

Peace, Self-Determination and Reckoning with the Past: A Reply to Butt, Lippert-Rasmussen, Pasternak, Wellman and Stemplowska

CÉCILE FABRE

ABSTRACT *In this article, I offer responses to five commentaries on my recently published book, *Cosmopolitan Peace*. Those articles address my conception of individual and collective agency, my account of self-determination (and its implication for the problem of annexation during and after the war), and my accounts of, respectively, reparations and remembrance after war. I revise or provide further defences of those accounts in the light of my commentators' probing remarks.*

1. Introduction

Let me first record my gratitude to all five contributors, and to Jonathan Parry and Jeremy Williams, who organised the workshop at which those papers were first discussed and put this symposium together. *Cosmopolitan Peace* is a long book; to have it subject to such thoughtful and careful scrutiny is a privilege.

I begin with Pasternak's discussion of corporate wrongdoings before considering Lippert-Rasmussen's and Wellman's observations on my account of *post-bellum* rights to self-determination and territory. I end with some remarks on Butt's and Stemplowska's articles, both of which address the ways in which, on my view, we should reckon with the past – through, respectively, restitutive justice and remembrance practices.

2. Corporate Wrongdoings in War

As Pasternak points out, I am sceptical on both ontological and normative grounds of the view that states can have moral agency. I do not believe that a state can act in ways which are not wholly reducible to the acts committed by its members, and that it can be held morally responsible for what it does. According to Pasternak, however, cosmopolitans can easily accept Christian List and Philip Pettit's ontological defence of corporate agency and apply it to the state.¹ Moreover, they should see that accepting corporate agency does not have unpalatable normative implications.

Pasternak raises a number of pressing difficulties for my account. She also suggests a number of interesting moves which a defender of corporate agency might wish to make, notably regarding the punishment of states. Let me say something – briefly –

about the ontological status of the state. On List and Pettit's account, which she also endorses, states can and do have a mind of their own, which supervenes upon but is functionally independent from the minds of their individual members. So long as they have the organisational abilities to implement the collective decisions reached by their members – decisions which might not in fact reflect those members' individual preferences – they can be said to *act*.

At first sight, the List-Pettit account is intuitively plausible, not least because it reflects how we routinely understand states to act. Yet, I remain unconvinced. Take a decision to wage an unjust war of aggression. *Someone* has to put the proposal forward – the Prime Minister, the President, and *someone* has to agree to it. Pasternak claims that a state might endorse a decision to wage that unjust war, 'even though few (perhaps none) of its individual decision-makers support this final decision.' I find it quite hard to imagine how that could happen, at least in binary cases in which members of the Cabinet and of the legislature are asked, individually, to say 'yea' or 'nay'. It is true that in ordinary language, we do say '*the* Cabinet', 'Congress', 'Parliament', '*the* People'. We do not say '*x* number of MPs voted for the war, etc.' According to Pasternak, those phrases denote the presence of an ontological being, the corporate agent, which is separate from the head of the government, all members of the legislature, and so on: I think of them as expository shortcuts.

In fact, as soon as we confront some of the normative implications of the ontological thesis of corporate agency, the latter seems to lose much of its initial intuitive plausibility. Pasternak helpfully records two normative worries which sceptics usually have about corporate agency. First, endorsing corporate agency commits us to regarding the state as a moral person whose moral rights might in turn 'compete with, and might even take priority over, the moral rights of their individual members' (p. 9). Pasternak does not think that sceptics need worry: so long as whatever rights the state has are derived from the rights of individuals, the latter will always take priority over the former. I agree with this – and say as much in the book (see *CP*, p. 5; see also *Cosmopolitan War*, s. 1.4).

The second normative implication is far more problematic, both for the normative view that states ought to be treated as moral agents, and for the ontological thesis itself. If the state is a corporate agent, and can act in ways which are not wholly reducible to the acts and decisions of its individual members, who, then, is morally responsible for what it does? When what it does is a war crime, who is to be blamed or punished for it?

