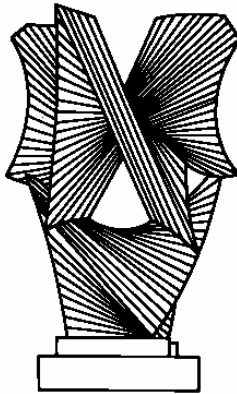


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## *Reparations as Rough Justice*

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## Reparations as Rough Justice

Adrian Vermeule \*

Forthcoming in NOMOS 50: TRANSITIONAL JUSTICE

I agree with much of Debra Satz's nuanced overview of compensation for historical injustices.<sup>1</sup> On both principled and pragmatic grounds, such compensation is exposed to many familiar objections and misfires in a familiar set of hard cases. Indeed there is a marked disconnect between the arguments and the policies in this area. Philosophers and others have thoroughly demolished the compensatory rationale for reparations,<sup>2</sup> yet governments, including the United States government, keep enacting programs of this sort, and such programs overwhelmingly tend to include compensatory cash payments along with in-kind compensation, in-kind restitution, apologies and other non-cash components. It seems that there is some persistent social demand for cash reparations accompanied by compensatory rhetoric, a demand that survives each new intellectual demolition.

Why is this? In a spirit of interpretive charity or sympathy, I want to suggest that there is a widely-shared intuition or complex of intuitions underpinning the persistent demand for compensatory reparations programs.<sup>3</sup> This intuition I shall label rough

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<sup>1</sup> Debra Satz, "Countering the Wrongs of the Past: The Role of Compensation," forthcoming in NOMOS 50: TRANSITIONAL JUSTICE.

<sup>2</sup> For an overview of the critical problems, see Tyler Cowen, "How Far Back Should We Go?: Why Restitution Should be Small," forthcoming.

<sup>3</sup> A different route would be to develop a strictly positive account of the political supply of such programs, on rational self-interest grounds. I believe such an enterprise is a nonstarter; whatever version of interest-group theory one assumes, it will be impossible to explain reparations programs without positing impartial or altruistic preferences on the part of (some decisive subset of) the payors. For a positive account of reparations that assumes "sympathy" for beneficiaries on the part of taxpayers, see Saul Levmore, "Changes, Anticipations, and Reparations," *Colum. L Rev.* 99 (1999): 1657.

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justice. It would be self-defeating to attempt a precise definition of rough justice, but here is a working approximation: rough justice is the intuition that sometimes it is permissible, even mandatory, to enact a scheme of compensatory reparations that is indefensible according to any first-best criterion of justice. Rough justice is indefensible; it seems attractive only when compared to no justice – when it is recognized that the status quo of inaction is also a proposal, one that may fare even worse, according to the same criteria that would condemn the relevant reparations proposals.

If the internal logic of the many programs of compensatory cash reparations one actually observes is that of rough justice, first-best critiques of reparatory compensation are beside the point, although pragmatic considerations remain relevant. There are well-known arguments to the effect that doing something imperfect can, perversely, be inferior to doing nothing, but I do not believe that such arguments go through in the settings we shall be discussing. I shall also suggest that it will not do to worry too much about the conceptual foundations of compensation, because some or most of the relevant worries are radically overbroad. They would condemn not only proposals for compensatory reparations, but also the ordinary mechanisms of compensation in nontransitional legal systems. This is a corollary of the main point: reparations proposals are no more than roughly just, but that is chronically true of the ordinary legal system as well.

### Objections to Compensatory Cash Reparations

Satz reviews some problems of both reparatory compensation in general, and of cash compensation as opposed to in-kind varieties. I shall focus on cash reparations justified in compensatory terms, as this is the hardest case for a sympathetic reconstruction of the implicit goals of reparations programs. It is not difficult to see the point of apologies, memorials and so on, but when the government gives the Issei and Nisei interned in the Second World War a cash payment of \$20,000 each,<sup>4</sup> the puzzles are apparent on the face of things. How could such a payment possibly make sense? There is a kind of intellectual asymmetry about programs like this: it seems much easier to poke conceptual holes in schemes of cash reparations than to make any sense of the political and social demand for them.

