

# Benefiting from the Wrong-doing of Others

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***ABSTRACT** Bracket out the wrong of committing a wrong, or conspiring or colluding or conniving with others in their committing one. Suppose you have done none of those things, and you find yourself merely benefiting from a wrong committed wholly by someone else. What, if anything, is wrong with that? What, if any, duties follow from it? If straightforward restitution were possible – if you could just 'give back' what you received as a result of the wrong-doing to its rightful owner – then matters are morally more straightforward. But in real-world cases that is often impossible, and questions of 'how much, from whom and to whom?' become far more vexing. The beneficiary disgorging all benefits of the wrong is part of the story, but where that is not possible or will not suffice to compensate the victim of wrong-doing we discuss various ways of allocating the cost of making the victim whole, including supplementation from public coffers.*

When thinking about wrong-doing and its remedies, we traditionally tend to try to keep things simple by framing the issue in insistently bi-lateral terms.

There is a wrong-doer (or group of wrong-doers). There is a victim (or group of victims). The question is who owes what to whom.

In the bi-lateral case, the answer is simple: the wrong-doer must compensate the victim for any losses suffered as a result of the wrong-doing. In the language of tort law, the wrong-doer must 'make the victim whole'. Even if the cost of compensating the victim vastly exceeds any gains the doer obtained from the wrong, the strong presumption is that the wrong-doer must nonetheless do whatever it takes to make the victim whole.<sup>1</sup> After all, he committed a wrong.

Things are not so simple in trilateral cases, where there is also an innocent beneficiary of the wrong-doing. That innocent beneficiary is, let us suppose, wholly innocent and not involved in any way in the wrong-doing itself. The innocent beneficiary is merely wrongly enriched through the wrong-doing.

Two questions arise in such cases. First, what ought the innocent beneficiaries do, when they realize that they have benefitted from wrong-doing? Second, what ought victims receive by way of compensation for the wrongs done to them? We will argue that, insofar as is still possible:

- innocent beneficiaries of wrong-doing should relinquish benefits which they wrongly received;
- those relinquished benefits should be used to compensate victims of the wrong-doing; but the innocent beneficiary has no special responsibility for paying the victim's costs over and above relinquishing in her favour the benefit he has received in consequence of the wrong-doing, and some other mechanism should be found for the victims to be compensated for the rest of their losses.

Furthermore, we will argue that each of those propositions has moral importance in its own right. The rightness of disgorging wrongfully held benefits is not wholly derivative from the wrongness of victims going uncompensated.

I.

Of course it's wrong to commit a wrong. Of course it's wrong to conspire, collude or connive with others in their committing a wrong. But what if you

have done none of those things, and yet you find yourself benefiting from a wrong committed wholly by other people? Is there anything morally problematic with that, and if so what and why?<sup>ii</sup>

Let us begin by bracketing out two easy ways of answering those questions. First, 'benefiting from wrong-doing' sounds awfully like being a 'receiver of stolen goods'. Pursuing that thought, we might be tempted to assimilate the person benefiting from another's wrong-doing to an 'accessary after the fact'. As defined by Blackstone, that is someone who, 'knowing a felony to have been committed, receives, relieves, comforts, or assists the felon'.<sup>iii</sup> And just as one can be an accessary to a wrong-doing legally, so too presumably can one be an accessary morally.<sup>iv</sup>

The main point to note about accessaries is simply this. Being an accessary to a murder makes you a *party* to the murder. To quote Blackstone again, 'An accessary is he who is not the chief actor in the offense, nor present at its performance, but' – and this is the point we wish to emphasize here – 'is somehow *concerned* therein.'<sup>v</sup> To be an accessary, even an accessary after the fact, to another person's wrong-doing is to contribute to and take part in it. And being involved in that way in the wrong itself is precisely one of the things that we want to bracket out here, in order to focus on the significance of benefiting from wrong-doing *as such*.

A second easy way of answering the question would be to assimilate benefiting from wrong-doing to cases requiring 'restitution' in some straightforward sense. Restitution often refers to the duty to return goods that have been delivered to you in error. In cases like that, no one committed any wrong against anyone. The driver of the delivery truck simply made an honest mistake. Your neighbour's '1' just looked awfully like a '7' on the order

form, so that's where the driver left the case of wine that your neighbour had ordered. In those circumstances, you in number 7 are under a clear obligation (legally, and surely morally as well) to restore the goods to their rightful owner.

