

Historical Injustice and the Right of Return

*Lukas H. Meyer**

There are two main sources of theoretical doubt regarding the validity of claims for reparation: the questions arising from the non-identity problem and those arising from the supersession thesis. Neither of them significantly undermines the Palestinian refugees' claims to reparations and a right of return.

INTRODUCTION

Do present-day Palestinians living in refugee camps¹ have a right to return to their homes and have their property recovered by virtue of their history of having been forcefully and deliberately expelled from their homeland? This essay presents two comments on doubts one might raise with respect to the validity of the Palestinian claims to reparation. These doubts reflect the two sets of questions that have defined, at least in part, the philosophical subject

* Privatdozent, Bremen University, Institute for Intercultural and International Studies. This was first presented as a paper at the "International Conference on Israel and the Palestinian Refugees," held at the Max Planck Institute for Comparative Public and International Law, in Heidelberg, July 11-13, 2003. I would like to thank Ruth Gavison and other participants at the conference and, especially, Chaim Gans and Alon Harel for their helpful criticisms and comments. Comments and criticisms are most welcome and can be sent to LHMeyer@barkhof.uni-bremen.de.

1 I follow Andrei Marmor in assuming that the needs of these refugees are particularly urgent and compelling and in stressing that the argument is not restricted to the refugees in the camps. See Andrei Marmor, *Entitlement to Land and the Right of Return: An Embarrassing Challenge for Liberal Zionism*, in *Justice in Time: Responding to Historical Injustice* 319, 325 n.13 (Lukas H. Meyer ed., 2004) [hereinafter *Justice in Time*]; also see *infra* note 28.

of *historical injustice*: first, the questions arising from the non-identity problem as introduced by Derek Parfit in his work *Reasons and Persons*² and, second, the questions arising from Jeremy Waldron's supersession thesis as presented in his article *Superseding Historic Injustice*.³ My comments are meant to show that the non-identity problem is of little practical significance for assessing the validity of the right of return of the Palestinian refugees. The same is true for the supersession thesis.

I. THE IRRELEVANCE OF THE NON-IDENTITY PROBLEM

The non-identity problem gives rise to the following general question: How can individuals today have a just claim to compensation owing to what was done to others in the past, when the claimants would not exist today had the latter not suffered these harms in the past?⁴ For example, do African-Americans, whose ancestors were subjected to the terrible injustices of being kidnapped in Africa and subsequently enslaved, have a just claim to compensation?⁵ Let us set aside a host of specifically legal questions

2 Derek Parfit, *Reasons and Persons* at pt. iv (1984).

3 Jeremy Waldron, *Superseding Historic Injustice*, 103 *Ethics* 4 (1992) [hereinafter Waldron, *Superseding Historic Injustice*] (an earlier version of this paper was published as Jeremy Waldron, *Historic Injustice: Its Remembrance and Supersession*, in *Justice, Ethics and New Zealand Society* (Graham Oddie & Roy W. Perrett eds., 1992)); and, most recently, Jeremy Waldron, *Redressing Historic Injustice*, in *Justice in Time*, *supra* note 1, at 55-77 [hereinafter Waldron, *Redressing Historic Injustice*]. Waldron's *Superseding Historic Injustice* is likely the most often discussed and cited paper in the debate about the moral validity of claims to reparation owing to historical injustices. David Lyons holds a similar view on historical entitlements. See Davis Lyons, *The New Indian Claims and Original Rights to Land*, 4 *Soc. Theory & Prac.* 249 (1977), reprinted in Reading Nozick: *Essays on Anarchy, State and Utopia* 355 (Jeffrey Paul ed., 1982).

4 See Christopher Morris, *Existential Limits to the Rectification of Past Wrongs*, 21 *Am. Phil. Q.* 175 (1984); Rahul Kumar & David Silver, *The Legacy of Injustice: Wronging the Future, Responsibility for the Past*, in *Justice in Time*, *supra* note 1, at 148-49.