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<sup>4</sup> *Civil Liberties Act of 1988*, 50 U.S.C. app. 1989b.

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Satz crisply summarizes the standard objections to justifying such payments in compensatory terms. First, the welfarist idea that cash can provide the payee with the same level of preference satisfaction that she would have enjoyed had the wrong never occurred is problematic here, due to the problem of experience goods<sup>5</sup> and the problem of adaptive preferences.<sup>6</sup> Although the former problem applies only in cases of denied opportunities relative to a counterfactual baseline, such as exclusion from education, the latter problem could also apply in cases of loss from a preexisting baseline, such as physical liberty.<sup>7</sup> Moreover, it is not enough to raise the payee to the welfare level that she would now occupy had the wrong never occurred; the interim welfare loss during the period of deprivation must also be taken into account. This problem could be solved with a higher payment, but the point is that it makes the payments one actually observes seem patently inadequate. I return to this point below.

The second large problem Satz identifies is that money may be incommensurable with the goods, material or intangible, lost as a result of the injustice. When injustices are inflicted – and I will stipulate that they were in the internment case – cash payments seem to miss the point. As Satz puts it in another connection, “financial compensation seems jarring because it does not match the type of harm it is being used to counter.”<sup>8</sup>

The third problem is that reparations programs are often not well-tailored to their compensatory rationales, even where they have such rationales. There is often a mismatch between the wrongdoer and the payor (usually taxpayers); a mismatch between the victim (who may be dead) and the payee; or a mismatch between the cash form of compensation and the character of the harm done (the incommensurability problem again). In some programs, more than one of these mismatches can be found.

### Compensation, Rough Justice and the Legal System

Satz’s points are clearminded and, on their own terms, incontestable. The harder question is what to do with them. Many of these points would sweep in or over many

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<sup>5</sup> See Philip Nelson, “Information and Consumer Behavior,” *J. Political Economy* 78 (1970): 311, 312.

<sup>6</sup> See Jon Elster, *Sour Grapes: Studies in the Subversion of Rationality* (New York: Cambridge University Press, 1983).

<sup>7</sup> See Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (New York: Cambridge University Press, 2004), 181.

<sup>8</sup> Satz, *supra* note 1, at 10.

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ordinary cases in nontransitional legal systems.<sup>9</sup> One or another of the conceptual problems with compensation pop up in most civil cases, and in some cases all of them pop up simultaneously.

In a footnote, Satz observes that “of course full compensation in the form of cash could be defended in some cases as a second best, where other more attractive alternatives are not feasible.”<sup>10</sup> But this is the normal state of the whole legal system. When a protected minority is denied equal access to employment or educational opportunities, the twin problems of experience goods and adaptive preferences arise. When a worker loses an arm or a life in an industrial accident and sues the firm, perhaps posthumously, it is not news to judges or legal scholars that cash compensation is difficult to defend in principle. A damages award is incommensurable with the plaintiff’s arm, or life. Preference satisfaction is not the yardstick by which ordinary people would judge the award; nor do lawyers, judges and jurors really think they are placing the plaintiff (or the plaintiff’s family) “at least as high on an indifference curve as he would have been without receiving [compensation] but also without suffering the loss.”<sup>11</sup> And, as we shall see below, often it is the case either that the payor is not the wrongdoer, the payee is not the one who suffered harm, or both.

In such cases, the argument for the cash payment is two-fold. One argument prominent in law and economics is that money should be extracted from the wrongdoer in order to create specific and general deterrence of future wrongdoing. On this view, the money is paid to the plaintiff only because, absent the payment, plaintiffs would lack sufficient incentives to litigate and would incur socially inefficient precautions to prevent harm.<sup>12</sup> I bracket this view here -- just as, in discussing reparations, I will bracket the (remote) possibility that reparations might deter the future commission of injustices by the payor group or others.

