

EXISTENTIAL LIMITS TO THE RECTIFICATION OF PAST WRONGS

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IN recent years many social critics have developed cases for compensation to various individuals and groups for certain wrongs committed against their recent or distant ancestors. Many such arguments appeal to seemingly uncontroversial views of rectification of past wrongs: if we wrong some person, we owe her¹ compensation for the harm done.

Some such cases are powerful, and if their conclusions are warranted they would require major changes in our societies. Consider the following cases for rectification of past wrongs, some of which should be familiar to the reader:

- (1) the land claims of various North American Indians,
- (2) a recent argument for reparations to black Americans,
- (3) some defenses of affirmative action and preferential hiring programs for women, blacks, and others as compensation for past injustices,
- (4) damage claims made on behalf of infants deformed by fertility drugs taken by their mothers,
- (5) general "historical" entitlement arguments for rectification of past injustices.²

What these cases appear to have in common is a claim that some individual or group is owed compensation for a wrong committed against an ancestor in the past. Without focusing on the details of such cases, let us note that each seems to be based on a principle of rectification such as the following:

General Principle of Rectification: if W wrongly harms V , then V is entitled to compensation from W for the harm.³

' W ' stands for individual wrongdoers and ' V ' for individual victims; the matter of rectification of wrongs committed against groups should for the present be understood in terms of wrongs committed against individuals. And by "compensation" I shall mean that V is to be made no worse off than she would otherwise be in the absence of the harmful act.⁴

The general principle, as stated, is insufficient for the cases mentioned. For in most if not all of these cases, the original wrongdoer W is dead, and the principle as stated does not say who then is liable for damages.

Suppose that W wrongfully harms V (e.g. W expropriates V 's oil fields); but before passing away W bequeaths her ill-gotten goods to W_i , a descendant. The latter is thus the beneficiary of W 's evil deed. We may then suppose that V has a claim to compensation from W_i , even though the latter has committed no wrong (other than receiving stolen goods). Even though innocent of any crime, we may believe that W_i is not entitled to the goods. Just as we generally view the restoration of stolen property as just, so W_i should return the goods in question to V or otherwise compensate V for her loss. Our general principle needs to be restated:

*General Principle of Rectification**: if W_1 wrongfully harms V , and if W_n is the sole remaining beneficiary of the wrongful act A , then V is entitled to compensation for A from W_n .

(We may assume that W_1, W_2, \dots , and W_n are biologically related, but this need not be.)

Even as amended, however, the general principle will not be sufficient for the cases mentioned earlier. For what happens if both W_1 and V are dead? Suppose that W_1 wrongfully harms some individual V_1 and that both then pass away. Suppose further that W_n is the beneficiary of W_1 's unjust act and that V_n is made worse off as a consequence of the act (e.g. V_n is V_1 's offspring and would have inherited the oil fields). Then doesn't V_n have a claim to compensation from W_n , even though neither is an original party to the unjust act?

W_1 's original act A was wrong and establishes a claim to compensation, I am supposing. If W_n is the sole living beneficiary of A , then it is she who may be held liable for the compensation. Is any-

thing of importance changed by V_1 's departure and V_n 's arrival? The latter is definitely made worse off than she would otherwise have been, or so it appears. And W_n is not entitled to the profits of A . Surely then V_n has a claim to compensation against W_n . Assume without further argument, that this is so. Then I must again restate our general principle:

*General Principle of Rectification***: if W_1 wrongly harms V_1 , and W_n is the sole remaining beneficiary of the wrongful act A , and V_n is made worse off by A , then V_n is entitled to compensation from W_n for the worsening of her position.

As a general principle of rectification there may still be problems with this restatement.⁵ In addition, it is no longer clear that this principle is as acceptable as the first version. However, these difficulties need not concern us. The problem with arguments for compensation that I wish to discuss may be brought out using the principle as we now have it.

Notice that it is not always clear in arguments for rectification of past wrongs whether the relevant V_n was born (or rather, conceived) *before* or *after* the original unjust act. But why should this be important?

