable, and therefore not open to aggregation. Two values are incommensurable “if it is neither true that one is better than the other nor true that they are of equal value,” RAZ, *supra* note 103, at 322. In terms of personal value (value for a particular person)  $B$  and  $D$  are incommensurable if it is neither true that one is better than the other for a particular person nor true that they are of equal value for that person.

only harmful if in aggregation it causes more loss than gain. In other words, had the event not occurred, one's overall or aggregate state of well-being would have been higher. Under the aggregative approach to harm the loss one incurs from setbacks to some of one's interests may be outweighed by the benefits one gains from the furthering of one's other interests.<sup>109</sup> For example, the non-identity argument indicates that the benefits of existence enjoyed by descendants of slaves may outweigh the setback of certain interests. As a consequence, because currently living descendants of slaves may have been worse off if slavery had not taken place, one must conclude that slavery and its legacy do not harm current descendants of slaves.

The solution to the non-identity argument proposed here challenges the applicability of the aggregative conception of harm in the context of constitutive values and interests,<sup>110</sup> such as those comprising identity-forming attachments.<sup>111</sup> Simply put, it does not necessarily follow from the fact that *Q* would have been worse off had *y* not taken place that *y* does not constitutively harm *Q*.

As explained above, people have identity-constituting interests and values as a matter of "who they are."<sup>112</sup> Having such interests may entail that how an object of one's attachment is faring is ipso facto of value for one. When such an attachment forms one's identity, some of these values or interests in how the object of the attachment is faring become constituting. In other words, since the attachment is identity-forming, the personal values that make up the attachment and are built into it are part of "who one is." From this it follows that in certain cases where being attached to a group entails that certain aspects of the well-being of the group have ipso facto value for one, events that harm that group may be harmful to one as a matter of "who one is." In such cases the harm to the group remains harmful to one even if the harm to the group also benefits one,

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108. An interest is defined as a stake in how something is faring. See FEINBERG, *supra* note 35, at 33; see also Albert Weale, *Needs and Interests*, in ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY (E. Craig ed., Routledge 1998), available at [www.rep.routledge.com/article/S040](http://www.rep.routledge.com/article/S040).

109. Such a view of harm is held, for example, by Feinberg. FEINBERG, *supra* note 35, at 34.

110. Seana Shiffrin effectively challenges the aggregative conception of harm on the grounds that benefit and harm do not counterbalance each other. Her claim is that benefit and harm are not on the same scale or are not of the same currency and thus a person may benefit overall and still simultaneously be harmed. Shiffrin, *supra* note 3.

111. Other attempts to solve or ameliorate the problem posed by the non-identity argument to historic justice claims turn to a conception of harm that is not derived from a comparative conception of harm. See Meyer, *supra* note 103, at 143-62; Haavi Morreim, *The Concept of Harm Reconceived: A Different Look at Wrongful Life*, 7 L. & PHIL. 3 (1988).

112. Because I am interested in historic injustice, I focus on the collective rather than private aspects of people's identities and on the identity-constituting interests that derive from one's identity-forming group attachments. Nevertheless, I believe that my argument here can be duplicated in certain cases of formative attachments that contribute to forming the private aspects of people's identity. An example of such an attachment can be children's attachments to their parents.

making one better off than one would have been had the group harm never occurred.

At this point the interlocutor may object, pointing out that even if certain things are formatively of value to one, such values are open to aggregation with the benefits or losses from one's other interests and values (be they constitutive or not). Even if one has a constituting stake in how something is faring, it does not necessarily follow that affronts to such values or interests are closed to trade-offs with setbacks or advances to one's other interests and values. That we have certain interests and values as a matter of "who we are" does not mean that, on balance, setbacks to those interests also *harm* us as a matter of "who we are." That a certain interest is constitutive does not entail that setbacks to that interest are incommensurate with setbacks and advancements to one's other interests. According to the aggregative approach to harm, while it is possible that some events have certain value to one as a matter of one's identity, whether certain events harm or benefit that individual remains a matter of one's overall well-being – determined by the aggregation of how all of one's interests and values are faring on balance. The fact that some interests and values are constitutive and others are contingent does not seem to change this.

The interlocutor's response assumes the same approach to harm that yields the unintuitive conclusions of the non-identity argument. Under the aggregative approach to harm *any event* that sets back one of a person's interests or values can always, in principle, still be *either harmful or beneficial* for that person. The personal value of any event (i.e., whether that event is harmful or beneficial to that person) is always determined based on an aggregative calculation of the effects it has on *all* of one's interests. The personal value of any event is never a function of how it affects a single interest or value in isolation, no matter how constitutive. The aggregative conception of harm denies that certain things are "foundationally" harmful or beneficial for people. For example, the Holocaust may be harmful or beneficial for Jews born after 1945, assuming they would not have been born had the Holocaust not occurred, and slavery may be harmful or beneficial to currently living African Americans. It all depends on how the past event affects people's interests overall. In the case of the content Jew (whose life is worth living), while the Holocaust has some adverse effects on him, its overall effect is beneficial. Therefore, while it may be a misfortune, and in that sense bad for one, to be a second or third generation from the Holocaust, the Holocaust itself benefited one. As indicated in the beginning, such conclusions seem implausible and prompt us to view the non-identity argument as a hurdle to be overcome.<sup>113</sup>

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113. In his analysis of wrongful life torts Joel Feinberg argues that while people who have a life worth living are never harmed by acts that determined their existence, they may still develop a justified sense of resentment towards those who performed the prenatal wrongful act. This applies to those with membership in a group that was somehow wronged or disregarded by the wrongful act. For example, an African American today may resent slavery and those responsible for it because of how it reflects on her country, community, culture, race and family. I believe that ac-

There is a key distinction between events that are harmful or beneficial for one and events that are harmful or beneficial for one as a function of “who one is.” When thinking of what is harmful or beneficial for a particular person, the former type of event is never either harmful or beneficial for that individual in and of itself. The value such events have *for* one is a function of the overall effects these events have *on* one. Hence, in principle these events can always be either harmful or beneficial for a person. In contrast, events that affect one as a matter of one’s identity have a certain value for one as a matter of “who one is.” This entails that regardless of its other effects on an individual, which on balance can be harmful or beneficial, this latter type of event *always* retains its value for that particular person. In other words, if a certain event is harmful for a person as a matter of “who one is,” then even if this event is on balance beneficial to that person it *also* remains harmful for him in a way that is not counterbalanced by the benefits it brings him or her. In such cases the event is beneficial as well as constitutively harmful for that person. The two effects cannot be aggregated because what is constitutively harmful for one cannot be cancelled out by benefits (without changing “who one is”).