The argument on which I will focus is different; I believe that it is widely assumed by lawyers, judges and legal scholars not yet converted to law-and-economics. The implicit argument is that cash payments in cases of this sort are rough justice: they

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<sup>9</sup> A similar claim is made, with respect to other varieties of transitional justice, in Eric A. Posner and Adrian Vermeule, “Transitional Justice as Ordinary Justice,” *Harv. L. Rev.* 117 (2004), 761.

<sup>10</sup> Satz, *supra* note 1, at n. 25.

<sup>11</sup> *Ibid.* at 5.

<sup>12</sup> Richard A. Posner, *Economic Analysis of Law*, 6<sup>th</sup> ed. (New York: Aspen Publishers, 2003), 206.

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are not really defensible according to any first-best normative criterion, but they are what Satz rightly calls a second-best expedient. What makes the expedient attractive is that, even though it is morally indefensible from a strictly first-best perspective, the status quo is even less morally defensible, assuming that one can coherently speak of comparisons and matters of degree in such things.

In most ordinary civil cases, the alternative to a cash payment is usually no remedy at all. In some cases in-kind remedies will be available – in an employment case one might instate or reinstate the worker, perhaps with back pay – but in standard accident or injury or wrongful-death cases it is dollars or nothing. As between the wrongdoer and the party who suffered wrong (or his descendants), a rough version of corrective justice suggests that the former should pay something, more than zero, to the latter, even if there are intractable objections to any particular account of how much and why.

In this system, valuation and measurement problems, incommensurability problems, and many of the other issues that Satz discusses are papered over by the institutional expedient of entrusting damage awards to juries, with loose judicial oversight. The advantage of juries is that they (1) need not give any rationale for their decisions and (2) as collective actors, need not hold any unanimous rationale for their decisions, but can proceed on the basis of compromise or incompletely theorized agreements.<sup>13</sup> There is no principled defense of this institutional practice. The only defense is that no award would be even worse, and that no principled arguments for any particular award would be tenable. Satz observes that “some of [the objections to compensation] might be acknowledged without entailing that the case for compensation is thereby demolished. For example, even if we cannot determine the exact level of compensation that descendants [of victims] are owed, we might be able to show that if not for the wrong, they .... would plausibly be better off than they are now.”<sup>14</sup> Replace the reference to descendants with a more general term like plaintiffs, and one has the basic intuition of rough justice that animates much of the nontransitional legal system.

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<sup>13</sup> Cass R. Sunstein, “Incompletely Theorized Agreements,” *Harv. L. Rev.* 108 (1995): 1733.

<sup>14</sup> Satz, *supra* note 1, at 21-22.

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So far we have assumed that the defendant/payor is the party who inflicted the wrong and the plaintiff/payee is the party who suffered the wrong. In both reparations programs and in ordinary civil cases, however, either or both of these constraints can be relaxed. In the legal system, one commonly observes payments to injured parties from corporations, successor corporations, municipalities, provincial and national governments, and other entities that are not obviously the “same” party as the wrongdoer, especially if a great deal of time has elapsed. There are well-known theoretical problems here about ethical individualism, legal identity, group membership, and individual responsibility for institutional action,<sup>15</sup> which I propose to leave firmly alone. Suffice it to say that, from the standpoint of the legal system, it is hardly unusual that the German government and German firms paid money to victims of Nazism, or that the U.S. government paid money to victims of the Japanese internment policy. One would need a very strong theory of complicity to think that (a majority of?) individuals alive today are responsible for the wrongs addressed in these programs. Yet to the lawyer’s sensibility these cases are not importantly different from cases in which the government committed a tort or breached a contract many years ago, under circumstances that tolled the statute of limitations. In both settings, it seems better to do very rough corrective justice than no corrective justice at all, even if the consequence is that the costs of taxation to fund the awards will fall on living individuals with only attenuated responsibility for the original harms.