The sorts of cases upon which we want to focus here, however, are different from that in two important respects. First, they involve a wrong rather than merely an innocent error.<sup>vi</sup> Second, in the cases we will be discussing, there is no discrete, tangible 'thing' to be returned.<sup>vii</sup>

The fact that it was a wrong rather than an innocent error surely heightens the duty of the beneficiary to relinquish the benefits he wrongly received, and at the same time heightens the claim of the victim to compensation for her wrongful losses. Indeed, the fact that it was a wrong rather than an innocent error heightens the duty of the beneficiary to relinquish the benefits that wrongly enrich him, even if doing so is not strictly necessary to compensate the victim.<sup>viii</sup>

Note that not all benefits that are causally downstream of wrong-doing can be properly treated as fruits of that wrong-doing and be required to be disgorged for that reason. Someone has flown a plane into a building; you go into a bar to get out of the smoke, strike up a conversation with someone who becomes your business partner, and you go on to make your fortune. The fortune is causally downstream of the wrong of crashing the plane into the building: you would not have gone into the bar otherwise. But the benefits you received are incidental rather than essential to the wrongs on which they counterfactually depend. What was wrongly taken from the victims has not passed, directly or indirectly, to you.<sup>ix</sup>

## II.

### A.

For what will serve as our running example, suppose your father had bribed a Harvard official to secure your admission to study there. Further suppose that it is certain that you would not otherwise have been admitted. Finally, suppose your life has gone very much better than it would otherwise have done in consequence.

But suppose, at age 50, you discover incontrovertible evidence of your father's misdeed: clearing up his estate, you find all the correspondence, along with the cancelled cheque. You learn from the Harvard archives who was next candidate for admission on the waitlist for your year. Tracking him down, you discover he was distraught at not getting into Harvard, became an auto mechanic instead, had been in and out of gaol, and led a pretty unhappy life quite generally in consequence of not being admitted to Harvard.<sup>x</sup>

Knowing all that, what should you now do?<sup>xi</sup> You can hardly 'give back' the education you received. You can hardly 'give back' the 30 years he spent miserable at having been wrongly denied admission to Harvard in favour of you. Since you cannot 'give back' what you have wrongly received, it cannot be a matter of literal restitution, as of some tangible good. Still, it seems you have much more reason to 'make it up' to the person who suffered in consequence of the wrong-doing. Furthermore, it certainly seems that you have more reason to do so than would someone who received the same benefit through an innocent error on the part of the Harvard admissions office.<sup>xii</sup>

## B.

In the case as just specified, the beneficiary of the injustice knows (1) precisely who was the victim of the injustice and (2) precisely what bad things have happened to them in consequence of it. Real-world cases often lack one or both of those features (and many others as well<sup>xiii</sup>). So let's vary these and other features, and see if this makes a difference to our considered judgments about what is owed by the beneficiaries.

First let's relax the assumption that there is a direct link between a unique, identifiable beneficiary and unique, identifiable victims of the wrongdoing. Suppose that upon further investigation you discover that exactly ten people in your year at Harvard had secured their admission purely through bribes. And suppose, as before, you can learn from the Harvard files which ten people were next on the waitlist to be admitted if anyone had declined. But suppose there is no way of telling the order in which you ten were wrongly admitted, and hence no way of telling exactly which person on the waitlist was wrongly deprived of a place by each of your wrongful admissions.

In one way, the proper response to that situation is clear. Whatever we think the one beneficiary should do for the one victim by way of recompense, the ten should do for the ten. You do not know exactly which one of the ten victims was denied a place because of your own wrongful admission, of course; but you know one of them was. The same is true of all the other of your classmates whose admission was due to a bribe. There is – as an unknowable fact of the matter, but a fact of the matter nonetheless – a one-to-one link between each of the beneficiaries of the wrong and one of the victims

of the wrong, and between each of the victims and one of the beneficiaries. At the aggregate level, you know that the ten victims were all excluded because, and only because, the ten beneficiaries of the wrong-doing were all included.

In such circumstances, you can simply pool whatever recompense is due from each of you beneficiaries of the wrong-doing, and transfer that to a fund to be distributed somehow among all of the victims. How exactly that fund should then be dispersed among victims is a tricky question: maybe the division should be equal, maybe it should be skewed toward those among the victims who are worse off. That is the difficulty (and it is obviously a difficulty with principled aspects as well as purely practical ones) that arises from the absence of a knowable one-to-one relationship between the person benefiting from the wrong and the person suffering from it. But the awkwardness is at least confined to that aspect of the matter alone.

C.

Those first two cases involved one-to-one or ten-to-ten relationships. For the next pair of cases, suppose there are different numbers on each side of the equation. Clearly, things get trickier then. But does that make any principled difference?

Return to the original case and vary it in a slightly different way. As in the original case, there is only one person whose admission to Harvard was secured through a bribe. But suppose that the waitlist has subsequently been destroyed in a fire, and that the only things that the beneficiary of the bribe

can now learn are the names of the 1000 applicants who were denied entry to Harvard in the year in which he was wrongly admitted

On this scenario, the beneficiary of the wrong knows that one of those 1000 people was deprived of admission by the wrong from which he benefited. But he also knows that that list contains the names of 999 people who would not have been admitted even if his father had not committed the bribe. And unlike the previous variation, he is the only one who won admission through wrongful bribery, so there are not 999 other relevantly similar beneficiaries of wrong-doing with whom he can pool his compensation payments in such a way that all and only those who were wronged benefit from the payments contributed by all and only those who were wrongly enriched at their expense.