The difference between the personal value of the two types of events can be clarified by pointing to two different accounts of the self and of the relation between the self and its interests. Michael Sandel differentiates between what he calls a situated self<sup>114</sup> or a “self of possession”<sup>115</sup> and an “unencumbered self.”<sup>116</sup>

The unencumbered self is not defined by its values, ends, interests, history, attachment and physiology or by any of its other attributes. It stands as a “subject of possession”<sup>117</sup> in relation to its attachments, values and interests. It is attached in the sense that some particular object may have some unique value for it, but it is never defined by the attachment or its interest in the object. In this respect a person’s relation to its attachments, values and interests is that of owner and property: one *has* attachments but one is never formed by one’s attachments. Sandel explains that under this conception of the self.

. . . there is always a distinction between the values I *have* and the person I *am*. To identify any characteristics as *my* aims, ambitions, desires, and so on, is always to imply some subject ‘me’ standing behind them, at a certain distance . . . it rules out the possibility of what we might call *constitutive* ends. No role or commitment could define me so completely that I could not understand myself

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cepting the fact that certain group harms are also real individual harms shows that Feinberg’s ad hoc “resentment” category really reflects individual harm. FEINBERG, *supra* note 35, at 33-34.

114. SANDEL, *supra* note 64, at 11-13; Michael Sandel, *The Procedural Republic and the Unencumbered Self*, in COMMUNITARIANISM AND INDIVIDUALISM 12, 18-19 (Shlomo Avineri & Avner de-Shalit eds., 1992).

115. SANDEL, *supra* note 64, at 20, 54-59.

116. *Id.* at 62.

117. *Id.* at 54-59.

without it. No project could be so essential that turning away from it would call into question the person I am.<sup>118</sup>

According to the unencumbered conception of the self there is always a distinction between the self and any specific property it has. We can always detach the self from any one of its properties and still maintain the identity of the self. Sandel points out that thinking of the self as entirely unencumbered carries a

. . . cost to those loyalties and convictions whose moral force consists partly in the fact that living by them is inseparable from understanding ourselves as the particular person we are – as members of this family or community or nation or people, as bearers of this history, as sons and daughters of this revolution, as citizens of this republic. Allegiances such as these are more than values I happened to have or aims I ‘espouse at any given time’. They go beyond the obligations I voluntarily incur and the ‘natural duties’ I owe to human beings as such. They allow that to some I owe more than justice requires or even permits, not by reason of agreements I have made but instead in virtue of those more or less enduring attachments and commitments which taken together partly define the person I am.<sup>119</sup>

In accordance with this critique, communitarian thinkers have advocated a competing account of the self.<sup>120</sup> As we saw earlier in the accounts of MacIntyre and Taylor, communitarians argue that people’s identity is situated in some specific social context. Under the communitarian view people are formatively attached to groups and objects such as their communities, family and culture. The personal values that make up these attachments and are built into them are part of people’s identities (in the sense of “who they are”). Unlike the idea of the self as unencumbered, this image of the self is consistent with having identity-forming attachments.

Both conceptions of the self capture something true about people’s attachments, interests and values and people’s relation to their groups and communities. Sandel has been criticized for applying a rigid dichotomy in his analysis of the nature of self; namely thinking of the self as *either* unencumbered *or* entrenched.<sup>121</sup> This is not the conception of identity I have in mind here. I believe that when thinking of our identity in terms of “who one is” our identity is neither completely unencumbered nor completely set. As argued above, most of our properties can be shed without impacting “who we are.” In such cases people are better described as

118. Sandel, *The Procedural Republic and the Unencumbered Self*, *supra* note 114, at 18-19.

119. SANDEL, *supra* note 64, at 179.

120. For a general account of the communitarian liberal debate, see TAYLOR, *supra* note 26, at 181-203; KYMLICKA, *supra* note 101, at 47-99; KYMLICKA, *supra* note 41, at 208-83.

121. Amy Gutmann, *Communitarian Critics of Liberalism*, 14 PHIL. & PUB. AFF. 308, 316-18 (1985). I am not sure this is a completely fair portrayal of Sandel’s approach, who seems to allow the individual a role in the changing and recreating of its own identity. See, e.g., SANDEL, *supra* note 64, at 152.

unencumbered selves who relate to their attachments and ends as “subjects of possession.”

In contrast, other aspects of our identity, which are fairly stable, form us into “who we are.” In such cases people’s relation to their attachments, values and ends is constitutive; this is often the case when considering one’s attachment to one’s nation, clan, tribe or family. This derives from the fact that while people’s identities may have no essence, they do have bedrock, in the sense explored above, that makes us into “who we are.” Considering the nature of the human condition, these aspects of our identity are often *practically* indelible and at times even beyond our choice. The self is situated in a certain web of values, interests and attachments that is largely socially given. Had human life been longer or had the structure of human societies been different, perhaps our identity-forming attachments and the personal values and interests they entail would have faded more often and changed more rapidly. But as things are, in the case of our constitutive attributes such as our identity-forming attachments and the values they comprise, it is more accurate to view people’s identity in terms of the situated rather than the unencumbered self.