5 For the claims of descendants of slaves in the U.S., see, for example, Hugo Adam Bedau, *Compensatory Justice and the Black Manifesto*, 56 *The Monist* 20 (1972); Bernard R. Boxill, *Blacks and Social Justice* (rev. ed. 1992); *When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustice* 309-90, 395-438 (Roy L. Brooks ed., 1999); Wole Soyinka, *The Burden of Memory, the Muse of Forgiveness* 44-69 (1999); Robert Fullinwider, *The Case for Reparations*, Report from the Institute for Philosophy and Public Policy 20 (2000); David Lyons, *Unfinished Business: Racial Junctures in US History and Their Legacy*, in *Justice in Time*, *supra* note 1, at 271-98.

concerning, for example, the laws of limitation and liability. Let us also assume that it is sometimes possible to identify with certainty direct descendants of slaves. Now let us consider the case of Robert, identified as just one such direct descendant of slaves.⁶ People can make claims to compensation for harms they have suffered. As a descendant of slaves, has Robert been harmed by virtue of the injustices suffered by his ancestors? Let us first consider briefly the most common interpretation of harm,⁷ which requires that the existence of the harmed person or people qua individuals be independent of the harming act or policy. This interpretation of harm can be expressed in the following formula:

(1) Subjunctive-historical interpretation: An action (or inaction)⁸ at time t_1 harms someone only if the agent causes (allows) this person to be worse off at some later time t_2 than the person would have been at t_2 had the agent not interacted with (or acted with respect to) this person at all.⁹

Under this interpretation of harm, a person can be understood to be fully compensated for an act or policy (or event)¹⁰ when she is as well off as she would have been had the act not been performed. Under this interpretation

6 See James S. Fishkin, *Justice between Generations: Compensation, Identity, and Group Membership*, in *Compensatory Justice* 85, 91-93 (John W. Chapman ed., 1991).

7 For a discussion of different notions of harm in the intergenerational context, see Parfit, *supra* note 2, at 487-90; James S. Fishkin, *The Limits of Intergenerational Justice*, in *Justice Between Age Groups and Generations* 62, 63-64 (Peter Laslett & James S. Fishkin eds., 1992); Sheana Shiffrin, *Wrongful Life, Procreative Responsibility, and the Significance of Harm*, 5 *Legal Theory* 117 (1999).

8 For a defense of the view that certain types of inactions, namely, omissions, can be harmful, see, for example, 1 Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others* 126-86 (1984).

9 "Acted with respect to this person" is meant to include the act that is the cause of this person's existence. It is difficult to interpret such acts as *interactions*. We prefer "had we not interacted with (or acted with respect to) this person at all" to David Gauthier's "in our absence." David Gauthier, *Morals by Agreement* 203-05 (1986). Both formulations are problematic, but it is beyond the scope of this essay to discuss their respective problems at length. Gauthier himself points out that his formulation runs into difficulty when dealing with situations in which a person has assumed a certain social role (e.g., the role of a lifeguard) that is, in part, defined by positive duties vis-à-vis others. If a person assumes such a role, her "absence" in a situation where she is duty-bound to intervene can render others worse-off, *id.* at 205. For the purposes of the formulation we prefer, it seems plausible to suggest that assuming such a role does constitute an "interaction" between the then-duty-bound person and those to whom she is bound where fulfilling the duties of her role is concerned.

10 People can be harmed by events, say, by a natural catastrophe. The following

of harm, Robert cannot be said to have been harmed by the kidnapping and enslavement of his ancestors, for had his ancestors not been kidnapped and enslaved, he would most likely not exist. His existence is the product of a certain genealogical chain not being broken. Hence, the initial kidnapping in Africa, the transporting to America, and the enslavement of his ancestors are (very likely) necessary conditions for Robert's having come into existence at all. Indeed, he would not have been better off had his ancestors not been badly wronged. Thus, we cannot rely upon this interpretation of harm and its accompanying interpretation of compensation to ground the claim that Robert has been harmed and should be compensated. The required state of affairs under this interpretation implies the nonexistence of the person claiming compensation.

To this claim we can respond in a number of ways.¹¹ The response I find most plausible is to allow for an identity-independent notion of harm in addition to the common identity-dependent notion of harm.¹² Such an identity-independent notion of harm can be expressed in the following formula:

(2) Subjunctive-threshold interpretation:¹³ An action (or inaction) at time t_1 harms someone only if the agent thereby causes (allows) this person's life to fall below some specified threshold.