Cases for compensation such as those mentioned earlier generally hold that some individual V_n is owed compensation from some other person W_n , where V_n is a descendant of the original victim V_1 , now deceased, and where W_n is the beneficiary of the unjust act of some ancestor W_1 . V_n has been disadvantaged by A because her situation was worsened by the wrong done to V_1 . *Hadn't the original villain W_1 committed A against V_1 , the latter's descendant V_n would not be in the disadvantageous situation she is in today.* The truth of this counterfactual assertion is crucial to the general argument. It must be the case that V_n would have been better off in the absence of A . Otherwise the claim to compensation based on the restated principle collapses.

If it is the case that V_n is conceived after A , the counter-factual claim is simply not true. In virtually all such cases, the argument for compensation fails. For if V_n is conceived after A , it is *not* the case that she would have been better off in the absence of A . *For in the absence of A , V_n would not exist.* Some other individual bearing (perhaps) the same name as V_n —call this individual “pseudo- V_n ”—

might exist, but she is not the same person as our original V_n . On any reasonable principle of personal identity, V_n and pseudo- V_n are not identical.⁶ They are two distinct individuals. Hence V_n has no claim to compensation based on the general principle of rectification.⁷

V_n 's very existence is conditional on A . The greater the effects of A on V_1 —which we may assume are some increasing function of A 's wrongness—the greater the certainty that V_n would not exist in the absence of A . The basic reason for this is that in the absence of the original act A , any number of factors that are causally necessary for V_n 's birth would also have been absent. The non-occurrence of A would have given birth to a different set of individuals pseudo- V_2 , ..., pseudo- V_m and to some pseudo- V_n . The reason for this is biological as well as philosophical, and here I reproduce the reasoning that Thomas Schwartz uses to demonstrate that we do not have obligations to our distant descendants.⁸

Consider the case of V_n and pseudo- V_n where $n = 2$; that is, the case where they are, in different possible worlds, V_1 's immediate offspring. Following Schwartz, I claim that they are not and, given the facts about human conception, could not be the same individual. Suppose that V_n in possible world I (where A occurs) and pseudo- V_n in possible world II (where A does not occur) are conceived (in their respective possible worlds) some time *after* the occurrence or non-occurrence of A , say, a couple of weeks. Then the circumstances of V_1 's life between the event of A or the non-occurrence of A and the conception of V_n and pseudo- V_n respectively would be different in the two possible worlds. Without A , it is possible that V_1 would not have met V_n 's father, or if they had met, it is possible that they might not have mated. Had they mated, it is possible that they might not have procreated.

Suppose that little time evolves between A (or the non-occurrence of A) and V_n 's (or pseudo- V_n 's) conception. Thus suppose that V_1 met and mated with V_n 's (or pseudo- V_n 's) father and that they procreated. Still, given A , V_n would have been conceived under conditions (at least a little) different from those under which pseudo- V_n would have been conceived in A 's absence.

But that makes it virtually impossible for V_n to

have developed from the same pair of gametes as pseudo- V_n , hence virtually impossible for V_n to have had the same genotype as pseudo- V_n . After all, trivial circumstantial differences could easily have determined whether intercourse, ejaculation, or conception took place at any given time. And the most minute circumstantial differences would have determined which particular spermatozoon fertilized the ovum and what particular pattern of meiosis was involved in the production of either gamete. Even if the circumstances surrounding V_n and pseudo- V_n 's conceptions are as similar as one can realistically suppose, still, V_n would have been no more likely than pseudo- V_n 's non-twin sibling to have had pseudo- V_n 's genotype.⁹

Consider the probabilities. V_n , or anyone else, owes her existence to the encounter of one particular spermatozoon and an egg cell. There are usually four or five hundred million sperm cells with each male ejaculation. We are each the outcome of the encounter of one of these million spermatozoa with an egg cell. There is thus a chance of one in four or five hundred million that any one sperm cell will make it. It could very easily have been another, in which case V_n or you or whomever would not be.¹⁰ *The most minute circumstantial difference will determine which spermatozoon will fertilize the ovum and thus the identity of the individual conceived.*