The aggregative account of harm assumes a conception of the self that is unencumbered by what is good or bad for it. It requires distinguishing between the individual and what has value for her; viewing the individual as a “subject of possession,” possessing certain interests but never *constituted* by any of them. According to this approach, since we only *possess* interests, nothing is ever necessarily good or bad for one as a matter of “who one is.” In analyzing the harm involved in setbacks to constitutive values and interests, the unencumbered conception of the self leads to the unintuitive conclusion of the non-identity problem: some events that seem clearly harmful for one turn out being, on balance, beneficial to one.

When one’s constitutive interests are set back one suffers what I call “constitutive harm.” Because the aggregative account of harm assumes a conception of the self that is detachable or unencumbered by its values and interests, it is not capable of capturing the harms involved in the setting back of one’s constituting interests. One incurs constitutive harm on a “foundational level,” which “blocks” aggregating it with other losses and benefits. Having an identity-constituting value or interest does not only entail that *having* the value or the interest is part of “who one is,” but also that certain things are good or bad, harmful or beneficial for one as a matter of identity. Since collective identities often come with built-in personal values, if event *y* is bad for *Q* as a matter of *Q*’s identity, then the only way in which *y* can become not harmful for *that person* is if that person were to go through a profound change or if the values society attaches to that person’s collective identity were to radically change. The aggregative approach rehabilitates *y*’s value for *Q* due to its positive effects on *Q*, but the problem with this is that *Q* does not exist as “the person *Q* is” without *y* being harmful for her. Benefits one gains concurrently with suffering constitutive harm are attributed to *that person* who is *constitutively* harmed; in such cases suffering constitutive harm is part of

the identity of the person to whom we *subsequently* attribute costs and benefits.<sup>122</sup> In other words, the aggregate benefit is enjoyed by the person who is, due to who she is, *already* constitutively harmed.

Realizing that there is a complementary conception of the self to that assumed by the non-identity argument helps explain our intuitions that we can suffer constitutive harm, even when the harmful event otherwise benefits us overall. The idea of constitutive harm fits well with the idea of the self as encumbered by its constituting interests and values. Unlike what is assumed by the picture of the unencumbered self, it is misguided in the case of constituting values to think of the self as “standing behind” or in detachment from what is constitutively good or bad, harmful or beneficial for it. One’s constitutive interests and values are part of “who one is.”

There are at least two types or “levels”<sup>123</sup> of harm: one that has to do with “who the person is” and another that has to do with what happens, on balance, to that person. According to my view, the same event may be both good and bad, both harmful and beneficial for the same person. On the one hand one may suffer constitutive harm as a function of “who one is,” and on the other hand one may enjoy the aggregative benefits deriving from the advancement of one’s other interests.<sup>124</sup>

Moreover, a single event can affect several identity-constituting values belonging to the same person. For example, usually people are formatively attached to more than one group or community and subsequently their collective identities often have several dimensions. A single event may deeply affect two communities or groups to which one is formatively attached, benefiting one and harming the other. Such events touch people at the crossroads of their identities and can be both constitutively good and bad for them. This is often the case for members of oppressed minority groups who are also members of an oppressed sub-minority group within the former minority group. For example, the interests of African American women may clash with the interests of the general African American community. African American women are members of both groups and in certain cases may be torn between these two aspects of their identity. An example is the Anita Hill and Clarence Thomas affair where on the one hand Anita Hill stood for the interests of black women,

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122. By “subsequently” I mean to denote a categorical precedence, not a temporal one.

123. By “levels” I do not mean that one type of harm is necessarily worse than the other, only that they are different in that one is open to aggregation and the other is not.

124. The idea that the same thing can be both good and bad for one is not new. For example, Bernard Williams points out that sometimes we are subject to conflicting moral obligations. An action can be good in terms of one obligation and bad in terms of another. While choosing one option over the other may be in some sense the right thing to do, it does not meliorate or cancel the moral cost of not adhering to the conflicting obligation. So if it is good for one to do the right thing, in such cases whatever one chooses to do is both good and bad for one. This is the loss that gives rise to the sentiment of “moral regret.” Williams explains that sometimes this sentiment is appropriate since there is a plurality of values, which may be reasons for conflicting actions. BERNARD WILLIAMS, *PROBLEMS OF THE SELF*, PHILOSOPHICAL PAPERS 1956-1972, at 166-86 (1973); BERNARD WILLIAMS, *Conflict of Values*, in MORAL LUCK, PHILOSOPHICAL PAPERS 1973-1980, at 71-82 (1981).

an often-subjugated group within the African-American community, while on the other hand she was simultaneously hindering her own interests, as part of the overarching African-American community, in the success of the nomination.<sup>125</sup>

In his exchange with Parfit over the non-identity problem, James Woodward points out that the relations between interests are more complicated and not as uniform as those assumed by the aggregative approach to harm. According to Woodward,

The "space" of peoples' interests has, as it were, many dimensions rather than just one and lacks a natural metric. People do not in all circumstances regard a setback to one interest as fully compensatable by a sufficiently large gain to some other interest. Relatedly, peoples' choices with respect to important interests often reflect a satisficing rather than a maximizing strategy. . . . To show that an action violates a moral requirement and is wrong, it will often be enough to show that it adversely affects some specific interest protected by a right; that the action affects other interests in a way that is, on balance, beneficial will not automatically cancel or compensate for this violation.<sup>126</sup>

Woodward does not spell out what possible relations he conceives between interests. However, the notion of "constitutive harm" fits nicely as one of the dimensions he envisions making up the "space" of interests.

To clarify, this is not an argument from incommensurability, according to which interests and values cannot be aggregated because they are incommensurate. In principle, harms to one's communal interests may be balanced against and aggregated with setbacks and advancements to one's other interests. As long as the two have values that are commensurate, there is no reason to think otherwise. My argument here, negating aggregation, turns on the relation between the subject of the harm and his or her interests, not on the relation between the values reflected in those interests.<sup>127</sup> The fact that in principle one is better off having the life one has, as a member of an historically wronged community, than never existing at all does not, in cases of constitutive harm, counterbalance the

125. See Nancy Fraser, *Sex, Lies and the Public Sphere: Some Reflections on the Confirmation of Clarence Thomas*, 18 *CRITICAL INQUIRY* 595 (1992).

