

Historic Injustice, Collective Agency, and Compensatory Duties

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1. Introduction

We tend to think justice demands compensation when one is harmed by an injustice.

Unfortunately, many injustices go uncompensated, some for so long that all the individual victims and perpetrators are no longer alive. These injustices—historic injustices—are more complicated, and it is a contested matter whether justice can demand compensation in these cases. While any injustice that remains uncompensated long enough will count as a historic injustice, I restrict my attention in this paper to severe and large-scale historic injustices like slavery and colonialism. One challenging question regarding these historic injustices is the question of legitimate claimants, that is, the question of whether anyone can legitimately claim to be owed compensation for the injustice.¹ A more challenging question is the question of compensatory duty-bearers, that is, the question of whether there is anyone to whom it would be just to ascribe duties of compensation, given that allegedly all the perpetrators—the guilty parties—are dead. While each question must be answered affirmatively for justice to demand compensation, this paper focuses exclusively on the latter question. Some answer this latter question negatively, arguing it is wrong to ascribe to anyone compensatory duties for injustices committed by others who died multiple generations ago. As James Fishkin notes, “it hardly

¹ For discussion on this question see Boxill, 2003; Sher, 2005; Cohen, 2008; Thomson, 2001; and Perez, 2005.

seems appropriate to hold people responsible for acts committed by their ancestors” (Fishkin, 1991, 95; see also Lewis, 1991, 17; Wheeler, 1997). This is a powerful position, one I call the historical responsibility objection (HRO).

The central premises of HRO are (1) that one must be guilty of wrongdoing with respect to a given historic injustice in order to bear a duty to compensate for the injustice, and (2) that no one alive today can be considered so guilty because no one alive today was alive when the historic injustice occurred. It is specifically the alleged lack of any agents culpably linked to the injustice that gives HRO its purchase (Kukathas, 2003, 168-169). The result of HRO is intended to be that we cannot ascribe compensatory duties to anyone for any historic injustice, because compensation inevitably imposes burdens that HRO takes to be unjust.

This paper sketches a novel refutation of HRO. All arguments I am aware of that refute or might be deployed to refute HRO focus on rejecting premise (1) above, defending compensatory duties for historic injustice on grounds other than wrongdoing.² Notwithstanding the quality of any such argument, it is difficult to deny the powerful intuitive force of premise (1), given especially the individualism that dominates political philosophy. I therefore propose to accept premise (1) and explore the implications of denying premise (2). Doing so would

² For arguments ascribing responsibility for compensation based on benefitting from injustice, see Radzik, 2001 and Butt, 2007; for arguments grounded in identification with relevant collectives, see Abdel-Nour, 2003 and Corlett, 2003; for an argument grounded in the notion of overlapping generations inheriting compensatory duties, see Butt, 2006; and for an argument grounded in duties to uphold morally reliable intergenerational institutions, see Thompson, 2006.

invoke the state as a collective agent, distinct from its constitutive individual agents, liable to acquire compensatory duties for wrongs it commits that none of its constitutive individuals bear. To the extent that states that are collective agents committed historic injustice, such states have duties to compensate.

The view that the state could be a distinct duty-bearing agent is not new. But arguments that adopt this view, especially with respect to historic injustice, either assume or defend the permissibility of the state distributing its duties directly to constitutive individuals who played no culpable role in the injustice, thus violating HRO. Indeed, it may seem impossible for the state to discharge its compensatory duties with respect to historic injustice without unjustly harming its constitutive individuals (Pasternak, 2013, 363-364). My aim is to argue that this problem can be avoided, at least insofar as states can be collective agents.

2. States as Collective Agents

An important upshot of HRO is that wrongdoing is the only legitimate source of compensatory duties with respect to cases specifically of *historic* injustice. This is not, however, to say that wrongdoing is the only source of compensatory duties with regard to any injustice, particularly contemporaneous injustice. In cases of contemporaneous injustice, grounding compensatory duties in sources other than wrongdoing, such as our associations with either the victims or perpetrators of the injustice, or certain benefits we may enjoy as a result of the injustice, seems intuitively plausible (Collins, 2016, 346-51). It is when the injustice happened several generations ago that these other grounds for compensatory duties seem to lose their force. It is worth noting this upfront because HRO, confined as it is to cases of historic injustice, is not

grounded in or committed to any overly restrictive or implausible views about compensatory duties more broadly construed. One could accept the demands of HRO without committing to the same demands in the context of standard cases of contemporaneous injustice.