Suppose that A causally affects the environment surrounding V_n 's gestation and early childhood. The combination of a different genotype and a different environment insure all manner of further differences: V_n would not have been composed of the same matter as pseudo- V_n , she would not have looked the same as pseudo- V_n , and she would not have had the same perceptions, the same memories, the same beliefs or attitudes, the same capacities, the same character or the same personality as pseudo- V_n . As a result, V_n would not have had the same psyche as pseudo- V_n —by any sensible standard of sameness of psyche. Neither would V_n have fulfilled just the same social roles and relationships as pseudo- V_n .¹¹

In sum, V_n would have differed from pseudo- V_n in *origin* (different gametes), in *content* (different matter, different mind), and in *basic "design"* (different genotype), and she would have been shaped

by a different environment to perform different functions. We have no more reason to identity V_n with pseudo- V_n than we have to identify siblings reared apart from each other.

If any trivial difference affecting conception would have this consequence—i.e., bringing it about that a different individual is conceived—then all the more so with a significant harm that disrupts the life of the original victim V_j . The more significant the harm, the greater the certainty that V_n 's existence would not have taken place in its absence. Where $n \geq 3$, the certainty is even greater yet; when many generations fall between V_j and V_n (or pseudo- V_n), the circumstantial differences surrounding V_n 's (or pseudo- V_n 's) conception will be even more different. Indeed, after several generations we cannot suppose any significant similarity in the environments of V_n and pseudo- V_n . V_n 's *very existence, then, depends on the original wrongful act that is supposed to be the foundation for the claim to compensation* (where "depends" has the sense of "would not occur in the absence of").

As long as A occurred prior to V_n 's conception then virtually¹² all cases for compensation resting on a principle of rectification such as ours fail. If V_n would not have existed in the absence of the original misdeed A , then it is simply not true that V_n would be better off in the absence of A . If the relevant counter-factual claim is false (or lacks truth-value), then arguments using the principle of rectification fail. And this would seem to be the case with all the examples of such cases mentioned earlier (although I shall not try to demonstrate this here). Only if V_n is actually made worse off by A can compensation be claimed.

What does and does not follow from this conclusion? (1) It does *not* follow that the original unjust act A was not in fact wrong. The treatment our Western European ancestors accorded North American Indians, blacks, and the native people of Mexico remains the barbarous deed that it always was. The systematic exploitation and domination of women in our (and other) societies are not any the less wrong.¹³ W_j did wrong V_j . The matter that I have been discussing merely concerns the compensation that may be owed to descendants of the original victims. If some of the descendants are the victims of some contemporary injustice then possibly they are owed compensation for these wrongs.

(2) It does *not* follow that the beneficiary W_n is *entitled* to the wrongfully obtained benefits. The fact that V_n does not possess a title to the goods does *not* entitle W_n to them. Ill-gotten gains remain precisely that.

Further, (3) the conclusion does *not* hold for the harms committed *after* the conception of V_n . Many cases for black reparations, for instance, defend claims to compensation for harms recently committed, and such cases are not affected by my argument.¹⁴

It merely follows that any descendant V_n of V_I does not have a claim to compensation based on a general principle of rectification such as ours (unless V_n is conceived before A or the harm for which V_n seeks rectification is her very existence).

It is clear that the important assumption of my argument is some such principle as:

V has a claim to compensation for A only if V herself would have been better off in the absence of A .

Such a principle is a “person-affecting” restriction similar to those principles that give rise to the so-called “paradox of future generations.” Person-affecting principles restrict our moral concern to the consequences of our actions on those specific individuals affected.¹⁵ I do not, however, claim that such a principle holds for all domains of morality, merely that *rectificatory justice* must presuppose it. From Aristotle on, rectification has been understood to involve correcting or compensating for an injury, harm, loss, injustice, and the like;¹⁶ a necessary condition for rectification is an injured party. The object of justice here is “to make whole,” to make amends. Rectificatory justice thus differs from distributive justice as notes H. A. Bedau in the context of a discussion of black reparations:

The chief difference between compensatory and distributive justice lies in whether the recipient deserves a benefit on account of, respectively, some injury he has suffered or on some other ground, e.g., his right to a fair share.¹⁷