One thing still seems clear: in the absence of compelling moral reasons to the contrary, he has a duty to relinquish the benefits, once he has discovered that that wrong has occurred.<sup>xiv</sup> To whom he should give the benefits, exactly, is not clear. What we want to emphasize above all else, however, is that unclarity about to whom he should give the benefits does not in any way mitigate his duty to give up the benefits. That is how we do, and should think, about criminal wrongs after all. Under the Proceeds of Crime Act applies to the proceeds of a crime, whether or not they have identifiable victims who are still extant to whom the proceeds of crime can now be rightfully returned.

D.

More surprisingly, perhaps, that 'disgorge the ill-gotten gains' response remains appealing even when the uncertainties run in the direction opposite to the way that they do in the previous case. So for a third variation on the Harvard admission case, suppose that (incredibly enough) there was only one individual refused admission that year and there were ten people whose admission was wrongly secured through bribes. Had any of those ten not been wrongly admitted, the one person would have been (and had no bribe been paid, Harvard's class would have just been nine smaller that year). Surely it seems right to say that each of the ten should relinquish (insofar as possible) the benefits of the wrongs committed on his behalf, even though there is only one person to compensate. After all, each is in possession of something that wrongly enrich him.<sup>xv</sup>

The proper focus in that case, once again, seems clearly to be much more on criminal-law-style disgorgement than on tort-law style compensation. A victim-centred regime like torts would have us collect only as much (from one or another of those who are wrongly enriched, or from several of them in some proportions) as it would take to compensate the single victim for the harm done to him when he was wrongly denied admission. A regime centered instead on wrong-doings would ordinarily require instead disgorgement of all the benefits that everyone received in consequence of wrong-doings – even if the sum thus collected vastly exceeds what it would actually take to compensate the single victim of those wrong-doings.<sup>xvi</sup> And that, in the case just sketched, seems to be clearly what we ought to do.<sup>xvii</sup>

Of course, stripping all ten of the cash equivalent of the benefits they wrongfully received, and giving all the proceeds to the single person who

was wrongly denied admission by those misdeeds, would wildly over-compensate him.<sup>xviii</sup> He had only one life that went worse, after all, not ten.

In such cases there are practical quandaries (again, with principled aspects) concerning what should be done with the rest of the money after the victim has been compensated. Maybe it should be put into a fund, to draw upon in years when the ratios are reversed. Maybe it should be used to bolster anti-corruption machinery in the Harvard Admissions Office to prevent future bribery.<sup>xix</sup>

But one thing, again, seems clear. It would be wrong in principle to let nine of the ten keep benefits they derived from the wrongs merely because the full costs of its one victim could be covered by the monies disgorged by one beneficiary of the wrong-doing. It seems equally wrong in most cases to let the beneficiaries keep nine-tenths of their (inadvertently) ill-gotten gains. Surely it should not be cheaper or in any other way more permissible to do wrong (or benefit from a wrong-doing, either), just because more other people are doing (or benefiting from) wrongs with whom you can split the costs.<sup>xx</sup> Neither, presumably, should it be any more permissible to keep a larger part of your (inadvertent) gains from the wrongs of others, just because more other people have also benefited (also inadvertently) from similar wrongs.

### III.

Even innocent beneficiaries of wrong-doing should therefore disgorge what they have wrongly received. They have committed no wrong themselves, to be sure. Nonetheless, they have what they have as a result of a wrong. They

are wrongly enriched, and it would be wrong for them to keep those riches. Next let us consider various questions concerning 'how much' they should disgorge.

A.

In cases of restitution, it is simple: the person who has wrongly received some particular good should give it back to the rightful owner. But where, as with the Harvard education, there is no tangible thing that can be given back – or where it can no longer be given back – 'giving back' must take some different form. And how to calculate 'how much' then becomes a live issue.

What they should give back in those circumstances is, we suggest, the cash equivalent of the subjective value of the thing they received.<sup>xxi</sup> That is the quantum of the beneficiary's *benefit*, after all.<sup>xxii</sup> There may be all sorts of pragmatic difficulties (to do with honest revelation, and so on) in employing this 'subjective benefit' standard directly as the social rule; pragmatically we might opt for some other rule instead. But surely in principle that is the right rule, which fact ought to inform any practical rules we adopt.

B.

There may be some conditions under which the innocent beneficiary should not have to give back *all* of the benefits that he has received. Here are two reasons.

