

FREEDOM FROM PAST INJUSTICES

A Critical Evaluation of Claims for
Intergenerational Reparations



Nahshon Perez

FREEDOM FROM PAST INJUSTICES

A CRITICAL EVALUATION OF CLAIMS FOR
INTERGENERATIONAL REPARATIONS



Nahshon Perez

EDINBURGH
University Press

© Nahshon Perez 2012

Edinburgh University Press Ltd
22 George Square, Edinburgh, EH8 9LF
www.euppublishing.com

Typeset in 11/13 Sabon by
Servis Filmsetting Ltd, Stockport, Cheshire, and
printed and bound in Great Britain by
CPI Group (UK) Ltd, Croydon CR0 4YY

A CIP record for this book is available from the British Library

ISBN 978 0 7486 4962 4 (hardback)
ISBN 978 0 7486 4964 8 (webready PDF)
ISBN 978 0 7486 4963 1 (epub)
ISBN 978 0 7486 4971 6 (Amazon ebook)

The right of Nahshon Perez to be identified as author of this work has been asserted in
accordance with the Copyright, Designs and Patents Act 1988.

... if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable ...¹

Present possession is plainly a relation betwixt a person and an object; but is not sufficient to counter-balance the relation of first possession, unless the former be long and uninterrupted: In which case the relation is increased on the side of the present possession, by the extent of time, and diminished on that of first possession, by the distance ...²

The dead? But the dead have no rights. They are nothing; and nothing cannot own something.³

Acknowledgments

In one of my favorite parts of *Alice's Adventures in Wonderland*, the duchess and Alice converse, and the duchess says the following: “‘Oh, don’t talk about trouble!’ said the Duchess. ‘I make you a present of everything I’ve said as yet.’ ‘A cheap sort of present!’ thought Alice. ‘I’m glad they don’t give birthday presents like that!’ But she did not venture to say it out loud.”¹

I always thought that (disregarding what the Duchess *actually* said, which was, most of the time, rather silly), Alice missed an important point here: what people say to you is a tremendous gift, guiding you from blind spots and potential mistakes.

In writing this book I gained tremendously from colleagues and friends who were kind enough to share with me their remarks, comments, and suggestions with regard to different aspects of the text, some in writing, some in conversation. It is a pleasant opportunity to thank them, in alphabetical order: Dan Avnon, Thom Brooks, Andrew I. Cohen, Avigail Eisenberg, Nir Eisikovits, Alon Harel, Patti Lenard, David Lyons, Jan Narveson, Avia Pasternak, Jeff Spinner Halev, and Christine Straehle.

Ideas from this book were presented at several conferences, and I wish to thank the participants in the various panels, the commentators, and the audience for various helpful comments: the “Pearl” lectures in philosophy and public affairs at Suffolk University (Boston, 2011); the Association for Political Theory annual conference (Notre Dame, Indiana, 2011); the Mid-west Political Science Association annual conference (Chicago, 2011); the American Political Science Association annual conference (Washington, DC, 2010); and the Western Political Science annual conference (San Francisco, 2010).

Most of the work on this book was done at the beautiful Elie Wiesel Center for Judaic Studies at Boston University. Michael Zank, the director, and Deeana Klepper, the chair of the religion department, made my stay a pleasant experience – for which I’m thankful.

FREEDOM FROM PAST INJUSTICES

The professional team at Edinburgh University Press contributed expertise, goodwill and excellent advice for which I'm grateful.

Last, but very far from being least, Alma Gadot-Perez was the first audience for many of the arguments that are presented in this book, and her critical responses were absolutely crucial in the process of writing this book.

Parts of Chapter 3 appeared as an article, under the title: "On Compensation and Return: Can the 'Continuing Injustice Argument' for Compensating for Historical Injustices Justify Compensating for Historical Injustices, or the Return of Property?," *Journal of Applied Philosophy*, 28(2), May 2011, 151–168. I thank the *Journal of Applied Philosophy* for permission to use those segments here.