Black's Law Dictionary supports my analysis here. Rectification, according to this dictionary, is the “act or process by which something is made right or by which a wrong is adjusted.” Restitution is “... the act of making good or giving equivalent for any loss, damage, or injury.” Compensation is that “which is necessary to restore an injured party to his former position.”¹⁸

While recognizing that this is the standard conception of compensation, George Sher, finding the counter-intuitive consequences of this notion unacceptable, proposes that

we modify the standard view of compensation itself—to say that compensating X is not necessarily restoring X to the level of well-being which *he* would have occupied in the absence of A , but rather it is restoring (sic) X to the level of well-being that some *related* person or group of persons would have occupied in the absence of A .¹⁹

Such a “modification” seems more of a transformation. For “modifying” the principle in this way would simply transform it into a principle of (non-rectificatory) distributive or redistributive justice. Now there may be sound arguments for such redistribution, but they are not rectificatory. Sher in effect recognizes this in a discussion of genetic damage cases, when he claims that a defective child is owed compensation even if *she* would not exist in the absence of the initial wrong. Sher claims that

What determined [the child's] desert of compensation was evidently not the fact that he would have been better off in the wrong's absence, but rather the simpler fact that the wrong caused him to exist at a level of well-being that falls below some crucial minimum. *Prima facie*, the crucial level may appear to be simply that of the average person or the average member of the child's society.²⁰

Given that rectification, when due, is owed no matter what the socio-economic status of the claimant, Sher's intuition is redistributive and not rectificatory. Otherwise, why would falling below a certain minimum be relevant toward determining desert of compensation? It seems important not to confuse rectificatory with distributive justice, if only so that we realize that the limits my argument imposes on the former do not automatically carry over to the latter.

The argument that I have developed is essentially a retrospective application of the Parfit-Schwartz insight about future individuals. Recently this insight has generated much discussion, some of the discussants finding the consequences of the insight “paradoxical.” It has been argued that the source of the alleged paradox is the “person-affecting” assumption mentioned earlier.²¹ The problem with such assumptions, some discussants argue, is that they exclude consideration of the good or beneficial

results that our actions may have independently of their effects on specific individuals. For instance, someone may argue that an "irresponsible" energy policy leaves future generations in a desperate state of affairs, even though *they* would not have existed at all in the absence of this policy. The various "person-affecting" principles do not allow us to condemn such a policy as they do not take into account the consequences, good or bad, of our actions on non-existent persons. Only if some individual's existence were independent of the particular policy could we speak of her being harmed by it. While many critics recognize that there are considerations that render this consequence of person-affecting principles less counter-intuitive,²² most nonetheless recommend modifying or abandoning them.

Whatever the merits of such arguments, they are irrelevant to the matter of rectificatory justice. For the latter notion is "backward-looking."²³ Its object is not (directly) the achievement of welfare-maximizing consequences but that of correcting past wrongs. It is essentially a juridical notion, as it is clear from the paradigm cases of just rectification. Principles that are concerned with beneficial consequences, such as utilitarian principles, are "forward-looking." Indeed, utilitarians should welcome the conclusion of my argument since it offers to such theorists yet further reason for leaving behind the claims of the past and focusing on the future. In any case, "forward-looking" considerations are not primary for rectificatory principles, and the general criticisms made of the person-affecting assumptions that give rise to the "paradox of future individuals" should not, for this reason, affect my argument.

As I mentioned earlier,²⁴ it is possible for some *V* to be wronged or injured without it being the case that she would have been better off in the absence of the wrongful act *A*. Suppose that *W₁* wrongs *V₁* and that the latter for some reason becomes very wealthy or happy as an unforeseen result of *A*. We might want to argue that *V₁* is nonetheless owed compensation for *A* even though it is *not* the case that she is worse off as a consequence of *A*. The inability to handle such cases might be a weakness of standard formulations of the Principle of Rectification.

The possibility of such cases, however, will not significantly affect my general argument. Suppose that we drop the condition that rectification is owed only if *V_n* is made worse off than she would be in the absence of *A*. Then might not *W₁* owe *V_n* compensation for the wrong done to the latter's ancestor *V₁*? I would argue not. (I assume, without argument, that if *V_n* is not entitled to compensation from *W₁*, then she is not entitled to compensation from *W_n*.) The relevant principle would be something like,

V_n is entitled to compensation from *W₁* (or *W_n*) only if it is the case that *W₁* injures or wrongs *V_n*.