A collective agent is a group of individuals organized such that the group constitutes an autonomous agent in its own right liable to acquire compensatory duties for injustices it commits in a way that does not imply that any constitutive individuals thereby acquire such duties.³ Collective agents can bear duties that no constitutive individuals bear (Collins, 2017). There is a substantial and growing philosophical consensus, which I cannot fully defend here, that collective agency is possible, and that at least some states are collective agents. This consensus builds around the intuitive notion that some groups, such as corporations or states, seem to be something ontologically over and above their constitutive individuals, namely, they are collective agents “fit to be held responsible” for their actions and therefore liable to acquire compensatory duties for any wrongs they may commit.⁴

The most prominent way to argue for this idea is by demonstrating that qualifying groups possess the features persons whom we would consider paradigmatic cases of agents possess, with rational decision-making the hallmark feature. There is a substantial literature defending the

³ There is a lack of conformity in the literature: such agents have variously been referred to as collective agents, group agents, or corporate agents.

⁴ I borrow this turn of phrase from Pettit, 2007. The notion of responsibility I have in mind throughout has to do with the duties we acquire to rectify the harms that come about as a result of our wrongdoing.

claim that some groups have a “group-level rationally operated decision-making procedure” that, crucially, cannot be reduced to the decision-making procedures of any constitutive individuals (Collins, 2017, 39).⁵ Moreover, from this irreducible decision-making procedure emerges ontologically distinct intentionality. Philip Pettit, for example, argues that such groups can have minds of their own that are “starkly discontinuous with the mentality of their members,” and therefore “deserve ontological recognition as intentional and personal subjects” (Pettit, 2003, 167, 175). Kendy Hess, as another example, demonstrates that some groups are structured such that they have their own rational points of view from which deliberation and action proceed (Hess, 2014a, 206-207). A rational point of view is a “logically integrated complex of commitments about fact and value” (Hess, 2014b, 245). That is, one’s rational point of view can be understood as a coherent web of beliefs and desires that drive one’s decision-making and action. The decision-making procedure of the collective, which moves from belief and desire inputs to decision and action outputs, makes it possible that the collective comes to believe,

⁵ See, for example, Collins, 2017; Erskine, 2001; French, 1984; Hess, 2006, 2014a, 2014b; Bjornsson and Hess, 2017; Pettit, 2003, 2007; Preda, 2012; Stilz, 2011; Tuomela and Makela, 2016; Wendt, 2004. Another line of argument is David Copp’s *Collective Moral Autonomy Thesis*, according to which it seems appropriate to assign duties to collectives that it would be mistaken to assign to any of the collective’s members, and therefore such collectives are genuine agents over and above their members (Copp, 2006, 2007). For skeptical arguments regarding arguments for collective agency, see Corlett, 2001; Lewis, 1991; May, 1987; and Quinton, 1976. For an argument that collective agents, to the extent that they exist, are in fact not fit to be held responsible, see Makela, 2007.

desire, and decide things that its constitutive members may not predict, know about, or agree with (Hess, 2014a, 208-211; Hess, 2014b, 243-249).⁶ The collective agent's point of view is *its own*. These groups are also taken to satisfy the conditions for responsibility insofar as they are capable of making value judgments, are capable of altering their deliberations and actions in light of these value judgments, and have the freedom necessary to act in accordance with such value judgments (Gilbert, 2006, 108; Pettit, 2007; Hess, 2014a, 215-217; Hess, 2014b, 249-259; Hess and Bjornsson, 2017, Hindriks, 2008; Stilz, 2011, 191-195).

If certain groups can be structured in a way that qualifies them as collective agents, states would seem to be an obvious candidate as a kind of collective agent. This claim has received comparatively less attention in the literature but has received rather little resistance. Indeed, such attributions of agency to states pervade social science scholarship and our commonsense views (Collins, 2016, 344; Wendt, 2004, 289). In political philosophy, for example, the extent to which *states* as opposed to their constitutive individuals adequately protect their members' basic rights determines their legitimacy, which is the basis on which *states* as opposed to their constitutive individuals are considered to enjoy a right to political self-determination.

At least some states seem to possess all the desiderata for collective agency just as well as any other group does. They are irreducible to their constitutive individuals; they deliberate and act as intentional subjects, that is, they deliberate and act from a distinct rational point of view;

⁶ Hess also demonstrates that what we might refer to as the group's beliefs and desires qualify as literal beliefs and desires on all major accounts of human intentionality (Hess, 2014b, 244-246; Hess, 2014a, 211-215). See also Gilbert, 2006, 104-108.

and they can freely act in light of value judgments they are capable of making (Erskine, 2001, 74-76; Wendt, 2004; Stilz, 2011, 195-198). It therefore seems they can have duties which are not shared by any constitutive individuals, in just the same way an individual agent can have a duty that no other individual agent has (Collins, 2017). This includes compensatory duties an agent might come to acquire through wrongdoing. This seems to accord with commonsense: “we tend to think states have moral duties: duties to alleviate global warming, protect citizens’ moral rights, admit asylum seekers, or wage only just wars” (Collins, 2016, 344). Taking these views to be sound, which I must do here without detailed defense, it may seem like a small step to identifying, for one example, the United States as morally responsible for the historic injustice of slavery and thus subject to compensatory duties. But it is an open question whether having the state actually compensate any legitimate claimants can be accomplished without violating HRO. In what follows I argue that the state as a collective agent can indeed discharge its compensatory duties without unjustly harming the state’s constitutive individuals.