Under this interpretation of harm, a person can be considered to be fully compensated for an act or policy (or event) if she or he does not fall below

reasoning applies when such an event occurs before the person who makes the claim to compensation based on the event comes into existence.

- 11 Currently living African-Americans might well have just claims to compensation based on the subjunctive-historical reading of harm because of harm done to them or to their more recent ancestors. See my discussion of the claims of the Palestinian refugees at *infra* p. [5] and Lyons' analysis of continuing discrimination against African-Americans at Lyons, *supra* note 5.
- 12 See Lukas H. Meyer, *Past and Future: The Case for an Identity-Independent Notion of Harm*, in Rights, Culture, and the Law 143 (Lukas H. Meyer et al. eds., 2003). A different type of response relies on a non-consequentialist interpretation of the relationship between wronging a person and harming a person. If we can wrong a person without harming that person, he or she can make a claim for rectification without having incurred any harm. A claim to rectify past wrongs may not give rise to the non-identity problem — as Rahul Kumar argues in Rahul Kumar, *Who Can Be Wronged?*, 31 Phil. & Pub. Aff. 99 (2003). For a different interpretation of the ethical significance of past wrongs, see Lukas H. Meyer, *Obligations Persistantes et Réparation Symbolique*, 101 Revue Philosophique de Louvain 105 (2003).
- 13 For the wording of these notions of harm, see Thomas W. Pogge, "Assisting" the Global Poor, in *The Ethics of Assistance: Morality and the Distant Needy* 260 (Deen K. Chatterjee ed., 2004).

the specified standard at a particular point in time. Robert can be understood as having incurred harm because his ancestors were kidnapped and enslaved. Whether Robert has been harmed due to the way his ancestors were treated depends upon whether the way they were treated led to Robert's falling below the specified standard of well-being. However, whether or not this is the case will turn on his *current* state of well-being. Employing this interpretation of harm and its accompanying interpretation of compensation requires a forward-looking assessment of what others ought to do today in terms of providing measures of compensation today.¹⁴

When we analyze historical claims on the basis of such a subjunctive-threshold interpretation of harm, the normative relevance of past wrongs will depend upon their causal relevance to the well-being of currently living (and future) people. Fulfilling our duties toward both the latter might well require compensation for the consequences of the fact that their predecessors were badly wronged. However, the fact that their predecessors were wronged does not, in itself, give rise to justified claims to compensation for their descendants today.

The compensation claims of the Palestinian refugees are relevantly different, however. The non-identity problem is of little practical significance in assessing the validity of the right of return of the Palestinian refugees — and for two reasons. First, the non-identity problem does not arise with respect to surviving victims of wrongs. Among those present-day Palestinians living in refugee camps are a good number of individuals who were forcefully and deliberately expelled from their lands by the Israeli

14 The relevance and importance of the forward-looking assessment of the normative significance of past wrongs has been stressed by, for example, Lyons, *supra* note 3; Waldron, *Superseding Historic Injustice*, *supra* note 3; Bruce A. Ackerman, *The Future of Liberal Revolution* 72-73 (1992); Bruce A. Ackerman, *Temporal Horizons of Justice*, 94 *J. Phil.* 299 (1997). For a theory of justice that grounds our obligations in backward-looking reasoning, see Robert Nozick, *Anarchy, State, and Utopia* 152-53 (1974). The theory relies upon counterfactual reasoning. For critiques of this theory, see Lyons, *supra* note 3; George Sher, *Ancient Wrongs and Modern Rights*, 10 *Phil. & Pub. Aff.* 3 (1981); Waldron, *Superseding Historic Injustice*, *supra* note 3. For epistemic reasons only, Nozick proposes Rawls' difference principle — a forward-looking principle, specifying what the future should be like — as a "rough rule of thumb for rectifying" historical injustice, Nozick, *supra*, at 231. This idea does not address the problem of the inapplicability of a non-comparative notion of harm as discussed in the text. For alternative *impersonal* interpretations of how the past matters normatively, see Peter Vallentyne, *Teleology, Consequentialism, and the Past*, 22 *J. Value Inquiry* 89 (1988); Thomas E. Hill, *The Message of Affirmative Action*, 8 *Soc. Phil. & Pol'y* 108 (1990/91); Fred Feldman, *Utilitarianism, Hedonism, and Desert* 17-35, 63-75 (1997).

fighting forces. The harm done to them can be understood in accordance with the common understanding of harm: the Israeli policy caused these people to be worse off than they would have been in the absence of that policy. These individuals would be fully compensated for the harm done to them were it the case that, as a result of measures of compensation undertaken, they were as well off as they would have been had the policy not been carried out.