The first concerns uncertainty. In the real world, it may not always be clear when we have benefited from wrong-doing, or the extent to which we

have done so.<sup>xxiii</sup> Suppose that, when clearing up your father's estate, you discover some correspondence with a Harvard official hinting at the possibility of a bribe, but you discover no cancelled check and nothing really conclusive in the correspondence. You reckon your father quite possibly bribed an official to get you into Harvard, but you don't know for certain. You have no doubt about the moral principle that should apply if you did (you should disgorge any benefits wrongly received). But you are missing a key piece of empirical information regarding the moral status of your gains from having gone to Harvard, and you must decide what to do in light of this.

One possible solution to that dilemma would be to disgorge a probability-weighted portion of your gains. If the cash equivalent of the benefits of your Harvard education is \$100,000, and if you believe there is a 30 percent chance that these gains were wrongly received, you should disgorge \$30,000. There are other defensible solutions, to be sure. But one thing seems nonetheless clear: you should ordinarily disgorge some of the benefits of your education when you have reason to believe they may have been wrongly received.<sup>xxiv</sup>

A second reason for supposing that the innocent beneficiary need not disgorge all (or perhaps in the limiting case any) of the benefits he received through the wrong-doing is that those are now inextricably intermingled with other things that are rightfully his, and former cannot now be returned without unreasonable levels of damage to the latter.<sup>xxv</sup>

The innocent beneficiary's current well-being will typically be predicated partly upon his own contributions, and those may have been predicated in turn upon the wrongful benefit, or they may have interacted

with it. We ordinarily think that people deserve to keep that portion of their well-being that is due to their own contributions. And if they are inextricably intertwined with wrongful benefits, those two principles are in clear tension. In the case at hand, people cannot keep what is rightfully theirs without keeping what they have wrongfully received, and they cannot disgorge what they have wrongfully received without also relinquishing something that is rightfully theirs. Which principle should prevail over the other in such cases is an open question, and one that will presumably at least sometimes be decided in favour of keeping rather than relinquishing such benefits.

Similar issues arise in law with 'good faith purchasers' of tangible goods. You bought a stolen car in all good faith. The asking price was not ridiculously low; you had no reason to suppose that the title certificate was forged and the car was actually stolen. The treatment of good-faith purchasers in the law varies across jurisdictions.<sup>xxvi</sup> But at least sometimes law says that we should leave the good-faith purchaser in possession of the goods. One reason to hesitate to require good-faith purchasers to return the goods to the original owner is that those goods are by now intertwined with their own plans and projects which returning the goods would therefore disrupt, imposing costs on them that may well exceed the benefits they derived from the goods. Were we confident that the benefits received instead exceeded the costs to them of returning the goods, however, we would no longer have any such hesitation.

In the law of 'unjust enrichment', too, someone who receives a mistaken payment is unjustly enriched and is held strictly liable to return the monies, once s/he becomes aware of the mistake. But those who are unaware that they have been unjustly enriched and innocently rely to their detriment upon

the validity of the enrichment in ways that would make them very badly off were they now to return the payment can employ the defense of 'change of position' in common law to reduce or altogether eliminate their liability.<sup>xxvii</sup>

In the case of the innocent beneficiary of the Harvard bribe, however, there is no thought of 'depriving' him of his Harvard education (or even his Harvard diploma) – merely of some of his money, and even then what is at stake is only the cash equivalent of the benefits he has derived from the wrong. True, taking away money, particularly large sums of money, can be disruptive too: but not ordinarily in the same way that returning particular goods around which you organize your life can be. Still, if the beneficiary's disgorging the sums is so disruptive that it imposes costs that exceed the benefits received, then there may be a case (as with the good-faith purchaser) for limiting the amount that he is required to pay. We do not deny the importance of considerations of cost in reckoning how much, exactly, is due from innocent beneficiaries. All we insist upon is that they should be seen merely as excusing conditions or as pleas in mitigation, reducing the magnitude of (or in the extreme case overriding) the claims of victims. How often or strongly those excuses or pleas in mitigation apply is an open question. Maybe, at least in certain classes of cases, they are common and strong. Our concern here is not to argue one way or another on that score.

Our concern here is instead merely to establish the firm presumption that innocent beneficiaries are under a duty to disgorge benefits that are wrongfully in their possession. Regardless of how frequently or infrequently that presumption is overridden, that wrongful benefits ought to be disgorged should always be the presumption.

## IV.

So far we have concentrated on the beneficiary side of the equation, focusing on the innocent beneficiary's duty to disgorge benefits. Let us shift now to the victim side of the equation, and the claim of victims for recompense of those wrongs. In our discussion up to this point, that has appeared to be a simple and subsidiary issue. But that appearance derives from a special feature of all the cases presented so far. In all those cases, fully disgorging the benefits would yield enough fully to recompense the victims. Next we need to consider what to do when it will not.