As for the constraint that the plaintiff/payee should be the wronged party, it too is sometimes relaxed both in reparations programs and in the ordinary legal system. In civil cases brought by individuals, although there is a nominal bar on the sale or assignment of tort claims by the victim, insurance companies routinely step into the victim’s shoes and litigate the claim by subrogation. It is routine that damages are paid to descendants in wrongful-death cases. It is also routine that the plaintiff is a government or organization litigating either in its “own” right, whatever that may mean, or as a representative of victims.

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<sup>15</sup> For a discussion of these problems, see Christopher Kutz, *Complicity: Ethics and Law for a Collective Age* (New York: Cambridge University Press, 2000).

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So too, in reparations programs that are actually implemented, one often observes payments to descendants of wrongdoers. In 1994, the State of Florida paid cash compensation to both survivors and descendants of survivors of the racist Rosewood massacres in 1923. In 1992, the Chilean government awarded a monthly pension in perpetuity to certain descendants of Pinochet's victims.<sup>16</sup> In such cases the argument for compensation is not really based on the idea that the descendants were wronged in their own right, by occupying a worse position or lower level of welfare than they would have occupied in some counterfactual world without the wrong. Rather the rough intuition is that, in strictly comparative terms, there is no better stand-in for the deceased payees – a views that seems vague and difficult to defend, but that strikes many as superior to the alternative of awarding no money at all.

Even more common than payments to descendants are cases in which payments are made to organizations or institutions – again taken, in some very rough sense, to represent or stand in for the victims. The German payments for Nazism went to individual survivors in some cases, but other payments went to Jewish organizations and to the state of Israel. This poses an issue of group entitlement that is the mirror image of the group responsibility issue on the payor side. Here too, one would need a very robust theory of group identity or membership to deny that the payee and the victim have diverged. Here too, however, there does not seem to be any qualitative difference between reparations programs and the legal system, or even a marked difference in degree. Even absent some robust theory of group identity, there is a common intuition that steering compensation payments to the Jewish organizations and to Israel is in some rough sense better than throwing up one's hands; and there is no party who is obviously a better stand-in for the deceased victims.

### Cash Reparations as Rough Justice

I have emphasized the continuities between the ordinary legal system and reparations. If compensation in ordinary civil cases rests on a rough intuition that payments indefensible on first-best grounds are nonetheless superior to the status quo of

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<sup>16</sup> These and other reparations programs are summarized in Eric A. Posner and Adrian Vermeule, "Reparations for Slavery and Other Historical Injustices," *Colum. L. Rev.* 103 (2003): 689.

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no payment, it is unsurprising that there is a similar rough-justice argument for cash payments in programs like the Japanese internment reparations statute. Chris Kutz describes cash payments of this sort as “symbolic financial compensation.”<sup>17</sup> This is exactly right, even or especially if we understand Kutz to use “symbolic” pejoratively, as a synonym of “partial” or “inadequate” rather than as a synonym of “expressive.”

In this pejorative sense of the term, the intuition behind a scheme of symbolic cash payments to victims is just that some compensation, even partial or inadequate compensation, is superior to a program containing no cash compensation at all. Full compensation, even could we overcome the conceptual and epistemic problems with specifying what the measure of full compensation would be, is ruled out by political constraints; and even if it were not, no first-best theory of corrective justice would justify a facially inadequate payment of the sort embodied in the internment reparations program. Such programs are compromises with political and budgetary constraints, between or among various conceptions of the relevant harm, and between or among various measures of the harm somehow defined.

The defense of such programs, if it is one, must be that ruling out full compensation does not entail no compensation at all. That is just a non sequitur. Whatever argument we use to poke holes in such programs will also condemn the status quo, even more strongly. The status quo is itself a proposal for a compensatory scheme – a particularly unattractive scheme in which (cash) compensation for historical injustices is set at zero (dollars).