126. James Woodward, *Reply to Parfit*, 17 *ETHICS* 800, 802-03 (1987).

127. Incommensurate values are a good example of another case in which an event can be both harmful and beneficial to one. Two values are incommensurable "if it is neither true that one is better than the other nor true that they are of equal value." In terms of personal value (value for a particular person) *B* and *D* are incommensurable if it is neither true that one is better (for a particular person) than the other nor true that they are of equal value (for that person). Incommensurable values cannot be aggregated or balanced against each other. Interests deriving from incommensurable personal values are in themselves incommensurable in terms of personal value, since the costs and benefits one enjoys or suffers from setbacks and advancements of these interests are in terms of incommensurable values. The harm a person suffers from the setback to one of her interests is not open to a trade-off with the benefits (or costs) she enjoys (or incurs) from the advancement (or setbacks) of another, incommensurable, interest. Under these circumstances the same event both harms and benefits that person. On the concept of incommensurability, see RAZ, *supra* note 103, at 322.

harm one suffers from the harm to one's community. In such cases neither this harm nor the harmfulness of the event that caused the harm are purged.

In principle the idea of constitutive harm pursued here may also help ameliorate some of the difficulties the non-identity argument poses to other issues of intergenerational justice and person-creating ethics. People's formative interests and values are not limited to their identity-forming group attachments. As indicated above, people's identities are also formed by non-collective attachments. They include non-relational formative traits and attributes, which may also infuse individuals with formative interests and values.

This article is concerned with defending claims for historic justice and thus only develops the idea of constitutive harm to the extent required to meet this challenge. However, an exploration of the category of constitutive harms may prove that it encompasses more than just those harms derived from setbacks to people's formative collective interests. In fact, the constitutive-harm approach may also prove fruitful in reaffirming many other moral intuitions questioned by the non-identity argument. The wider the category of constitutive harms gets, the narrower the problem posed by the non-identity argument becomes. So, while the constitutive-harm approach circumvents the non-identity argument instead of demonstrating that it is wrong, it may prove that the non-identity argument is not as central a problem to ethics as many believe.

## X. PUTTING IT ALL TOGETHER

Accepting the idea of constitutive harm, all that remains for completing the argument is connecting the various threads: historic injustice is suffered by groups; such group harm may ipso facto harm those individuals attached to the groups via their collective identity. When the interests those individuals have in the well-being of the group are constitutive of their identities, as they can be when people are formatively attached to a group, the harm to the group can ipso facto harm the attached individuals as a function of "who they are," creating a constitutive harm. In other words, in certain cases the harm to a group caused by an historic injustice also functions as a constitutive harm to the group's formatively attached individual members. Because it is constitutive, this harm is immune to the non-identity argument; no matter how good one's life is and therefore how much the historic injustice benefited one overall, without rectification or identity transformation the harmfulness of the historic injustice is indelible.

## XI. TWO LOOSE ENDS: OTHER TYPES OF HARMS AND THE IDENTITY OF GROUPS

### A. *Other Types of Harms Individuals May Incur in the Context of Group Affiliation*

There are at least three types of harms individuals may incur due to their group affiliation. A person may be harmed *for being a member* of a group; a person may be harmed through harm to a group that may be

*instrumental* in setting back that person's own interests; and, a person may be harmed *as a member* of a group. This article has focused on the third type of harm, which needs to be differentiated from the first two types, both of which prove unhelpful for countering the non-identity problem.

Individuals can suffer direct harm for being members of a group and they can be indirectly or instrumentally harmed by a direct assault on the group. For example, if I say "Kill O because he is a Blue," then O, who is Bluish, is directly harmed *for being a Blue*. It is a setback to O's individual interest in not having his life threatened. If I say, "Kill all the Blues" or if I destroy the Blues' country or culture, then I harm or damage the group known as "the Blues." In these cases my actions are not directed at any specific individual Blue, but against the Blues as a group. In such circumstances even if a particular Blue is not directly harmed for being a Blue, individual Blues can suffer *indirectly* from such action. Assuming that having a culture or country is important to the personal well-being of individual Blues, attacking the interests of "the Blues" can indirectly harm individual Blues.<sup>128</sup> Furthermore, even if the threats and attacks are only directed at a subgroup, such as the *French Blues*, and do not directly harm *all* individual Blues, they still might all be harmed as a byproduct of the harm to the subgroup. The fact that some Blues survived or were not personally directly affected does not mean that the annihilation of a large part of their people and culture does not cause them any harm. Such harm may derive from the instrumental value the group or the subgroup has for them. In addition, a direct harm to an individual for being a member of a group can become an attack on the group in general (for example, through its symbolism or the way it is experienced by others), and consequently may indirectly harm all the individual members of the group. This is one way to explain how hate crimes do not harm just the individual victims. Hence, harms directly suffered by groups can indirectly harm their individual members and harms directly suffered by individuals (especially harms they suffer for being members of a group) can indirectly harm their groups and subsequently indirectly harm all members of the group.

Both these types of harm are vulnerable to the non-identity problem and incompatible with the type of solution offered here. First, harm one suffers for being a member of a group does not supervene and is not otherwise a function of group harm. It is a purely individual harm. Since I take historic injustice to be a group matter, this type of harm cannot capture the harm individuals suffer as a function of an historic injustice to their group.