Preface

This book puts forward an unfashionable thesis: that individuals should, in a majority of cases, be able to live their lives without bearing costs related to past wrongs. This is not a popular opinion among most academics working in political theory and numerous adjacent fields, but I believe it should be heard as the arguments leading to this conclusion are strong, clear, and infrequently discussed seriously.

Writing a book arguing against intergenerational redress while at the welcoming Elie Wiesel Center at Boston University may be seen as a surprising endeavor. Every day when I enter the building, I see the plaque at the entrance commemorating the tragic fate of Professor Wiesel's family. How can one, in this environment, argue against intergenerational redress? But as Professor Wiesel indicated in his important November 2010 lecture, descendants of wrongdoers are not wrongdoers, and descendants of victims are not victims, but different people.¹ These distinctions, which will be crucial to the argumentation in this book, clarify why it could be written in this environment.

This book does not argue for forgetting; its focus lies elsewhere. It focuses specifically on individuals born after a past wrong has ended and all the wrongdoers and victims have passed away. It asks whether these individuals, born after a wrong has ended, can be expected to participate in the cost of intergenerational redress offered to (most likely) descendants of victims of this past wrong. The answer that will be provided in this book, for a majority of cases, will be, no, such individuals should not be expected to bear material costs related to past wrongs.

This conclusion follows from two different, yet complementary claims. First, arguments in favor of intergenerational redress are almost all unconvincing, and, second, individuals born after a wrong has ended have a right to a clean slate.

The assertion that individuals should not be expected to bear material costs related to past wrongs does *not* support the neglect of poor descendants of deceased victims of past wrongs, but the reason for offering assistance in such cases should be that they are *poor*, *not* that they are *descendants*.

As I was reading the many sources that argue otherwise, I noticed that one especially important question receives insufficient attention: “who should pay?” If intergenerational redress for past wrongs is sanctioned, *someone* has to pay the bill. In cases of intergenerational redress, the potential payers are not wrongdoers as the wrongdoers have all died. Who, then, is required to bear this burden of material redress? And why? And how much? And to whom should such redress be paid if the original victims have all passed away? If “who should pay?” seems like a worthy question, you are welcome to read on.

Contents

<i>Analytical Table of Contents</i>	vii
<i>Acknowledgments</i>	xi
<i>Preface</i>	xiii
Introduction	1
1 Laying the Groundwork	8
2 Non-identity and Redressing Historical Injustices	24
3 Against Redress (1): The Individualistic Perspective	40
4 Against Redress (2): Thinking about Collectivities, States, and Nations	60
5 Intergenerational Redress and Forward-looking Considerations, and the Remaining Case <i>for</i> Redressing Past Wrongs	99
Conclusion	125
<i>Notes</i>	138
<i>Index</i>	181

Analytical Table of Contents

<i>Acknowledgments</i>	xi
<i>Preface</i>	xiii
Introduction	1
Framing the debate in individualistic terms; why arguing against redressing historical injustices is important; overview of the book	
1 Laying the Groundwork	8
A. What are historical injustices? A workable definition. B. Historical injustices, a typology of remedies: monetary compensation, restitution, non-material compensation (apologies, memorials); some observations on compensation in general. C. The focus of the book: material redress. D. Some notes on individual responsibility and the separateness of persons. E. Property rights and the supersession thesis.	
2 Non-identity and Redressing Historical Injustices	24
A. The non-identity problem. B. Two attempts to justify redress following past wrongs, and to overcome the non-identity problem: “identity” and “timing.” C. Examining the “identity” and “timing” arguments’ attempts to justify redressing past wrongs versus the non-identity problem and versus some additional arguments.	
3 Against Redress (1): The Individualistic Perspective	40
A. Some (necessary) preliminary definitions and distinctions: compensation, restitution, and “setback” compensation. B. The “continuing injustice argument”; a description. C. Under a magnifying glass: examining the “continuing injustice argument”: restitution, compensation; information-related problems.	