This helps to explain or justify the striking institutional fact that reparations programs are almost never ordered by courts in the name of legal principle. Rather they are the product of bargaining and compromise, usually within legislatures or at least with the participation of legislatures and other political bodies. The institutional parallel between reparations and jury awards of compensation is that legislatures, like juries, are better suited to devise unprincipled schemes of rough justice. Judges are uncomfortable with arbitrary compensatory awards and with politically textured compromises. And, of course, judges face a further constraint, which is that a judicial order mandating

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<sup>17</sup> Christopher Kutz, “Justice in Reparations: The Cost of Memory and the Value of Talk,” *Phil. & Public Affairs* 32 (2004): 277, 279.

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compensatory cash reparations might be ignored or evaded by the legislative institutions who control the government's purse.

Sometimes it is suggested that the cash component of reparations programs should not be understood as compensatory at all. Rather, the point of including "symbolic" cash is just to put backbone in the really symbolic elements of the program, namely apologies, memorials or other public gestures of atonement for wrongdoing. Absent the cash, the symbols of atonement would be cheap talk. This view is in some tension with the incommensurability concern; perhaps adding money sullies the apology rather than making it sincere. Offering an apology for some wrong one has committed would usually become a more offensive gesture, rather than a more credible expression of remorse, were a \$100 bill to be thrown in -- although this may be a strictly interpersonal point that does not hold for government payments. In any event, the credibility-enhancing view only solves part of the problem. It explains why the payor should surrender money, but it cannot explain why the cash should be transferred to the program's beneficiaries. If a costly signal is all that is needed, the money might just as well be burned or sent into outer space. What makes these programs compensatory, in some recognizable sense, is the rough-justice intuition that at least some money should not only be extracted from wrongdoers or stand-ins for wrongdoers, but should actually go to the victims of wrongdoing.

### Some Objections to Rough Justice

Let me finish by considering some objections to the philosophically relaxed view I have sketched so far. Satz and others point out that compensatory programs must compete with other programs, given an overall governmental budget constraint.<sup>18</sup> This is true of all programs, however, including strictly forward-looking social investments justified on cost-benefit grounds. The point gets no unique purchase against reparations programs, whether fully compensatory or partially compensatory. In another version of the argument, Kutz says that "[a] compensation scheme, even if not maximalist, is a significant draw on the state treasury, and so competes against other urgent claims. To compete favorably as a matter of right, the compensation scheme requires a principled

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<sup>18</sup> Satz, *supra* note 1, at 29.

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argument that partial payment (as opposed to cheaper symbolism) really is required as a matter of justice.”<sup>19</sup> But justice need not be equated with principle. The argument for such programs is not that they are principled in any first-best sense, but that they are nonetheless just in a rough sense, compared to no payment at all.

Kutz also objects to roughly just programs of cash reparations on another ground: “[p]artial payment might just as well irritate as salve old wounds in a way that a nonmonetized gesture will not. Of course money is nice, and some is better than none. But it seems likely that anything short of the maximalist program [of full compensation] will leave claimants dissatisfied that justice has been done at all, much less fully.”<sup>20</sup> Disputing someone else’s casual empiricism is boring for bystanders, but this seems implausible. Almost all extant programs of cash reparation have been partial, and of these the great majority have been straightforward successes in some rough sense – at least in the sense that they do not leave widespread dissatisfaction in their wake.

Kutz’s argument for the perversity of partial payment is an application of the general theory of second best: where some distortion or constraint blocks complete implementation of the first-best policy, attempting to approximate the first-best as closely as possible (given the constraint) might make things worse, not better.<sup>21</sup> If any such argument works in fact then it works in fact, but the general theory of second best does not guarantee that it will work. All the theory says is that it cannot be shown, a priori, that approximating an unattainable first-best as closely as possible is necessarily the best strategy.<sup>22</sup> It remains possible, in any particular case, that the approximation strategy is best in fact. In this case, there is little evidence that partial payment will indeed have perverse effects.

At a minimum, whether partial payment is better than nothing should depend on the political process by which the payment is accomplished, on the perceived alternatives, and on the accompanying symbolism.<sup>23</sup> The framing of the alternatives is probably important: if the perceived alternative to rough justice and partial payment is no justice at

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<sup>19</sup> Kutz, *supra* note 16, at 304.