Second, thinking in terms of instrumental harm is not helpful. Individuals may suffer harm as a *consequence* of harm to their group; in such

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128. For a discussion of the instrumental importance of a community's well-being to the well-being of its individual members, see Raz & Margalit, *supra* note 70, at 133-35. For a liberal perspective on the instrumental value of community, see KYMLICKA, *supra* note 101, at 162-81. Kymlicka claims that liberalism mandates not only promising people the freedom to choose their preferred way of life but also a secure cultural and social context which gives people actual choices and the opportunity to exercise their capacity for autonomy.

cases the harm to the group sets back the independent personal interests of those individuals. However, following the logic of the non-identity argument, those currently living are usually better off being deprived by the effects an historic injustice has on them by way of affecting their instrumental interest in their community's well-being than never having been born at all. For example, it is better for a Blue, who has a life worth living, to suffer the setbacks of growing up in a shattered community than never having been born at all. Hence, for reasons of non-identity, if individuals suffer harm as a consequence of historic wrongs to their community and ancestors, this harm cannot be instrumental.

*B. The Identity of Groups and the Continuity of Group Harm*

The applicability of the non-identity problem is not limited to individuals. Groups and collectives also have identities. Events that are necessary conditions for the creation of a group and for the formation of its identity cannot set back the interests of that group: had these events not taken place the group would never have existed.<sup>129</sup> The proposed solution depends on demonstrating that historic wrongs can harm groups over generations, which in turn depends on a group's identity persisting over time. If an historic wrong determines the identity of a group, we will inevitably run into a non-identity problem on the group level as well. Events that determine a group's existence and identity (i.e., had those acts not taken place *that group* would not have existed) seem neutral in terms of what is good or bad for the group; such acts do not make the group better or worse off. From the point of view of what is good or bad for the group, "same-group acts" are mere conditions for the group having any interests at all and thus can neither harm nor benefit the group. Group identity and the idea of group identity persisting over time and in the face of changing group attributes are not trivial notions. Some elaboration on the stability of group identity is called for.

One aspect of the identity of groups is that it can exist for much longer periods than an individual's. The "lifetime" of the type of groups involved in historic injustice, such as nations, peoples, religions, families and races (taken as a social term) is long in comparison to the lifetime of an individual person.

The identity of a group is not necessarily dependent on the specific identity of the individuals it comprises. A group can be made up of different members in different times and still maintain its identity. While there is a connection between the identity and nature of a group and the identity of its members, not every change in the identity of members changes the identity of the group. In the terms of the non-identity problem, events and acts which determined the identity and existence of individual members of a group do not necessarily also determine the existence and identity of the group itself – in other words, not all "differ-

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129. James S. Fishkin, *Justice Between Generations: Compensation, Identity, and Group Membership*, in *NOMOS XXXIII: COMPENSATORY JUSTICE* 85, 93 (John W. Chapman ed., 1991).

ent-people acts” are also “different-group acts.”<sup>130</sup> In fact, once groups such as nations, peoples and religions are established, most of the acts that determine the identity of their members do not function as “different-group acts.”

Much in determining that group *P* today is the same group as group *G* of a hundred years ago has to do with factual similarities between the groups and the various causal connections between the two groups. While it is not clear what degree or which types of factual similarity and causal connection between past and present groups commonly constitute an identity relation between the groups, it is clear that these characteristics only offer a partial explanation of the phenomena of group identity persisting over time.

Group identity is to some degree also a matter of perception. Other components beyond similarity and causality, such as memory, self-perception and the perception of others play a role in determining the identity of groups. In this sense group identity is not only discovered but also, to an extent, created. While there are factual limitations to the ability to create collective group identities and a group’s ability to invent itself as descended from any historical group it happens to like, it is also clear that group identity is largely a function of collective memory and the stories people tell themselves about the history of their community.<sup>131</sup> Hence, accounting for the persistence of group identity over time and justifying or rejecting claims about such identity is not always an easy matter; certainly not conceptually.

Here it is assumed that continuity of group identity is possible and that it takes place in the cases of historic injustice contemplated here. For example, it is sensible to view the African American community of today as a descendent group of the African American slaves of the eighteenth and nineteenth centuries and of the African American community of the first half of the twentieth century, or that the Jews living today are members of the same collective as those who died in the Holocaust.<sup>132</sup> These cases, as do others involving historic injustice, exhibit strong causal connections and similarities between the earlier group and the current group,

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130. A “different-group act” is an act that creates a new group—without that act that group would not have existed.

131. On memory and group identity, see W. JAMES BOOTH, *COMMUNITIES OF MEMORY: ON WITNESS, IDENTITY, AND JUSTICE* 1-65 (2006); for a discussion on remembrance and republican political theory thought, see BRUCE JAMES SMITH, *POLITICS & REMEMBRANCE* (1985); on how shared memory revives the connection between current groups and past groups, see AVISHAI MARGALIT, *THE ETHICS OF MEMORY* 65-74 (2002); for a brief discussion of the role of memory and group identity in the context of historic justice, see Jeremy Waldron, *Historic Injustice: Its Remembrance and Supersession*, in *JUSTICE, ETHICS AND NEW ZEALAND SOCIETY* 139, 141-44 (Graham Oddie & Roy W. Perrett eds., 1992).

132. There are ways to enter a group besides being born into one or having a familial ancestral lineage made up of past group members. I include in the “descendants group” those current members of the historically wronged group who are not direct descendants of the members of the group who were initially affected by the historic wrong, but are nevertheless currently members of the group whose members were originally wronged and which currently suffers from an historic injustice.

which also self-identifies itself with the earlier group, establishing a continuity of group identity.

In establishing an historic injustice simple continuity of group identity will not do. The current group must not only be the same group whose members were wronged in the past, but the past wrong must also still harm that group in the present. Hence, historic injustice is not just a matter of identity continuity but *also* a matter of continuity of the harmful effect of the historic wrong. If the group or background circumstances have changed in a way that maintains the group's identity but makes the past wrong no longer harmful to the group, then there is no group harm to channel the effects of the historic wrongs to currently living individual members. In cases of historic injustice the core argument for rectification is the continuous harm to the group and subsequent harm to its individual members.