4	Against Redress (2): Thinking about Collectivities, States, and Nations	60
	A. Collective responsibility and intergenerational redress, examining three “collective responsibility creators”: identification, participation, and benefit. B. Who should pay? Collective responsibility and luck. C. Contracts and promises. D. On Jaspers’ metaphysical guilt.	
5	Intergenerational Redress and Forward-looking Considerations; the Remaining Case for Redressing Past Wrongs	99
	A. Forward-looking considerations; forward-looking considerations and intergenerational redress: a general evaluation; improving intercommunal relations; deterrence; efficiency. B. The remaining case <i>for</i> redressing past wrongs (the <i>Maria Altmann</i> case as paradigmatic).	
	Conclusion	125
	The plurality of arguments against redressing historical injustices; how states are born: a comment on memory; the right to a clean slate.	
	<i>Notes</i>	138
	<i>Index</i>	181

Introduction

Framing the debate in individualistic terms; why arguing against redressing historical injustices is important; overview of the book

Framing the Debate in Individualistic Terms; Why Arguing against Redressing Historical Injustices is Important

This book is written as a critique of a fashionable opinion: namely, that historical injustices should be redressed. Calls for redressing past wrongs¹ are widespread both in the academy and elsewhere. Examples of this general tendency, both from within the academic literature and from a variety of other sources, will be examined in this book.

In sharp contradiction to this fashionable opinion, I shall argue that in the vast majority of cases, there are very good reasons to let bygones be bygones. Several different justifications for the “let bygones be bygones” position will be examined in this book. However, the crux of the argument is that, as a rule, individuals born after a wrong has ended should usually not be burdened with the heavy cost of redress in cases in which all the direct wrongdoers and victims have passed away. There will be some exceptions, leaving the possibility of justified attempts for redress intact in some cases, but a careful examination of the arguments both for and against redressing historical injustices will show that the arguments in favor of redress almost always fail to justify their own stated goal.

In this introduction I shall first discuss the main assumption of this book – that of the separateness of persons – followed by a brief explanation of the way I define historical injustices, and why I believe that arguing against redressing historical injustices is important. Following this, I will briefly state the methodology of the book as well as offer a brief overview of each chapter. As the goal of this introduction is simply to present the book, I shall leave most of the (numerous) footnotes to the body of the work.

The central assumption of this book is the assertion that each individual is a separate person.² This point may seem trivial (*of course*, I'm *not* my father, mother, sister, brother, children, or neighbor!), but it is surprising how quickly, and easily, scholars, journalists, op-ed writers, NGOs, governments, and others overlook this simple point. Once this assertion, that each individual is a separate person (specifically, from other persons), is properly acknowledged, it becomes clear that a majority of the justifications for redressing historical injustices effectively undercut the individuality of separate persons. This, I shall argue, is a major failing. While there are some other strong arguments against redressing historical injustices, the separateness of persons – and its powerful, yet simple, ability to resist many attempts to justify redressing historical injustices – has not, as yet, received a serious consideration.

What are historical injustices? Historical injustices, as I shall define them in this book, are cases of past wrongs in which all the original wrongdoers, and all the original victims, have passed away. Note that not all of the people who existed at the time of the wrong need to have died for the event to be considered a historical injustice according to the definition just given, *only* the original wrongdoers and the original victims. It may be the case that all of the people who lived at the time of the wrong have since died, and in many cases this will be the situation, but it is not a necessary condition for my definition.

There are three parts to the definition: the wrongdoer(s), the wrong, and the victim(s). In Chapter 1, I shall analyze each component, but here I want to point to three crucial aspects of this approach to historical injustices. First, the original wrongdoers and original victims have all passed away. Second, the wrong must be significant enough to merit our attention. It is not, let us say, a minor case of John stealing Jane's wallet in 1725 in London, but a major event that violated any reasonable criterion of liberal rights. Furthermore, it is an event that we know took place, so issues of fact – while never completely beyond disagreement on this or that detail – are not a major obstacle with regard to understanding the main details of the original wrong. Thus, the definition intentionally excludes cases where records are insufficient to establish that there was a specific past wrong to redress. Third, historical injustices raise issues, by definition, that concern people who were *not* involved in the wrong. This point explains why attempts to justify redress of past injustices are so fascinatingly appealing *and* controversial. The original victims and wrongdoers have died; whatever rights, duties, and policies a given

scholar would like to justify *today*, these will be applied *not* to the original victims and wrongdoers, *but to different persons*.