3. Discharging Duties and Their Effects on Others

It is worth considering briefly why compensation generally and compensation for historic injustice specifically are important. Justice, as I understand it, is concerned with securing or guaranteeing to the greatest extent possible ideal social conditions, which might be understood as the conditions under which everyone enjoys the most extensive set of rights and liberties that is compatible with similar rights and liberties for others.⁷ Some instances of deviating from these

⁷ This is clearly reminiscent of Rawls’s Liberty Principle. See Rawls, 1971, 60. I set aside any controversy over what that set of rights and liberties should include.

conditions, e.g., by enslaving people, count as injustices and seem to call for redress.⁸ There are of course limitations to this: we cannot violate innocent people's fundamental rights, for example, in the course of compensating a victim of injustice. Such exceptions notwithstanding, however, compensating for injustice is important because injustices are or create deviations from conditions of justice, and compensation becomes necessary for the realization of those conditions. The worry is that without a reasonable expectation of compensation for the injustices we suffer the principles of justice might become a "pack of lies" (Boxill, 2014, 195). Our principles of justice lay out the things we can legitimately claim, but without compensation for the injustices that frustrate our ability to claim those things, we would effectively have no claim to the things justice insists we can claim. Compensation thus becomes inseparable from justice in a nonideal world. An important right we all have, then, is a presumptive right to be compensated when we are wronged, unless compensation runs counter to the aims of justice, most obviously in the form of violating others' fundamental rights. It is imperative, then, that we examine injustices—historic or otherwise—to see what justice demands of us in our efforts to recreate or approximate as much as possible ideal social conditions.⁹

⁸ Sometimes all redressing injustice requires is that we ensure an injustice ceases and we implement measures to help ensure it does not happen again. Thanks to Richard Schoonhoven for pressing me on this point.

⁹ One might accept all this but insist that cases of historic injustice are importantly different. Namely, one might think that because historic injustices happened so long ago, and our world today is so rife with its own contemporaneous injustices, it makes little sense to fret about things people who died multiple generations ago did to other people who died multiple generations ago.

My view with respect to compensation for historic injustice rests on an underappreciated but normatively significant distinction between a state distributing its compensatory duties to constitutive individual agents—which is to say that the state directly assigns second-order compensatory duties to certain identifiable individuals—and a state discharging its compensatory duties, without directly assigning second-order duties to any individuals, in a way that nevertheless indirectly harms some individuals. I submit that it is reasonable for HRO to insist that a state refrain from doing the former (at least within the context of historic injustice), while it is not reasonable to insist that the state refrain from doing the latter. The crux of the issue is balancing the legitimate claims present-day individuals have against having to rectify the wrongs others committed multiple generations ago with the legitimate claims justice as well as legitimate claimants have on us to ensure compensation occurs. When conflicts occur, we must weigh claims against each other. I maintain that being indirectly harmed by an agent's discharging her duties is in many cases not sufficient to override the duty the duty-bearing agent has to compensate.

Central to HRO is the intuition that one has a right not to bear a compensatory duty for an injustice in which one played no culpable role. It does not follow from this, however, that one has a right not to be harmed at all as the result of a wrongdoer fulfilling his compensatory duty. If this were true, then justice might not be able to demand compensation for any injustice. It is unreasonable to insist that any harm to a third party resulting from one discharging one's duty is unjust. Consider being severely injured by a negligent driver. Justice will still require the

This kind of claim, which I reject here without argument, has been defended in various ways.

See, e.g., Waldron, 1992; Wenar, 2006; Spinner-Halev, 2007.

wrongdoer to compensate you for your injuries and losses, even when that compensatory duty will indirectly harm the wrongdoer's family and friends, though of course to varying degrees. Perhaps if the indirect harms that result are themselves objectionable or overriding, then justice would not require compensation. But this is very different from claiming that the infliction of indirect harms per se voids the compensatory demands of justice. The harm to third parties when the wrongdoer compensates is not the harm of being forced to bear the duties of others, which the third parties have a right to avoid. It is, rather, the harm of losing out on certain benefits that might have been transferred to the third parties by the wrongdoer had the wrongdoer not acquired a compensatory duty through wrongdoing, but to which the third parties do not have an independent right. And if the wrongdoer has a duty to compensate for wrongdoing, then the wrongdoer no longer has a right to the resources required to fulfill that duty, and therefore no right to transfer those resources to any third party. Assuming that the third party does not require such resources to lead a minimally decent life, it would seem the wronged party's right to compensation outweighs any claims third parties might press for resources they might have received but for the compensatory duty being fulfilled.