<sup>20</sup> *Ibid.* at 303-304.

<sup>21</sup> See Lipsey and Lancaster, “The General Theory of Second Best,” *Rev. Econ. Studies* 24 (1957): 11.

<sup>22</sup> See Avishai Margalit, “Ideals and Second Bests,” in Seymour Fox, ed., *Philosophy for Education* (Jerusalem: Van Leer Jerusalem Foundation, 1983), 77.

<sup>23</sup> I am indebted to Jacob Levy for this point, which has doubtless lost force in transmission.

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all, rather than full compensation, we may expect partial payment to produce a surprising level of satisfaction. Accompanying symbolism, including apologies, can help political leaders to depict partial payment as consequential redress. This inverts the usual idea about the relationship between apologies and cash. Rather than cash being necessary to make an apology credible, an apology might be necessary to make the cash satisfying.

Of course commitment problems are important, both for cash and for non-cash forms of reparation. As there is no legal mechanism that could bar multiple reparations for the same historical injustice, in principle there is nothing to bar advocates for redress from claiming, after partial payment has occurred, that the payment was inadequate. Furthermore, payment for one injustice may set a social precedent for new reparations claims. On the supply side, the worry about commitment problems, precedent-setting and slippery slopes dampens support for slavery reparations to African-Americans. Once partial reparations for slavery have been granted (and the reparations will necessarily be partial, in light of political and budgetary constraints), what bars new claims for further compensation? What about reparations for Jim Crow and other post-slavery injustices? In contrast, reparations programs that are enacted tend to be targeted to beneficiary classes that will soon die off. In such cases the commitment problems are reduced, because there will soon be no extant group to press a new claim; the beneficiary class is typically small, which reduces the cost of the program; and the imminent demise of the beneficiaries means that it is now or never.<sup>24</sup> It is hardly clear that any first-best principle could justify a pattern so shot through with political compromises, but the status quo of no payment is shot through with political compromises that are even less appealing.

### Equality and Rough Justice

Finally, there is the problem of equal treatment. A program of partial cash compensation might raise equality concerns on two counts: equality between the compensated and the uncompensated, and equality within the compensated class. As to the first concern: on equality grounds, Jon Elster argues against the idea of “doing what one can” in transitional justice in post-Communist societies. If full compensation for all is unattainable, the second choice should be compensation for no one rather than

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<sup>24</sup> Levmore, *supra* note 2.

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compensation for some.<sup>25</sup> The argument depends crucially on the fact that “essentially everybody suffered under Communism,”<sup>26</sup> either through affirmative deprivations or denial of opportunities. Thus compensation to all victims would amount to nothing more than shifting money from all to all, an incoherent enterprise. Elster’s argument does not apply in a society where not everybody has a plausible claim to have suffered historical injustice. In that case, the reparations program shifts money from all to some or from some to some, which is perfectly coherent (whether or not desirable). Furthermore, the compensated and the uncompensated are not similarly situated, and there is no equality objection.

To be sure, we might worry that the compensated are only a subset of those who have suffered historical injustice in the relevant society. Why should Japanese-American internees receive compensation while German-Americans who were also interned in the Second World War do not?<sup>27</sup> If German-Americans are included, why not go beyond war internments to compensate African-Americans or their descendants, Chinese-Americans or their descendants, and so on? But a familiar point to constitutional lawyers is that government has legitimate interests in proceeding “one step at a time.”<sup>28</sup> The benchmark for assessing government performance is not any particular statute or program, but an aggregate of statutes and programs over time.

Suppose, however, that the succeeding steps are never taken. This would mean that political constraints will have produced an arbitrary underinclusiveness in reparations policy: some groups who deserve compensation will obtain it (in the rough-justice sense of partial cash compensation plus symbolism), while others never do. This is indeed one of the rougher features of reparations programs, but that feature is shared by a large number of programs in nontransitional legislation and adjudication. For any number of legal, political and economic reasons, including the limited capacity of the judicial system, the set of groups or individuals with plausible claims to compensation is far larger than the set of those compensated in fact. Any theory of equal treatment that would entail condemning large chunks of the legal system is well out of bounds.