Why is it important to argue against redressing historical injustices? Why is this book worth the reader's attention? Two reasons. First, arguing for redressing historical injustices is becoming more and more fashionable. This is not merely an academic concern, as the proliferation of such demands may be seen in Australia,³ Northern Cyprus,⁴ the United States,⁵ Israel/Palestine,⁶ and many other places, which indicates a growing public interest in the subject.⁷ Some voices that seek to redress historical injustices ignore the separateness between persons implicitly, and sometimes explicitly. This leads me to the second reason why I think (and hope) that this book deserves the reader's attention: if we take the separateness between persons seriously, attempts to redress historical injustices will raise immediate worries. If the original wrongdoers and the original victims have all since died, any attempt to redress the historical injustice(s) will impose costs on individuals born after the wrong ended.⁸ This seems counterintuitive to regular notions of redress, or perhaps worse. There may be some reasonable ways to get around this simple yet fundamental point, but these will have to be very persuasive in order to bypass the simple point, which I will not tire to repeat: attempts to redress historical injustice(s) are applied to individuals who were not involved in the original wrong. Ignoring this point may end up burdening, *sometimes severely*, individuals who were not involved in the wrong. If this strikes the reader as problematic, or even worrisome, I hope the arguments of this book will be worth her or his time.

A word about methodology and style. This book is written in what may be called the tradition of analytical political theory. My interest is in arguments which I aim to examine and discuss in this book. I will mention several actual case studies throughout the book – court cases from Australia and Austria, examples from political theory, and Jewish classical sources – to provide illustrations and to point to an otherwise overlooked dimension in the argumentation, but this book concerns arguments, not historical or legal research.

The literature on historical injustices is, as yet, not as developed as other subjects within political theory. However, the subject touches upon some neighboring issues, such as rights to private property and collective responsibility, which have attracted the attention of many other scholars. While I have tried to cover the relevant literature, this is not a book about books. It is, rather, an attempt to provide a systematic argumentation about the book's subject matter. I also

wanted to avoid burdening the book with too many notes. I therefore added references only to books and articles that are directly relevant to the arguments developed here which, as the reader will see, is a significant number.

A last comment is about style. When writing this book (any book actually) the question of “who the readers will be” arose. My goal has been to make this book accessible for the non-specialist, while maintaining the rigor required for a serious academic work. I therefore assume *no* prior knowledge and try to introduce the arguments step by step. My goal has been to maintain the rigorous argumentation expected from works of political theory, while also allowing a student – or any interested reader – to read and enjoy, rather than to craft an overly specific book with an audience of a few experts.

Overview of the Book

Readers have limited time and diverse interests. I have tried to respect both by writing in a precise, succinct style and by limiting my focus to the specific subject of redressing historical injustices, while avoiding the temptations of discussing the many “neighboring” subjects. The wish, of course, is that the reader will be interested enough in order to read the whole book. However, I am well aware (as a reader myself) that this might not be the case for many readers. The following outline, therefore, has three goals: to illustrate the structure of the book; to explain why it is structured the way that it is; and to assist a busy reader in finding the issues she or he is interested in as quickly as possible.

Chapter 1 provides several background explanations and definitions which underline the important gap that this book attempts to fill. In this chapter I offer a definition of historical injustices and, given that there is more than one kind, develop a typology of remedies (not of injustices, which I will explain in the chapter). This chapter justifies the specific focus of this book on material redress, rather than other forms of redress (such as apologies). I then discuss the separateness of persons and individual responsibility, two aspects crucial to the arguments that follow in later chapters. Lastly, as material redress bears immediately on property rights, I discuss property rights and the thesis that past wrongs are in some cases superseded by later events (i.e., the claim that historical injustices may be superseded if circumstances have changed since the wrong). I argue that property rights in and of themselves – while obviously important in any consideration of

historical injustices – cannot provide satisfactory theoretical solutions for the problems that historical wrongs entail.