Second, for the descendants of people who were expelled from their homeland, it might well be true that they would not exist had their parents and (great-)grandparents not been expelled. However, these descendants can be said to be the victims of the wrong that their parents did not receive compensation for the wrongs inflicted upon them. The individual descendants can be said to have been harmed from their conception or birth because of the lack of sufficient compensation to their parents. Again, the harm done to them can be understood in accordance with the common understanding of harm: having refrained from providing sufficient measures of compensation to the first generation of Palestinian refugees, those entities who are under obligation to provide such compensation harmed the descendants of the first generation of Palestinian refugees by causing those descendants to be worse off than they would have been had the relevant entities fulfilled their obligation. And, again, the second generation of Palestinian refugees would be fully compensated for the harm done to them if, as a result of measures of compensation undertaken, they were as well off as they would have been had the first generation of Palestinian refugees received the compensation they were entitled to. And this line of argument can be similarly extended to the third and fourth generations of Palestinian refugees.

Thus understood, the later generations' claims to compensation do not have to contend with the non-identity problem.¹⁵ However, the legitimacy of people's claims can depend upon their actions (and inactions) and the impact these have on their well-being. For these actions (inactions) can be attributed normatively to people only insofar as they make the decision to act (not act) and take responsibility therefor. The strength of later generations' claims to compensation — derived from the failure to provide a sufficient measure of compensation to the first generation that suffered the initial harm — is thus likely to wane over time. The more the descendants' well-being can

15 See George Sher, *Transgenerational Compensation* (paper presented at the Historical Justice Conference, held at Potsdam, Germany, 19-20 July 2000) (unpublished manuscript, on file with author).

be attributed to actions or inactions for which they themselves or members of the intermediate generations are responsible, the less the hypothetical state of affairs that would obtain had the direct victims received adequate compensation¹⁶ is relevant for determining the claims of the indirect victims.¹⁷ This insight is, however, of little practical significance in assessing the strength of the claims of the descendants of the Palestinians who were expelled from their homeland. Most of them are the children or grandchildren of the direct victims. The harm done to their ancestors is not ancient. Thus, here the descendants' claim to compensation — based on the harm inflicted on them due to the failure to provide adequate compensation so far for the initial harm — is strong.

II. THE IRRELEVANCE OF THE SUPERSESSION THESIS

Let us now turn to the second source of doubts regarding the validity of historical claims to reparations. Injustices committed against people in the past may not give rise to claims to reparations today if such claims can be understood to presuppose an indefensible interpretation of property entitlements. David Lyons and Jeremy Waldron argue that the view that once we acquire entitlements they continue until we transfer or relinquish them is indefensible since there are reasons of principle¹⁸ for holding that entitlements and rights are sensitive to the passage of time and changes in circumstances. According to Waldron, entitlement to land is based upon the idea that such entitlement can be an integral part of people's life plans and projects as individuals and as members of groups. Entitlements to land can be important in enabling people to autonomously realize particular goods of their way of life.¹⁹ When circumstances change, the entitlement might no longer be important in that sense or may decrease in normative

16 Assuming we could know what that state of affairs would be.

17 See, e.g., Sher, *supra* note 14.

18 Here we are not concerned with pragmatic reasons behind, for example, statutes of limitations and the doctrine of adverse possession. See Marmor, *supra* note 1, § 3.1.