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<sup>25</sup> Jon Elster, “On Doing What One Can,” *E. Eur. Const. Rev.* 1 n. 2 (1992): 15.

<sup>26</sup> *Ibid.* at 16.

<sup>27</sup> See *Jacobs v. Barr*, 959 F.2d 313 (D.C. Cir. 1992), cert. denied, 506 U.S. 831 (1992).

<sup>28</sup> *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955).

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The second equality concern is that, in programs such as the Civil Liberties Act, compensation is not individuated, despite relevant differences in suffering or rights-violations across subgroups of the beneficiary class.<sup>29</sup> This is not an argument against partial compensation; it is an argument for individuated partial compensation. Here too, however, any theory of equal treatment strong enough to condemn nonindividuated reparations would necessarily overshoot, condemning quotidian nontransitional programs. Consider workers' compensation, which awards damages on a set schedule for the loss of limbs despite obvious variation across persons, and agency cost-benefit analysis, which uses a nonindividuated value of a statistical life despite obvious variation across persons.<sup>30</sup> One point in favor of standardization is that it conserves on administrative costs, perhaps so much that there will be a larger pot of money to be distributed. Another point is that the standardization of benefits may create or enhance a sense of solidarity among the beneficiary class, whereas individuation would produce invidious comparisons and intragroup jealousies. We may even speculate that avoiding such jealousies, and promoting intragroup solidarity, helps to produce the sense that justice has been done, even by a scheme of partial compensation.

### The Limits of Rough Justice

Let me briefly emphasize the limits of the rough-justice intuition. The intuition is underspecified, in the sense that it does not arbitrate between or among proposals that are all (1) roughly superior to the status quo and (2) not ruled out by political or institutional constraints. The force of the intuition is negative: it rebuts an explicit or implicit claim that compensatory reparations should be dismissed as “unprincipled” or “incoherent” from a first-best perspective. Satz and others raise several thoroughly pragmatic worries about compensatory reparations programs, and I have no general quarrel with such points. The only issue about them is whether they are true in fact. In some cases, as with Kutz's argument that symbolic cash compensation or partial payment is generally

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<sup>29</sup> The Civil Liberties Act is cartoonish in this regard, offering an identical \$20,000 payment to each sufferer. *Civil Liberties Act of 1988*, supra note 3.

<sup>30</sup> See Cass R. Sunstein, “Valuing Life: A Plea for Disaggregation,” *Duke L. J.* 54 (2004): 385; Eric A. Posner and Cass R. Sunstein, “Dollars and Death,” *U. Chi. L. Rev.* 72 (2005): 537.

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perverse, I have gone on to suggest that the concern is not empirically warranted, but there is no larger claim to be made about such arguments.

### Conclusion

Insofar as reparations programs, especially cash reparations programs, are justified on compensatory grounds, they are indeed subject to all the conceptual problems that Satz and others have identified. In response, I have offered two points, which I believe are related. The first point is that many of the problems with compensation exist in ordinary, nontransitional legal systems as well; if taken seriously, the conceptual worries prove far too much. The second point is that reparations programs of the sort we actually observe are typically indefensible on any plausible first-best criterion of justice. What animates them is the sense of rough justice: the sense that no compensation would be, in some sense, even less tolerable than a spasmodic lurch in the general direction of justice. It is not so much that “we should do what we can”; it is rather that we can at least do better than we have. So the intuition runs, and it is not defeated or even engaged by pointing out that doing better than we have will require arbitrary and indefensible compromises with political and economic constraints.

The relationship between these two points is that compensatory reparations programs, by and large, do not seem systematically more objectionable than other compensatory projects that emerge from the legal system. Viewed in the concrete, both transitional and nontransitional programs or awards of compensation are often disastrously unprincipled. We must step back a mile or three, to reflect that in many cases the only other option not ruled out by political constraints – doing nothing at all – would be even worse.

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