Here is yet another variation on the Harvard admission example, along those lines. As in the very first version, suppose we know exactly which person was denied admission by the bribe and exactly which person gained admission thanks to the bribe. As in the first version, suppose the person denied admission has had a much worse life in consequence. But suppose that instead of the person wrongly admitted enjoying a very much better life than he would have otherwise done, his life goes only a *tiny* bit better. He was not really cut out for Harvard. He struggled during his time there, and he was pretty insecure and timid in taking advantage of the opportunities that Harvard offered. He is a little better off for having gone to Harvard than he otherwise would have been, but not by much – not by nearly as much as the person wrongly denied admission is worse off.

Then he discovers the awful truth: he was wrongly admitted thanks to his father's bribe. He seeks out the person wrongly denied admission, and offers him the full cash equivalent of all the benefits (modest though they have turned out to be) that he derived from his wrongful admission. The

victim of that wrong thereby gains some compensation for the wrong – but not nearly enough to compensate him fully.

From the point of view of the beneficiary-of-wrong, duty has been fully done. The benefits that he actually derived from the wrong have been fully disgorged. As regards compensating the victim, however, much is still missing. From the perspective of the victim, surely what matters is not what benefits someone else derived from the wrong-doing, but the value to *himself* of the opportunity of which he was deprived.

Where the one person's gains are not sufficient to cover the other person's losses in that way, someone is always going to end up being out of pocket. The question is simply, 'Who should that be?' The innocent beneficiary and the innocent victims are both innocent. Neither has done anything to deserve to bear that burden. The victim did nothing wrong. Neither did the innocent beneficiary of someone else's wrong-doing (once he has relinquished the benefits that came his way through that wrong-doing<sup>xxviii</sup>). But even though neither deserves to suffer the loss, someone has to (or it has somehow to be divided among them and/or other people: we shall return to this shortly). Who should that be?

Of course if the wrong-doer himself is still around, then he is clearly the person with primary responsibility for compensating his victim and making him whole. But we assume, for the purposes of discussion, that the wrong-doer is unavailable to play this role. Anyone who is complicit in or has contributed to the wrong-doing in some other way would bear secondary responsibility for righting the wrong.<sup>xxix</sup> But again, for the purpose of this example, we assume that there are no such people to play this role.<sup>xxx</sup>

## A.

In deciding how to allocate burdens among those who remain, many considerations come into play. Some of them suggest that the victim should be the one to bear the bulk of those burdens. Suppose the fact that the victim has fared so badly is largely attributable to his failure to take adequate advantage of other opportunities that were open to him after he was declined admission to Harvard. Suppose that, with a minimum of effort, he could have done very nearly as well if he had bothered applying to Swarthmore or some other very good school, but he failed to do so. Then perhaps he should bear the burden of the remaining cost.<sup>xxx</sup>

## B.

Other considerations might argue in favour of requiring the innocent beneficiary compensate the victim for his losses fully, over and above merely disgorging the benefits that wrongly enrich him. Some might suppose that a case for doing so might be couched in terms of how closely the beneficiary of the wrong is connected to the wrong-doing. Of course, *ex hypothesi*, the innocent beneficiary was not himself directly implicated in the wrong-doing. Still, he might be more-or-less closely connected to it, in other ways. Or so the thought might go (to foreshadow, our conclusion will be that this initially tempting thought does not stand up to closer examination).

The beneficiary might appear to be connected dangerously closely to the wrong-doing, for example, if he were the 'direct, intended beneficiary' of the wrong-doing. The thought is just this. It is one thing if your father bribed the

Harvard admissions officer with the direct intention of securing *your* admission. It is (or is it?) quite another, if someone with a grudge against another of the candidates who deserved admission had bribed the Harvard admissions officer not to admit that person, and you just happened to be next on the list for admission. In both cases, you benefitted from the wrong (assuming your life went better with a Harvard education than it would have done without one).

But being the directly intended beneficiary of someone else's wrongdoing does not make you any more (or less) liable to disgorge the benefits, or any more liable to cover remaining costs that would otherwise fall on the victim even after the disgorged sums have been paid to him. The beneficiary is not somehow morally tainted by his own name figuring in a full description of his benefactor's evil intentions. The wrong-doer's guilty mind does not make you (the unwitting but intended beneficiary of his wrongdoing) morally tainted in any way.<sup>xxxii</sup> That is just not the way *mens rea* works. Intentions just do not transmit across benefits, like that.

We conclude that whether the innocent beneficiary was the directed intended beneficiary of the wrong-doing makes no difference to his duties in the matter. Those who are not the direct intended beneficiaries of wrongdoing have no more (and no less) duty to disgorge the benefits that they wrongly received. Those who are the direct intended beneficiaries of the wrong-doing have no more duty to do more toward compensating the victim than simply disgorging the benefits that they wrong received.

So to answer the first of the questions posed at the beginning of the paper ('Is it wrong to benefit from wrong-doing?') our answer would be: 'No, you have done nothing wrong, and the wrong done by the other in no way

transmits to you through your the receipt of the benefits.' But to the second question ('Does anything else morally follow?') our answer would be: 'Yes, you must disgorge the benefits as soon as practicable after you discover they were the consequence of wrong-doing.' (And we should add: 'You also ought to take all reasonable measures to discover whether or not they were the consequence of wrong-doing, and if so to whom.')