Certain group identities derive from, are constructed by, or are a by-product of historic wrongs. For reasons of non-identity such wrongs could not have harmed such groups. By extension, it follows that these cases are beyond the reach of the solution offered here. There are actual cases of historic injustice that *seem* to fall under this scenario. For example, one may argue that the current African American community would never have existed without the wrongs of slavery.<sup>133</sup> Clearly if there had been no slave trade there would be no African American community in the U.S., and even if there were it would be radically different from the African American community we know. Therefore, because the historic wrong is a necessary condition for the creation of the group, it never harmed it.

In most cases the difficulty such examples pose to the applicability of my solution is not insurmountable. In many cases historic wrongs, such as slavery, are not singular or short-lived occurrences; they often span many years and are made up of many specific interconnected wrongful acts. While initially these acts may have caused the formation of the group now demanding historic justice, after the group identity had been sufficiently established those wrongs began to harm that group without radically affecting its very identity. This is certainly true in the case of the wrongs of the slave trade and slave economy that spanned centuries. Moreover, even if the original wrong to an otherwise ungrouped set of individuals formed them into a (wronged) group, and hence did not harm *the group* at the moment of its natality, the subsequent failure to rectify the harm those individuals suffered as a consequence of this failure turned, with time, into group harm. According to this approach it is the failure to rectify the harm to individual members of the group that creates the historic injustice to the group, not the original historic wrongs to those individuals.<sup>134</sup>

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133. For a discussion of this problem, see Fishkin, *supra* note 129, at 93.

134. For such an approach to solving the non-identity problem, see George Sher, *Trans-generational Compensation*, 33 PHIL. & PUB. AFF. 181, 190-95 (2005).

This article stays within the confines of assuming continuity of group identity and further assuming continuity in the harm to the group.<sup>135</sup> Considering the relative “longevity” of groups involved in historic justice claims and the partial incongruence between group identity and the identity of these groups’ individual members, assuming that there is continuity of group identity in cases of historic injustice seems valid.

## XII. A FEW WORDS ON RECTIFICATION, RESPONSIBILITY, STANDING AND STATUTES OF LIMITATIONS

### A. *Rectification*

Proving harm does not amount to a justification of claims for historic justice. Establishing a right for rectification requires proving factors beyond the victims’ interests in rectification,<sup>136</sup> such as liability of the parties charged with bearing the cost of the rectification, considerations of justice deriving from convenience and other competing values,<sup>137</sup> the practicality of choosing and creating an effective scheme of rectification<sup>138</sup> as well as legal constraints,<sup>139</sup> such as statutes of limitations and property rights.<sup>140</sup>

In cases of historic justice some of these commonly required components for justifying rectification are more complicated. Beyond the basic relationship between the original victim, who must be somehow harmed, and the original wrongdoer, who must be somehow liable for that harm, three further relationships emerge: one, between the original wrongdoer and those currently asked to bear the cost of rectification; a second, between the original victims and those currently demanding rectification; and a third, the relationship between those individuals currently making the claim for historic justice and those individuals against whom the claim is made. This article bears primarily only on the second type of relationship.

Through focusing on group harm in cases of historic injustice this article sheds light on the nature of the relationship between the original victims and those currently demanding historic justice. As indicated above,

135. For an account of the relation between group identity and historic justice, see Jeremy Waldron, *Redressing Historic Justice*, 52 U. TORONTO L.J. 135, 147-51 (2002).

136. Person X has a (moral) *right* for rectification from person Y if his interest in rectification is a sufficient reason for holding Y to be under a duty to rectify X. For a more general account of the interest theory of rights, see RAZ, *supra* note 103, at 165-92.

137. For example, that a child will be born with certain deformities and illnesses may serve as a reason for not conceiving or even for aborting a pregnancy. Nevertheless, there are competing reasons such as a woman’s privacy, freedom and religious liberty which may serve as counter reasons for a duty to abort or not to conceive in such circumstances. See Haavi Morreim, *The Concept of Harm Reconceived: A Different Look at Wrongful Life*, 7 L. & PHIL. 3, 29-30 (1988).

138. See, e.g., BROPHY, *supra* note 8, at 98-166; Posner & Vermeule, *supra* note 8, at 725-46.

139. Posner & Vermeule, *supra* note 8, at 711-25; BROPHY, *supra* note 8, at 98-140 (focusing on aspects of reparations litigation).

140. For various arguments against reparations to descendants of slaves in the U.S., see BROPHY, *supra* note 8, at 75-94. For an argument of how changes in background facts and the needs of others can affect and even dissolve rights for rectification in cases of historic injustice, see Jeremy Waldron, *Superseding Historic Injustice*, 103 ETHICS 4 (1992).

the significant relation is a shared group membership between the original victims and their descendants. The harmfulness of the original wrong to current individual members of the group is a function of the ongoing injustice to their community or group. Therefore it is having a formative attachment to the community that gives rise to the harm.

There are many possible remedies for historic injustice, ranging from conversion (often of land), redistribution of resources, affirmative action and reparations in the form of payment, to less tangible remedies such as apologies, symbolic gestures<sup>141</sup> and reconciliation or truth-telling.<sup>142</sup> The fact that group harm is the conceptually primary harm involved in historic injustice offers some insight into how to tailor these remedies. Since the harm suffered by individuals is a function of the group harm or, more accurately, the group harm is the harm to the individual, the remedy should at least partially focus on rectifying the group rather than just its individual members. Remedies directed at the interests of the individual members of the group, such as making equal payments to the individual members of the harmed community, rather than at the group's interests as a whole, may not achieve the desired end. The interests of individuals do not always serve the interests of their group as a whole. Therefore, directly rectifying individuals may not assist in elevating the overall state of the group. Direct rectification of individuals is warranted when it falls under the category of compensatory justice, which addresses the past harm individuals suffered (up until the moment of compensation) as a consequence of the group harm being harmful for them – for example, having a low self-image or suffering from depression or anxiety due to the harm to their group. This form of rectification does not directly address the source of these past individual harms – the ongoing injustice to the group, which is the main harm to individuals in cases of historic injustice. Compensating individuals for harms they suffered in the past that derived from the harm to their community will most likely fail to end the ongoing group harm. In order to end this harm a form of restorative justice is required to address the injustice to the group.<sup>143</sup> “Restoring” the group to the position it would have been in had it not suffered the historic wrongs may put an end to the historic injustice to the group (which, again, is the primary harm individuals suffer in cases of historic injustice) as well as remove the threat of causing any further derivative harm to individuals (of the sort dealt with through compensatory justice).