19 See, e.g., Lukas H. Meyer, *Transnational Autonomy: Responding to Historical Injustice in the Case of the Saami and Roma Peoples*, 8 Int'l J. Minority & Group Rts. 263, 291-95, 295-99 (2001) (discussing, in section 10, the normative significance of sub-sovereign transnational control over their homeland for the political and cultural autonomy of the Saami people and, in section 11, the non-territorial claims of the Roma people to securing the status of a minority in the countries in which they reside and to recognition as a transnational minority for protecting a group identity that transcends national borders).

significance. For example, the entitlement of original owners might weaken over time if they are separated from the land. Having been separated from the land, entitlement to the land might no longer be important for those original owners in autonomously realizing their way of life. Thus, generally speaking, entitlements are sensitive to background circumstances and they are vulnerable to prescription. As Waldron argues, property entitlement is a set of claim rights, liberty rights, and powers that are "circumstantially sensitive."²⁰

Further, if legitimate entitlement is sensitive to changes in background circumstances, it is possible that the ongoing effect of an illegitimate acquisition and, more generally, of unjust violations of the rights of others can become legitimate when circumstances change. This is Waldron's principal argument for the thesis that historical injustices can be superseded.²¹ He gives an example in which the violation by one group of the legitimate rights of another group to a given waterhole is superseded by an ecological catastrophe such that the interlopers acquire a right to share what they had wrongly begun to use. In these circumstances, "they are entitled to share that water hole. Their use of [the waterhole] no longer counts as an injustice; it is now in fact part of what justice now requires. The initial injustice by [the first group] against [the second] has been superseded by circumstances."²² Hence, justice may require that original owners of land share their land with others, and they may be required to share even with those who unjustly appropriated the land. However, even if supersession of injustice is possible, the claim that it has occurred in any given situation "depends on which circumstances are taken to be morally significant and how as a matter of fact circumstances have changed."²³ The argument for the possibility of supersession rests on a hypothetical case of ecological disaster such that the need of others to use the resource is both extreme and brought about by circumstances beyond their control.

If we assume that the Palestinians were unjustly expelled from their

20 Or, as David Lyons puts it, "[P]roperty rights themselves, and not just their exercise or contents, are relative to circumstances." Lyons, *supra* note 3, at 370.

21 See Waldron, *Superseding Historic Injustice*, *supra* note 3, at 24; Waldron, *Redressing Historic Injustice*, *supra* note 3, § 7. The supersession thesis concerns the ongoing effect of past injustices only. Claiming that injustices are superseded implies neither that the past unjust violations of rights were not unjust nor that they should no longer be considered unjust. Even if certain injustices are superseded, we may well bear obligations to publicly acknowledge the wrongs committed and to provide, say, measures of symbolic reparation toward the victims. See Meyer, *supra* note 12.

22 Waldron, *Redressing Historic Injustice*, *supra* note 3, at 68.

23 *Id.*

lands by the Israeli fighting forces and that the appropriation of these lands was unjust, it seems implausible that these historical injustices are superseded today so that their ongoing effect — namely, Israeli exclusive sovereign control of the land — is to be considered legitimate.²⁴ Israel cannot plausibly claim either to have an extreme need to exercise exclusive sovereign control over the land or that such a need has been brought about by circumstances beyond its control.²⁵ Further, and according to Waldron's account of property rights, supersession of the historic injustices will turn on whether for the Palestinian refugees, loss of their homeland and their property is of significance for their sense of who they are and who they want to be. In actuality, the loss is highly important to them, namely, to their individual and collective identities. We can explain this in terms of the importance of a shared communal life that allows the members of an ongoing cultural and ethnic group to autonomously participate in the realization of the particular goods of their way of life.²⁶ For a people to realize this value, they typically need a meaningful degree of autonomous control over land, and for the Palestinians, there is no available substitute for their homeland. This is not an atypical situation either.²⁷ Further, and as Andrei Marmor has stressed, in the case of the Palestinian refugees, the claim to a right of return is particularly pressing owing to the miserable conditions under which they live in the refugee camps, with, as Marmor puts it, "very limited opportunities to escape such a predicament."²⁸ In the case of the Palestinian refugees, it seems clear that their yearning for their lost homes "is not just a sentimental

24 I do not mean to imply that Jeremy Waldron or David Lyons holds that these more recent injustices are superseded. Both claim that some colonial injustices committed two-hundred years ago can plausibly be said to be superseded given the dramatic changes that have taken place. But see Paul Patton's critique of the claim that colonial injustices in Australia and New Zealand are superseded, Paul Patton, *Colonization and Historical Injustice — The Australian Experience*, in *Justice in Time*, *supra* note 1, at 159, 167-70.