While the innocent beneficiaries of wrong-doing have done no wrong, they will of course have done wrong should they fail to disgorge the benefits they have wrongly received. It is not that innocent beneficiaries of wrong-doing owe more than anyone else to the wronged party, as a general matter. It is merely that the wronged person has an enforceable claim to the gains that the beneficiary possesses, and he has no comparable claims against others.<sup>xxxiii</sup>

### C.

So far we have been talking only of two options: either the beneficiary or the victim (or each in some proportion) should bear the excess costs of the wrong to the victim, over and above what would be rectified by the beneficiary's disgorging his benefit resulting from that wrong. There are various principled grounds bearing on the decision cast in those terms.

There is, however, a further option. If the beneficiary's disgorging does not fully compensate the victim, then maybe the further costs of doing so should be spread across the general public, rather than being taken out of the hide of either the innocent beneficiary or the innocent victim of wrong-doing.

Of course the public does not 'deserve' to bear the burden any more than either the beneficiary or the victim.<sup>xxxiv</sup> No one does, in the scenario as described.

Why might we think the public ought be the one to bear the burden? Well, spreading the burden among the larger group of people that constitutes 'the public' makes the cost to each member of the public smaller, and hence more affordable (if done through taxes that are themselves equitable, anyway), than if either the beneficiary or the victim alone or in some combination were required to bear it.

It is easy to see how such a principle could also be defended on contractualist grounds. *Ex ante*, it would seem rational the people would choose to run an increased risk of having to bear a very small cost in order to fund schemes that compensate victims of wrong-doing. In that way, they could diminish the risks that, through no fault of their own, they might end up bearing *very* significant costs, either because they are the direct victims of wrong-doing or innocent beneficiaries who must compensate others for wrongs done to them.

V.

At the outset we posed a third question: whether it was worse to enjoy undeserved benefits obtained through wrong-doing (albeit not one's own wrong-doing) than it is to enjoy undeserved benefits by mere innocent error. We are now in a position to see just how different cases of benefitting from wrong-doing are from benefitting from innocent error, on both the beneficiary and victim sides of the ledger.

On the beneficiary side, we would be much less insistent that the beneficiary relinquish a benefit he acquired through innocent error. Suppose your admission to Harvard came not through your father's bribing the admissions official but instead through a sheer clerical error in the Admissions Office. In some sense, it was still wrong that you were admitted to Harvard (your test scores just didn't merit admission). But it was not the result of any wrong-doing.

In that case we might be relatively more relaxed about allowing you to retain the benefits of that error in your favour. Certainly, at the very least, we would not be remotely tempted to insist that you should those disgorge benefits in cases where no one has been made worse off by the error, where the benefits were obtained through innocent error rather than as the product of wrong-doing, even a wrong-doing not your own.

On the victim side, too, we are much less insistent that the victim be compensated for his losses when they come about through blameless accident or innocent error than when they come about as a result of intentional wrong-doing. In the classic case of bi-lateral wrong-doing, we think that the wrong-doer himself should do whatever it takes to make the victim whole, even if that leaves the wrong-doer himself seriously out of pocket. Where the wrong-doer himself has now disappeared from the scene, we think that the innocent beneficiaries of their wrong-doing should at least disgorge all the benefits they thus received in favour of the victim of that wrong-doing; and where that still is not enough to compensate the victim, we ordinarily think arrangements should be made to complete the task of compensating victims (section IV above).

But what seems crucial to that response is the fact that the victim's losses came as a result of his being *wronged*, somehow. When instead the victim's losses come as the result of blameless accident or innocent error, we are much more prepared to let the losses lie where they fall. As evidence of that, just notice the fact that there is a publicly-organized system of Criminal Injuries Compensation in a great many jurisdictions, but there is one of Accident Compensation only (so far as we are aware) in New Zealand.

## VI.

There have been a great many wrongs committed in the past that have lingering consequences into our own time. Even if none of us alive today enslaved a race or dispossessed a people of its land and natural resources, many of us alive today are markedly better off (and others markedly worse off) because those wrongs were committed by people now dead. If we can figure out, through far-fetched stories about Harvard admissions, what the right response is to benefiting from wrong-doing, then we will have a better grip on what morally we ought to do about wrongs of much greater moment than those committed in the Harvard Admissions Office.

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<sup>i</sup> That is the clear verdict of commutative justice, and it is that with which this paper is exclusively concerned; considerations of distributive justice may point in other directions; Lionel Smith, 'Restitution', *Oxford Handbook of Legal Studies*, ed. Peter Cane and Mark Tushnet (Oxford: Oxford University Press, 2003), pp. 48-61. So too may equity, where its consequences vastly exceed the wrongness of the wrong; Jeremy Waldron, 'Moments of carelessness and massive loss', *Philosophical Foundations of Tort Law*, ed. D. G. Owen Oxford: Clarendon Press, 1995), pp. 387–408.