All too often, ascribing responsibility to the state serves, as a matter of fact, to exonerate individual agents: in the three decades or so following the end of the Second World War, French politicians, intellectuals, indeed citizens, all too often placed responsibility for the Vichy regime's policy of collaboration with the German occupying forces on 'the state', thereby conveniently occluding the thousands of individual acts of collaboration which they, and their forebears, had carried out. Pasternak rightly points out that a proponent of state agency need not accept *that*. She must however offer a plausible account of corporate liability to punishment and reparations – and this, I contend, is where serious difficulties arise. (Since she focuses on punishment, I will restrict my remarks to this particular issue).

I define punishment as the deliberate imposition by some party on a wrongdoer of a burden, harm or cost which the wrongdoer has a *prima facie* right not to incur. Given

that rights protect interests, to punish a wrongdoer consists in harming, or undermining his interests. In addition, I justify punishment by appeal to expressivist considerations. As Pasternak notes, the question is whether the state *can* and *may* be punished, on my account of punishment. She believes so and, more strongly still, argues that punishing the state is the best way properly to acknowledge its role in large scale war crimes, notably genocide. After all, as she notes in a particularly interesting passage, corporate entities such as multinational corporations are legally liable to criminal prosecution for certain kinds of crime (e.g. corporate manslaughter: there is no reason to exempt states from criminal liability for similar and worse crimes).

On this latter point, I agree with her: *if* there can and ought to be corporate liability domestically, *then* there can and ought to be corporate liability internationally. But I remain uneasy about the antecedent – that is to say, about corporate liability to punishment in general, including in domestic contexts and for crimes such as manslaughter. For to say that the state can in principle be liable to punishment is to presuppose that the state, *qua* state, has interests which it is possible to undermine. Here, I part company with Pasternak. As I noted above, and as she herself claims, the state's rights are derived from the rights of individuals. Furthermore, the state's rights protect those individuals' interests. On this picture, there is no room for the view that the state *itself* has interests. Were we (for example) to punish a wrongdoing state by annexing part of its territory, or by sending its diplomats home, or by rescinding its membership in international organisations, we would not harm *that state's* interests in those goods: rather, we would harm its members' interests therein. Likewise, by so acting, we would not express our condemnation of what *the state* has done and reaffirm our belief that *the state's* rights only derive from the rights of its individual members. We would instead condemn those states' officials and citizens for what they did or failed to do.

Importantly, I do not think that Pasternak and I would endorse radically different kinds of punitive practices (though she is more sympathetic to punitive sanctions than I am.) She too would accept (I presume) that generals and leaders, indeed sometimes rank and file soldiers such as SS guards at Auschwitz can and may be sent to prison for war crimes. I too accept (though do not say in the book) that expelling diplomats can also count as a punitive measure. Our disagreement centres on *who* are the bearers, as it were, of the punishment. I maintain that the state cannot be.

3. States, Territory, and Self Determination After War

Whereas Pasternak disputes my rejection of corporate agency, Lippert-Rasmussen and Wellman accept it. But each argues in their own way that the post-war breaking up of a state, through (respectively) annexation and secession, poses particular challenges for my overall account of peace after war.

Annexation

In a nice turn of phrase, Lippert-Rasmussen rightly notes that, as a cosmopolitan, I am more inclined to 'loosen states' normative grip' than many other political theorists. As he also rightly notes, however, I broadly accept the consensus view that 'victorious belligerents must aim to restore the political sovereignty and territorial integrity of

their defeated enemy' – in other words, that annexation is illegitimate (*CP*, p. 2; pp. 131–32). This is because, on my cosmopolitan account of justice, individuals do have joint rights to political self-determination, for both instrumental and non-instrumental reasons. Instrumentally, there are good reasons for entrusting those individuals, via their political institutions, with the task of bringing about cosmopolitan justice for all. Non-instrumentally, once and so long as individuals have fulfilled their cosmopolitan obligations of justice, they have the right together to shape their collective future.² Accordingly, I argue that, save in those cases where peace negotiations occur decades after the original *de facto* annexation, belligerents (and occupiers) are under a *pro tanto* obligation to return the territory they have seized.

Lippert-Rasmussen claims that I ought to endorse four kinds of annexation: humanitarian annexations by initially unjust aggressors, preventive annexations, compensatory annexations, and paternalistic interventions. Importantly, he thinks that this is a welcome implication, not a *reductio*, of my cosmopolitan premises. But if he is right, then it would appear that my cosmopolitan theory of justice makes even less space for the territorial and political integrity of states than I seem to think.