But surely *V_n* is injured or wronged by *W₁* only if *V_n*, in the absence of *A*, (1) *exists* and (2) is *not* injured or wronged by *W₁*. One does *not* injure or wrong someone simply by bringing them into existence. What else has *W₁* done to *V_n*? *V_n* is neither harmed nor wronged by *A*. (Indeed, if we take the view that being brought into existence is a benefit,²⁵ then *V_n* is benefited by *A*.)

To object to this would be to claim that *V_n* may be entitled to "compensation" from *W₁* (or some *W_i*?) even if it is *not* the case that *V_n* would exist in the absence of *A*. Thus, *V_n* would be entitled to "compensation" almost irrespective of what *W₁* did, simply by being born in unfortunate circumstances (or in any circumstances?). Again, this seems a most circuitous route by which to justify redistribution.

The main objection to my argument might simply be that the conclusion violates our "intuitions," that it yields "unacceptable consequences."²⁶ I suspect that many readers will find it counter-intuitive; I used to as well. But it is not clear what weight this ought to have. Some may believe that

Because the intuition of a harmful act is irrelevant to its victim's desert of compensation is so firm, that intuition will again simply override any account of compensation that conflicts with it.²⁷

This is almost to claim that some moral "intuitions" are incorrigible. Reflecting on the argument and the considerations that I have presented, however, one may come to accept the conclusion. For if the argument is sound, our "intuitions" are wrong and we ought to abandon them.^{28,29}

NOTES

1. Throughout this essay, "she" and "her" will be used in their generic sense.
2. For (1) see McDonald (1976), Lyons (1977), Sher (1981). For (2) see Bittker (1973), Bedau (1972). For (3) see M. Cohen, *et. al.* (1977), and Goldman (1979), pp. 65-140. For (4) see the discussion of similar cases in Feinberg (1976). For (5) see Nozick (1974), pp. 230-231.
3. See, for instance, Aristotle (1941), V, 1131b25-1132b20; Nozick (1974), pp. 152-53; Goldman (1976), p. 67: "An individual harmed in violation of his rights should be restored by the perpetrator of the injury to the position he would have occupied, had the injury not occurred." Note that it is possible to harm someone without wronging her (e.g. just punishment), and that it is possible to wrong someone without harming her (e.g. beneficial involuntary euthanasia); thus the "wrongly harm."
4. George Sher calls this the official view of compensation. See Sher (1979), p. 378. "Compensation" here may be weakened to "partial compensation."
5. V_n may actually have been *worse off* in the absence of A owing to unfortunate circumstances or to unforeseen beneficial side-effects of A . See Nozick (1974), pp. 57-58. I am indebted to Larry Alexander and to the referee of this journal for some cases of individuals having been made *better off* by A . I discuss this matter later in the essay.
6. A similar argument is developed in Sher (1979). See also Levin (1980). Gregory Kavka (1982b) develops essentially the same argument I give as a criticism of Nozick's theory. Kavka and others, however, do not appear to think that the argument is completely destructive of the standard cases for rectification of past wrongs. Also, Lawrence Davis (1976) remarks with respect to Nozick's theory that "Had our ancestors lived and moved in a rectified version of our history, quite likely many of us would not be alive today."
7. Unless, of course, it is her *existence* which is the disadvantage for which V_n seeks compensation. I suppose throughout that this is not the case.
8. See Schwartz (1978) and (1979). See also Parfit (1976) and Adams (1979).
9. This paragraph is taken, with a few minor changes, from Schwartz (1979), p. 182.
10. Nozick (1974), p. 226n.
11. This paragraph and the next are taken, with a few changes, from Schwartz (1979), pp. 182-83. See also the paper by Levin (1980).
12. All such cases except those involving "secret harms", e.g. W_1 secretly steals V_1 's oil fields, the theft remaining undetected prior to V_2 's birth. I owe this idea to the referee for this journal and to Richard Wasserstrom.
13. The nature of the wrong in case (4) is more complex. See Schwartz (1979), pp. 193-94.
14. Though such cases will depend on the conception of the self presupposed. A Parfitian Complex View of the self will weaken such cases for rectification, where a Simple view might strengthen them. I cannot, however, go into these issues here. For these distinctions, see Parfit (1973). See also Partridge (1982) and Levin (1980).
15. A "person-affecting" principle, such as "It is better to do what affects people for the better," is to be contrasted with an "impersonal" principle, such as "We ought to increase happiness." Parfit (1976), p. 100. For recent discussions of the "paradox of future individuals," and its relation to such principles, see Kavka (1982a) and Parfit (1982).
16. See the works referred to in note 3.
17. Bedau (1972), p. 22n.
18. *Black's Law Dictionary*, 5th ed., pp. 1147, 1180-82, 256.
19. Sher (1981), p. 8.
20. See Sher (1979), p. 389. (Economists and welfare reformers often take *half* of the *median* income as a guideline for "acceptable" welfare transfers. Clearly the *average* income or well-being level is too high.)
21. See note 15.
22. "The conclusion [that we have no obligations to future individuals] is not quite as shocking as it first appears for it leaves open the possibility that we have an obligation to our ancestors, our contemporaries, or our *immediate* descendants to sacrifice in order to promote future people's well-being." Kavka (1982a), p. 95n. Indeed, Schwartz provides an argument for obligations *concerning* future individuals but owed *to* our contemporaries. See Schwartz (1978), pp. 11-13 and (1979), pp. 191-92.