<sup>ii</sup> Judith Jarvis Thomson, 'Preferential hiring', *Philosophy & Public Affairs* 2 (1973): 364-84, thinks there is. She acknowledges that a policy of preferential hiring 'means that the costs are imposed on ... young white male applicants who are turned away', but she insists 'it is not entirely inappropriate that those applicants should pay the costs. No doubt few, if any, have themselves, individually, done any wrongs to blacks and women. But they have profited from the wrongs that the community did' (p. 383).

<sup>iii</sup> William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765), bk 4, ch. 3.

<sup>iv</sup> Just how bad it is to be an accessory, compared to the principal wrong-doer, is an open question. In some legal jurisdictions being an accessory is a lesser offence. In other jurisdictions (and traditionally at common law) it is just as bad. How we should regard these matters in the court of moral judgment is similarly open. But we can afford to leave that open for present purposes.

<sup>v</sup> Blackstone op. cit., bk 4, ch. 3; emphasis added.

<sup>vi</sup> Of course, once the error is discovered it is wrong not to do whatever you virtually costlessly can to rectify it. Similarly, you may be forgiven an act you

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could not have known to be wrong at the time, but once it is (or should be) known to be wrong not rectifying it is a wrong in itself.

<sup>vii</sup> Another way in which cases of literal restitution look easier is that, where there is some discrete object wrongly in your possession that you can just give back, there seems to be no doubt 'how much' you should give back. (But that appearance may deceive: even with a pure 'giving back', there may be issues of 'rent' or 'depreciation'.)

<sup>viii</sup> Robert E. Goodin, 'Disgorging the fruits of historical wrongdoing', *American Political Science Review* 107 (2013): \*\*\*-\*\*\*.

<sup>ix</sup> See the discussion of 'tracking and tracing' in *ibid.*, pp \*\*-\*\*, and sources cited therein.

<sup>x</sup> Insofar as those are not 'automatic' consequences of the wrongful act, George Sher is right to remind us that some share of these costs should be morally charged to the ledger of the 'victim' who allowed himself to go down that path when he could reasonably have avoided it; see his 'Ancient wrongs and modern rights', *Philosophy & Public Affairs* 10 (1980): 3-17. David Miller makes the same point with respect to the costs suffered by political communities in *National Responsibility & Global Justice* (Oxford: Oxford University Press, 2007). Just what this share should be is an open question, which we shall discuss in passing below.

<sup>xi</sup> For purposes of this discussion we bracket the question of the liabilities of Harvard Corporation: suppose they had taken all reasonable precautions against corruption in the admissions office and are nowise liable for the activities of the rogue admissions officer.

<sup>xii</sup> Is it the fact that the wrong-doer is the beneficiary's own father that is driving our judgments? Would it really make all that much difference if the

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bribe was paid by a total stranger purely in order to prevent the admission of his worst enemy's son? We doubt it. But even if having an associative bond or being an intended beneficiary makes *some* difference, it does not make *all* the difference.

<sup>xiii</sup> For example, in some cases the beneficiary may have reason to suspect – but may not know – that he is a beneficiary of a wrong. We discuss this further in section III.B below.

<sup>xiv</sup> Goodin, *op. cit.* Furthermore, it is a relatively strong duty: he cannot easily justify failure to relinquish the benefits by appealing to modest costs to him of doing so or modest contributions to the overall good that he can bring about through other uses of these resources.

<sup>xv</sup> That would be true, even if literally no one was displaced by the wrongful bribe, i.e., if Harvard's class were just ten larger than it would have been if no bribes had been paid.

<sup>xvi</sup> Goodin, *op. cit.*

<sup>xviii</sup> As an anonymous reader of this journal has pointed out to us, it would paradoxically lead to *him* benefiting from injustice, i.e. the very injustice done to him.

<sup>xix</sup> Would those benefiting from schemes funded through these monies themselves be beneficiaries of wrong-doing? Perhaps, but surely they do not benefit at the expense of the victim. Indeed, they are being redistributed towards the purpose of preventing that others be so victimized, and thus do not wrongly enrich anyone.

<sup>xx</sup> Certainly, anyway, when any one of them acting alone would have committed a wrong carrying those same full costs. In addition to the matter of

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principle here (my liability should reflect the full magnitude of the wrong done by me or on my behalf), there is also an element of pragmatics: telling wrong-doers that any penalty to be paid by their beneficiaries could be reduced by their recruiting more wrong-doers would yield the incentives that are perverse, to say the least.