This can be similarly true when the wrongdoer is the state as a collective agent and the harmed third parties are the state's constitutive individuals. To avoid running afoul of HRO, however, the state ends up being limited in how it may discharge its compensatory duty. Many people seem to assume that compensation for historic injustices such as slavery would involve an independent tax on a state's constitutive individuals that would then be paid to any legitimate claimants. Such a "reparations tax" would violate HRO. This is because the state would be distributing its compensatory duty directly to constitutive individuals who have a right not to

have such duties foisted upon them. The problem that might be raised by proponents of HRO is that it seems impossible to avoid this, even if the state discharges its compensatory duty without turning to any constitutive individuals and assigning derivative duties to them. It might seem that any compensation scheme will inevitably involve the resources the state acquires from its constitutive individuals. And no matter how cleverly you frame the issue, a proponent of HRO might complain that it is still ultimately the case that resources one transferred to the state, i.e., one's own taxes, are being used to compensate an injustice in which one played no role. But I think the distinction drawn above can apply here.

A common argument in political philosophy is that a state's legitimacy derives from its ability to adequately secure the basic rights of its constitutive individuals, thus generating for the state a fundamental duty to reasonably preserve or approximate conditions of justice. It is also not terribly controversial that constitutive individuals have a standing duty to do their part in making it possible for the state to perform this particular duty. This is one ground for the justifiability of taxes: fulfilling the state's duty requires resources, and these resources must come from somewhere, so the state has a right to tax individuals within reasonable limits. Put another way, individuals have a duty to pay taxes to help make sure the state is able to preserve or approximate conditions of justice. If the state has a compensatory duty with respect to a historic injustice and discharges this duty with current resources (which would not be true of an independent reparations tax), then it is doing so only with the resources to which it already has a right. This could be done in a number of ways. Perhaps the state fulfills its compensatory duty by drawing from a "rainy day fund"; or perhaps it temporarily reduces its contributions to non-critical services or temporarily delays some non-critical infrastructure project; or perhaps it

diverts funds away from other countries to which it is providing, say, military aid. Similar to the case above, the harms to third party constitutive individuals associated with these suggestions do not involve something that is necessary to lead a minimally decent life or to which the third party otherwise has an independent right. If the state can compensate for its wrongs without burdening its constitutive individuals any more than it already has a right to burden them, then it seems the duty to compensate for injustice outweighs the claims third parties might have not to be harmed in these sorts of ways.

4. Conclusion

An argument like this perhaps calls for a more thorough defense. What I have tried to do here, in the limited available space, is suggest a novel way to defend compensation for historic injustice that does not assign compensatory duties to individuals who played no culpable role in the injustice. If states are collective agents, then states are capable of bearing compensatory duties that are conceptually distinct from any of the duties its constitutive individuals may bear, and this makes it possible to confront the challenge of HRO without having to violate the intuition that we should not impose compensatory duties on individuals “who have nothing to answer for in connection with” the historic injustice in question (Gilbert, 2006, 114).

If I am right then the state has a duty to compensate for its wrongs, even wrongs it committed multiple generations ago. But there are limitations to an approach like this. First, and perhaps most obviously, one limitation of my argument might be that justice can demand only partial compensation for historic injustices: the amount required to adequately compensate all

legitimate claimants might be too high to be practically or morally feasible.¹⁰ Another limitation is that justice might not be able to demand compensation at all for certain historic injustices.

One set of questions I cannot address here has to do with identity over time, and it may be the case that some states are not the same collective agents today as they were (if they were) when the historic injustice occurred. Turkey and the Armenian Genocide may be one such example. I do not think this worry holds with respect to the United States, or the United Kingdom, or perhaps even France, with respect to their historic injustices, but it is nevertheless a question that may demand detailed treatment.

Despite these questions, I think mine is a compelling approach. While HRO proposes a very powerful challenge to proponents of compensation for historic injustice, I do not think it is insurmountable.¹¹

¹⁰ See, e.g., Craemer, 2015.

¹¹ I would like to thank Richard Schoonhoven for extensive feedback on and discussion of a previous draft of this paper. Thanks also to Jeremy Davis for helpful comments on the penultimate draft. I presented a previous version of this paper at the United States Military Academy Works-in-Progress Colloquium in February 2018. I would like to thank participants in that colloquium for their helpful feedback.

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