Chapter 2 examines the non-identity problem which presents a challenge for scholars wishing to justify compensating the descendants of deceased victims of past wrongs. If the past wrong is causally connected to the existence of these descendants, then the past wrong did not harm them insofar as without it they would not exist. In this chapter, I critically discuss two attempts to overcome the non-identity phenomenon. The first attempt is the argument from group identity, which states that past wrongs harmed not only the individual members of a group, but also the group's identity. As the wrong done to the group is maintained via the group's culture, current group members are still harmed by the past wrong; hence, a justification for compensation. The second attempt is the argument through timing. If (a) the original victims were parents at the time of the wrong and their descendants' existence is therefore not causally connected to the wrong, and (b) the parents' ability to bequeath resources to their descendants was harmed by the wrong, this presents a justification for compensation that may avoid the non-identity problem.

Can the "identity" and "timing" arguments successfully avoid the non-identity problem? My conclusion is that the "identity" argument fails to overcome the non-identity problem, whereas the "timing" argument offers insightful and interesting solutions. That said, there are reasons to be quite skeptical of the "timing argument" apart from the non-identity problem, which will be examined (as a part of an "individualistic" approach to intergenerational redress) in Chapter 3.

Chapter 3 examines the individualistic approach to redressing historical injustices. This means that this chapter focuses on pro-redress arguments that aim to justify compensation, or restitution, paid to individuals regardless of their communal belonging. Chapter 3 centers on the distinction between compensation and restitution, and why this distinction is crucial for a precise assessment of pro-redress arguments. This distinction, once it has been presented, grounds an assessment of the individualistic "family" of pro-redress arguments. Some of the main arguments examined following from the compensation/restitution distinction are: the responsibility of the descendants of victims; the duties of the descendants of the wrongdoers; the right to continue one's life without a constant threat of disturbance; and information-related problems.⁹ I am unaware of any previous attempts such as this in the literature.

Chapter 4 examines the main collective-based arguments for inter-

generational redress. There are a variety of widely different arguments regarding collective responsibility and collective belonging, and painstaking efforts are required to analyze them. As a result, the chapter will be divided into four sections. Section A examines three often repeated ways to argue that collective responsibility exists (when certain conditions are met): “identification,” “participation,” and “benefit.” I shall discuss each argument and assess whether it can justify intergenerational redress. Section B examines the connection between collective responsibility and luck; given that belonging to a collective is often determined via involuntary entry (usually through birth), critics of intergenerational collective responsibility can point to the arbitrariness of ascribing responsibility to such group identities. In this section, I will explore both this critique and potential answers. Section C examines the argument that both states and contracts are intergenerational, and therefore a state that signed a contract at time T1, but failed to meet its obligations under this contract, is obliged to fix this broken contract at time T2 (creating an obligation to be levied on the citizens of this state at time T2), even if the original individuals who signed the contract are long dead. Lastly, section D examines Jaspers’ famous “metaphysical guilt” approach to collective responsibility, and argues that Jaspers’ rightly famous approach does not attempt to justify intergenerational redress. This section criticizes Larry May’s attempt to justify intergenerational redress (by following Jaspers’ approach) on two points: first, May neglects Jaspers’ original meaning; and, second, his argument violates the Rawlsian assumption of the separation between persons.

Each section of this chapter is structured in two stages: in the first step, I assess whether the collective-based argument is analytically valid in *contemporary* cases. If the answer is yes, I take the assessment to step two: whether the collective-based argument succeeds in establishing an *intergenerational* collective responsibility required for a successful redress argument. My conclusion is fairly skeptical: almost all of the collective-based arguments examined do not succeed (and some do not attempt to) in justifying intergenerational redress. The few exceptions are mainly in the context of restitution rather than compensation.

Chapter 5 is divided to two sections: the first section examines forward-looking considerations for and against intergenerational redress; the second section examines a successful and justified case for intergenerational redress.

Forward-looking considerations with regard to intergenerational