25 See Chaim Gans' subtly nuanced analysis of the just claims to self-determination of both the Jewish and the Palestinian peoples, Chaim Gans, *The Palestinian Right of Return and the Justice of Zionism*, 5 *Theoretical Inquiries L.* 269 (2004); Chaim Gans, *The Limits of Nationalism* 97-123 (2003).

26 Marmor, *supra* note 1, § 3.2.

27 See, e.g., Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 *Harv. Hum. Rts. J.* 57 (1999); Benedict Kingsbury, "Indigenous Peoples" in *International Law: A Constructivist Approach to the Asian Controversy*, 92 *Am. J. Int'l L.* 414 (1998); Meyer, *supra* note 19.

28 Marmor, *supra* note 1, at 328.

matter,"²⁹ but something that is closely related to the person's individual or communal sense of identity.

This is not to deny the Jewish right to self-determination.³⁰ Also, changes of circumstances do matter: a number of considerations can be distinguished that are relevant for specifying the contents of the Palestinian right of return and how that right ought to be exercised.³¹ These considerations reflect, first, how best to serve the interests underlying the Palestinians' right of return; second, how to respect and accommodate the legitimate interests and rights of others who might be affected by recognition of that right; and, third, pragmatic or strategic concerns of how best to serve the goal of establishing a legitimate and stable political order in the region. This essay does not even attempt to inquire into these normatively and empirically difficult questions. Such an inquiry might lead us to the conclusion that (many of) the Palestinians should not return to their homeland, that, instead, Israel ought to provide measures of material and symbolic compensation, and that (many of) the Palestinians should accept, say, control over the West Bank as a sufficient territorial base for realizing the particular goods of their way of life. However, such a conclusion could not rest on the mistaken premise that the Palestinian right of return has been superseded. Rather, such a conclusion would reflect an assessment of how (the) Palestinians ought to exercise their right of return and — or alternatively — it would reflect the view that (the) Palestinians have good or even compelling reasons to waive their right of return as a measure of political strategy.

CONCLUDING REMARKS

The argument presented in this essay has been theoretical and mainly negative: the two main sources of theoretical doubt about the validity of

29 *Id.*

30 See sources cited *supra* note 25.

31 See Marmor, *supra* note 1, § 3.3; Andreas Føllesdal, *The Special Claims of Indigenous Minorities to Corrective Justice*, in *Justice in Time*, *supra* note 1, at 339, 350-51; Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (1990). See especially Alon Harel, *Whose Home Is It? Reflections on the Palestinians' Interest in Return*, 5 *Theoretical Inquiries* L. 333 (2004) (Harel argues that the Palestinians' interests correctly understood do not support their right of return, while I would argue that they ought to exercise their right of return in a way that reflects, *inter alia*, (some of) the considerations as most helpfully discussed by Harel).

claims for reparation owing to past injustices do not undermine the validity of the right of return of the Palestinian refugees. Neither the questions arising from the non-identity problem nor those arising from the supersession thesis significantly undermine the Palestinian refugees' claims to reparations and their right of return. First, the common understanding of harm and its accompanying notion of reparation and compensation are applicable to those Palestinians who were forcefully and deliberately expelled from their homeland as well as to their descendants with respect to the harm done to them owing to the lack of effective measures of reparations for the initial harm. Second, even if we allow for the conceptual possibility of historic supersession of injustices, it seems highly unlikely that the Palestinians' right of return has been superseded. Morally speaking, there does not seem to be a compelling case for considering the ongoing effect of the expulsion of the Palestinians from their homeland as just given current circumstances. However, the essay does not address the question of how the Palestinians ought to exercise their right of return or whether they (or many of them) might have good or compelling reasons to refrain from realizing their right of return. Responding to this question would require consideration not only of how best to serve the interests underlying the Palestinians' right of return, but also how to respect and accommodate the legitimate interests and rights of others, including the Jewish right to self-determination. Last but not least, we would need to pragmatically assess how best to serve the goal of establishing a legitimate and stable political order in the region.