In principle most, if not all, of the possible remedies mentioned above may prove appropriate in cases of historic injustice, so long as they fit the particular injustice and are tailored to address either the compensation of

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141. For example, the erection of monuments and museums, such as those in Berlin dedicated to the Holocaust or the annual “Sorry Day” in Australia, dedicated to remorse for the forced removal of Aboriginal children from their parents and placement in white families. See *A Day to Honour the Stolen Generations*, *supra* note 13.

142. For a discussion of possible remedies, such as apologies, payment of cash or in-kind payments, affirmative action, or political rights, see Posner & Vermeule, *supra* note 8, at 725-36.

143. On the models of rectification – restorative and compensatory – see Jeremy Waldron, *supra* note 131, at 144-59.

individuals or the restoration of the group (or both). For example, in many cases of historic injustice not all members of the historically harmed group are negatively impacted. In such cases often the dire state of some in the group embodies the harm the historic wrongs cause to the group as a whole, thereby harming all its current individual members. Rectifying this group harm, which in turn is harmful to all members of the group, requires assisting those members of the group whose dire state embodies or is the source of the harm to the group as a whole. Similarly, programs of affirmative action may be justified as a form of rectification for historic injustice even though they do not equally benefit all individual members of the harmed group; this is true as long as such action improves the state of the group as a whole by, for example, ending institutional discrimination, achieving better representation, and empowering and opening up new valuable possibilities for others in the group. Apologies and symbolic remedies may also be appropriate, for they are able to achieve both individual compensation and group restoration. The same is true for the return or transfer of once-appropriated land, as long as, again, the focus is on the interests of the group and not just on the interests of individuals. Remedies directed towards compensation of individuals for past harms are difficult to assess. Unlike the harm individuals suffer from the group harm, which is the same for all those attached to the group since the harm *is* the group harm, the type and extent of harms requiring compensation of individuals differ from individual to individual. Considering the magnitude of the number of people often affected by historic injustice, compensating each individual for such harms becomes extremely difficult and even impractical. Under such circumstances blanket remedies that potentially can touch all, such as apologies and symbolic gestures, as well as uniform direct payments to all members of the group, may be effective.

Finally, the identity of a historically wronged group, and consequentially of its formatively attached members, may be strongly tied to the group's ongoing state of victimhood. In such cases the rectification of the group may cause the identity of the group to dissolve and lose its coherence or unity. The danger posed by this eventuality is found in the loss those attached to the group may experience from the loss of a significant anchor in their identities; a loss that may even exceed the harm that was rectified. When this threat arises it must function as an important consideration in tailoring the form of rectification, which should be informed by consideration of transformative justice as well as considerations of restorative and compensatory justice.<sup>144</sup>

### *B. Responsibility*

The non-identity problem has significant implications for matters of responsibility for historic injustice, primarily in denying any responsibility exists. Since according to the non-identity argument historic wrongs cannot harm descendants of historically wronged victims, it follows that those responsible for the historic wrongs, or their descendants, owe noth-

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144. See, e.g., LEORA BILSKY, *TRANSFORMATIVE JUSTICE: ISRAELI IDENTITY ON TRIAL* (2004) (exploring the power of trials and judgments to transform collective identity).

ing to the descendants of the original victims. This argument also dissolves the duty to consult the needs of future generations in performing “different-people acts,” making acts that are otherwise intuitively wrong because of their effects on future people (such as environmental degradation,<sup>145</sup> irresponsible policies of population growth<sup>146</sup> or wasteful fiscal policy<sup>147</sup>) morally permissible (according to person-affecting morality). By arguing that such acts can harm future individuals, my account helps remove this difficulty in certain cases, making it wrong to disregard certain foreseeable group interests of future people and, depending on the fulfillment of other requirements, making those who do disregard such interests responsible for the effects of their conduct. Nevertheless, my account does not assist in solving the perplexities of responsibility and liability over time and between generations, nor does it tackle the question of individual liability for wrongs perpetrated not by an individual but by one’s community or by other individuals belonging to that community and acting in its name, be it in the present or in the past. In other words, focusing on victimhood and harm and not on responsibility and liability, this article does not address why and when individuals living today should bear the cost of rectifying harms caused by the wrongs of their ancestors and suffered by currently living plaintiffs.

### C. *Standing and Statutes of Limitations*

Focusing on constitutive harm derived from group harm can help plaintiffs demanding historic justice meet the standing requirement, which was arguably the main reason for the dismissal of the recent appeal in the Seventh Circuit Court of Appeals referred to in the Introduction.<sup>148</sup> The modern doctrine of standing requires that the plaintiff suffer an injury that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.<sup>149</sup> In addition, there must be a causal connection between the injury and the conduct that is the target of the litigation.<sup>150</sup> In other words, the injury has to be fairly traceable to the event that is presumed to have caused that injury. Finally, it must be likely that a decision in favor of the plaintiff would successfully redress the injury.<sup>151</sup> In *In re African-American Slave Descendants Litigation* the court ruled that “it would be impossible by the methods of litigation to connect the defendants’ alleged misconduct with the financial and emotional harm that the plaintiffs claim to have suffered as a result of that conduct.”<sup>152</sup>

145. See Schwartz, *supra* note 3.

146. See Derek Parfit, *On Doing the Best for Our Children*, in *ETHICS AND POPULATION* 100, 100-02 (M.D. Bayles ed., 1976).

147. See Neil H. Buchanan, *What Do We Owe Future Generations? Framing the Issues, with an Application to Budget Policy* (GWU Law School Public Law Research Paper No. 351, 2007).