23. "On the other hand, the justification of reparation is essentially 'backward looking'; reparation is due only when a breach of justice *has* occurred ... while the aim of compensation is to procure some future good, that of reparation is to rectify past injustices ..." Boxill (1975), pp. 117-18. I use the term "compensation" in a way analogous to Boxill's "reparation."

24. See note 5.

25. But this is controversial. See Parfit (1982).

26. Sher (1981), p. 8.

27. Sher (1979), p. 384.

28. There are a couple of "ways out" of my conclusion, which I shall mention briefly. I do not believe that they will succeed, but they must be developed before we can evaluate them.

1) One could argue, as do some defenders of rectification, that it is to *groups* and not to individuals that descendants of W_j owe compensation. In addition to answering the standard arguments against compensation to groups, any such account must (a) explain how a collectivity may remain the same over time, not only if all its members change (a standard problem), but if its history is radically different in different possible worlds. Further, (b) since the specific descendants of the originally harmed group G_j are actually benefited by A , if they are to be compensated as a group for some harm, then the compensated wrong cannot be identical with any harms the individual members of G_n have suffered. So an account of group harms must be constructed so that a collectivity may be harmed in manner H even if none of its present members have been harmed in manner H .

(2) Another way out would be to argue that since the original victim was wronged, the beneficiaries W_n (including V_n ?) owe the original victim V_j something by way of rectification (or acknowledgment) of the wrong. One may exclaim, following Thomas Jefferson, that the dead have no rights; but some philosophers have argued, without presupposing immortality of the soul, that an individual may be harmed after her death. [Aristotle (1941), Nagel (1979).] Posthumous awards, for instance, may be thought to benefit the dead. Perhaps some plausible account can be constructed for the claims of the deceased, *pace* Jefferson. Then it may be argued that W_n (and V_n) ought to rectify the harm done by W_j to V_j by passing on the ill-gotten goods or some form of compensation to V_j 's actual descendants. (" V_j would have wanted it that way.") V_n will not have a *claim* to this transfer, however, unless it is the case that claims are transferable across generations in the absence of written instructions or a convention to this effect.

29. I am indebted to Gregory Kavka, Richard Mohr, Thomas Schwartz, Wayne Sumner, and the referee for this journal for helpful written comments on an early draft of this essay. Parts of the essay were presented to the American Philosophical Association, Pacific Division, in Oakland, March 1983, and I am especially grateful to the commentator, Larry Alexander. I am also indebted to Adèle Mercier for criticisms of an early version of the argument.

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