<sup>xxi</sup> As an essential (rather than incidental) part of the wrong-doing, as we have already emphasized. In the Harvard case that would include not only the education itself but also everything for which such an education is a necessary means (higher income, social status, personal and professional networks, perhaps even a spouse). If the recipient hated his time at Harvard and derived no subjective benefit, that does not mean that the victim of the wrong-doing does not deserve any compensation, merely the person who was wrongly admitted in his place does not have any duty to do so based on having benefitted from this wrong.

<sup>xxii</sup> On this point, Daniel Butt, 'On benefiting from injustice', *Canadian Journal of Philosophy* 37 (2007): 129-52 at pp. 140-2 and Robert Fullinwider, *The Reverse Discrimination Controversy* (Totowa, NJ: Rowman & Littlefield, 1980) are clearly correct; and Robert Fullinwider's earlier rejoinder to Thomson, *op. cit.*, 'Preferential hiring and compensation', *Social Theory & Practice* 3 (1975): 307-20 is clearly incorrect. How much it cost the victim for the beneficiary to receive this benefit is something to be taken into account on the victim side of the ledger, not the beneficiary side. The benefit I receive from having my driveway paved is the same, whether done by an efficient workman who paves it at low cost to himself or an inefficient one who does so at high cost to himself.

<sup>xxiii</sup> Jeremy Waldron, 'Superseding historic injustice', *Ethics* 103 (1992): 4-28.

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<sup>xxiv</sup> Notice, however, that when uncertainty is combined with another morally attractive proposition (viz., 'err on the side of justice, when in doubt'), that militates toward disgorging in full rather than in some probabilistically-discounted fashion.

<sup>xxv</sup> Sher's (op. cit.) thought a propos rectifying historical injustice, for example, is that the more time that has passed and the more that has happened since the original wrong-doing, the more those subsequent factors are likely to be responsible for the current state of affairs and the less the relative contribution of the original wrong-doing to that state of affairs will be.

<sup>xxvi</sup> Some jurisdictions apply a 'theft' rule, according to which owners of stolen goods that sue within a reasonable time frame always retain claim to their goods. Other jurisdictions apply the so-called 'Market Overt' rule by which the claim of good-faith purchaser of stolen goods is sustained. See Saul Levmore, 'Variety and uniformity in the treatment of the good-faith purchaser', *Journal of Legal Studies* 16 (1987): 43-65; and Alan Schwarz and Robert Scott, 'Rethinking the laws of good faith purchase', *Columbia Law Review* 111 (2011): 1332-84. Lawyers find practical difficulties in implementing alternative loss-sharing solutions; John Henry Merryman, 'The good faith acquisition of stolen art', *Crime, Procedure and Evidence in a Comparative Context*, ed. John Jackson, Maximo Langer and Peter Tillers (Oxford: Hart, 2008).

<sup>xxvii</sup> Peter Birks, *Unjust Enrichment* (Oxford: Clarendon Press, 2003). R. Nolan, 'Change of position', *Laundering and Tracing*, ed. Peter Birks (Oxford: Clarendon Press, 1995). Note that 'change of position' is an objective rather than subjective test; 'expectations' alone will not satisfy it.

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<sup>xxviii</sup> Were he to keep them *after* he discovered that they were the product of wrong-doing, or even if he had solid grounds for suspecting that his father may have paid a bribe to get him admitted, that would of course be a wrong-doing of his own.

<sup>xxix</sup> Chiara Lepora and Robert E. Goodin, *On Complicity and Compromise* (Oxford: Oxford University Press, 2013).

<sup>xxx</sup> In the case of our running example, Harvard is still around – but we assume in that example that Harvard is faultless, having taken all reasonable precautions against corruption in its Admissions Office.

<sup>xxxi</sup> Maybe that is so, even if his failures were attributable to an unusually fragile disposition, i.e., something for which he cannot be held responsible; but that is a larger issue we cannot enter into here.

<sup>xxxii</sup> For further discussion, see Christian Barry and David Wiens, 'Benefiting from wrongdoing and sustaining wrongful harm', mimeo., Australian National University.

<sup>xxxiv</sup> Note, however, that wrongs often have pervasive effects: one person benefits from the initial injustice, then other people benefit from his benefiting, and it all snowballs. Waldron, 'Superseeding historical injustice', p. 11, refers to this as the 'contagion of injustice'; and Butt, 'On benefiting from injustice', p. 145 appeals to it to justify government-sponsored schemes for compensating victims of crime and historical injustices. We don't object to these arguments, which seem true too. What these arguments draw attention to, however, is merely that there are more beneficiaries (among the public at large) who should disgorge gains unwittingly obtained by virtue of the wrong-doing. Perhaps expanding the pool of beneficiaries in this way would

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make it more likely that the sums disgorged will actually suffice to cover the losses of victims of the wrong-doing. But the problem under discussion here is who should bear the costs if the sums disgorged do not cover victims' losses. The Waldron and Butt arguments do not speak to that issue.