148. *In re African-American Slave Descendants Litig.*, 471 F.3d 754 (7th Cir. 2006).

149. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

150. See *id.*

151. See *id.* at 561.

152. *In re African-American Slave Descendants Litig.*, 471 F.3d at 759.

Claims focusing on group harm are less susceptible to the pitfalls of tracking a causal chain leading up to the current harm than trying to track the origins of harm to a specific currently living individual through the various previous harms to her various ancestors. The harm to the group is easier to track because it is an ongoing harm to a single and fairly stable entity and the origins of this harm extend all the way back to the original wrongs.

However, a claim for historic justice based on the fact that the harm to the plaintiffs is an aspect of an ongoing harm to their community, originating in historic wrongs, is obviously in danger from statutes of limitations, since in cases of historic justice the harm to the group originates in historic events.<sup>153</sup> Defendants could claim that since the harm to the currently living individual is an aspect of the harm to the plaintiffs' group, the legal right to sue for the historic wrongs perpetrated against the group expired long ago.

Nevertheless, this argument may be circumvented. First, in many cases one may claim that the harmed group has been continuously attempting to attain justice through the legal and political system and this process should be viewed, as a whole, as an ongoing "litigation" predating the activation of any limits set in any statutes of limitations and therefore constructively tolling the limitation period.

Moreover, in many cases of historic injustice the members of the wronged group were denied legal rights and accessibility to justice during the period set in the statutes of limitations.

In addition, in cases of historic injustice the rationales justifying temporal limits for initiating litigation – promising finality, predictability, freshness of evidence, prompt prosecution and judicial efficiency – do not seem as applicable as they do in more standard litigations.<sup>154</sup> First, in historic-justice cases, unlike most regular causes of action, there is rarely a problem with the availability of reliable evidence for proving the claims – that historic wrongs were committed is often an accepted historical fact (and when it is not accepted, the reasons are most often more political than scientific).

Second, considerations of finality, predictability and reliability of third parties are suspect when used to dismiss claims based on grand historic injustices. Those who benefit the most from the finality and rehabilitation of the current distribution of legal rights (derived to an extent from *not* rectifying the injustice) are usually not neutral third parties to the dispute but often the members of the community who most benefited, directly or indirectly, from the injustice. In addition, seeing that the parties who are liable for historic justice are most often large collective entities such as nations, countries and corporations, the rationale of allowing, at some point, a wrongdoer to go on with his or her life, no longer dreading the

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153. See, e.g., *id.*

154. For an account of rationales for statutes of limitations, see Suzette, M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68, 73-81 (2005). See also BLACK'S LAW DICTIONARY 1450-51 (8th ed. 2004).

shadow of pending litigation, is mitigated because such collective entities do not suffer dread.

Finally, further reasons for enacting statutes of limitations derive from considerations of efficiency of the legal system, which cannot cope with an endless amount of claims and has an interest in minimizing the amount of complex litigation that comes before it, and therefore requires setting a limit, laid out in an easily applied rule, on the number of potential claims. Such considerations are less compelling under the account presented here. First, not all the wrongs perpetrated in history continue to harm individuals throughout the generations – groups change or overcome past wrongs. Therefore, most claims based on historic wrongs dissolve with time as they cease to harm currently living individuals. Therefore, opening the gates of justice to those claims based on historic injustice would not result in a flood of claims going back to antiquity. Second, since historic injustice is often a source of wide social inequality and unrest, considerations of institutional efficiency are superseded by these greater social needs.

In summary, while claims based on historic wrongs to a group are susceptible to statutes of limitations, the rationales behind such statutes do not support applying them to historic-justice claims.

### XIII. CONCLUSION: HISTORIC JUSTICE AND THE NON-IDENTITY PROBLEM

I set out to defend claims for historic justice from the non-identity problem, looking for a type of harm currently living individuals may suffer from a persisting injustice perpetrated against their community and originating in historic wrongs to their ancestors and predecessors. According to the non-identity argument, future people who have a life worth living cannot be harmed by events without which they would have never been born (or conceived). The motivation for this article was to show that such harm is possible.

Constitutive harm fits well with thinking of the self as encumbered by certain constituting interests and values. This notion of harm is inapplicable with the picture of the unencumbered self, which is assumed by the aggregative conception of harm. Because of this, the aggregative conception of harm is inapplicable for accounting for the harm people suffer from setbacks to their constituting interests or as a function of their constituting values. Since the non-identity argument assumes an aggregative conception of harm, it misses the reality of constitutive harm by counterbalancing such harm with setbacks and advancements of individuals' other interests. This article validates claims for historic justice, and this is why it looked to constitutive interests and values that derive from people's identity-forming group attachments, which make up aspects of people's collective identities. Group harm, such as the harm involved in historic injustice, can function as direct or ipso facto harm to individuals who are attached to that group because some group interests are ipso facto the interests of those attached to the group. Since some group attachments are identity-forming (infusing people with certain constituting interests and values) certain group harms are ipso facto constitutively harmful to those individuals as a matter of identity. When group harm

functions as constitutive harm to those formatively attached to the group, the harm to the group ipso facto harms the individuals regardless of issues of non-identity. This is because such harm is not open to aggregation with the gains or losses one may otherwise enjoy or suffer as a consequence of the injustice to the group. In summary, the problem the non-identity argument points to does not entirely rule out the possibility of individual people suffering harm as a consequence of harm to their group, which originated in wrongs perpetrated in their prenatal past against their ancestors. This remains so, even if those individuals have a life worth living and thus are better off having the life they have than never having been born at all. When rectification for past harms is justified, the remedy should be tailored to ameliorate the group harm as the best way to address the harm to the group's individual members.

As explained above, this argument in itself does not amount to a full justification of claims for historic justice. Establishing a right to rectification depends on other factors beyond the showing of harm. However, demonstrating that individuals can suffer harm as a consequence of historic injustice helps overcome one of the many hurdles standing in the way of attaining historic justice.