I do not sufficiently distinguish those various cases in the book. Nor do I fully take on board the implications for the ethics of annexation of my defence of military occupation. On reflection, I agree with Lippert-Rasmussen that both humanitarian and preventive annexation can in principle be justified, *under certain conditions*. For example, I accept that *if* B regularly uses a part of its territory to wage unjust wars against A, and *if* the only way for A to defend itself is by annexing that territory, then A is *pro tanto* justified in doing so. (I say *pro tanto*, for presumably, one would have to know whether the annexation is a proportionate response, is likely to succeed at thwarting B, and so on.)

Compensatory annexations are more problematic. These are cases where B unjustly aggresses A, as a result of which A suffers dreadful losses. B loses the war, and A occupies parts of its territory, T_B . If annexing T_B is the only way in which A can get compensation for those losses, then (according to Lippert-Rasmussen) it may do so. Granted, this may result in displacements of populations, and one may worry therefore that those individuals' interest in being able and allowed to settle, long term, in a particular place (what I call occupancy) may be undermined. But (Lippert-Rasmussen presses), sometimes that interest may be better served by actually moving and living elsewhere.

The latter point is particularly interesting: it draws attention to the fact that an interest in not having to leave the place where one has long lived is not the same as an interest in planting stable roots somewhere. At the same time, it is also very likely that, in many cases, forcible displacement does in fact undermine individuals' interest in occupancy, at least for the cohorts of displaced individuals, if not for their children and grandchildren. I take it that, under those circumstances, Lippert-Rasmussen would not regard annexation as a legitimate reparation for wartime wrongdoings.

The fourth case, of 'paternalistic annexations' is more problematic still. A paternalistic annexation is one whereby military occupier A knows that, if it returns T_B , B's regime will, with the support of much of its population, commit grievous human rights violations against citizens of B who live in T_B . Although the majority of B's population wants A to return T_B , A refuses, instead permanently annexing it.

Lippert-Rasmussen takes me to be committed to the view that paternalistic annexations are unjustified, precisely to the extent that they occur without the consent of B's population. I do not discuss such cases specifically, but Lippert-Rasmussen is correct to speculate that I would not accept 'paternalistic annexation'. I take it that, generally, Jack acts paternalistically towards Jill when he means to act in what he takes to be her best interests, even though he has, or ought to have, reason to believe either that she does not consent to his so acting or would withhold consent if she were in a position to do so. If Jill is or would be deemed competent to make decisions about herself, Jack's interference is wrongful, even if Jill's actual or presumed refusal to consent is grounded in what others regard as a faulty understanding of her condition.

This is a better way of capturing what I meant to say when I wrote, in *Cosmopolitan War*, that 'it is a necessary condition for an individual permissibly to be given that to which she has a right that she should (in some sense) consent to it.' (CW, p. 48.) As a result, Lippert-Rasmussen's objections lose some of their bite. First, he claims that this view does not address the very likely case where those members of B whose rights would be protected thanks to the annexation consent to the latter. By way of reply: in one sense, he is right that my rejection of paternalistic annexation does not address such cases, but this is precisely because the annexation is carried out for the sake of individuals who consent to it: it is not, in other words, a *paternalistic* annexation.

Second, he argues that, in some cases, consent is not a necessary condition for just return – as the bicycle example shows. I agree. I also agree that there are cases where a refusal to consent is no obstacle to a paternalistic interference – notably when it is grounded in lack of moral competence (as distinct from a failure to understand one's condition properly – which does not vitiate one's refusal to consent.) But the relevant case here is this: B's citizens who live on T_B and whose rights *alone* would be violated unless the annexation proceeds nevertheless do not consent to it. May A proceed? Here, we need to distinguish between two variants. In the first variant, they *are* in a position to express consent to the annexation (for example by explicitly calling for it, by demonstrating in favour of the removal of B's regime from T, etc.) and yet do not. In the second variant, they are not in a position to do so (for B's regime engages in seriously repressive policies against its opponents, etc.) In the first case, I maintain that A ought not to annex T_B : to do so would be unacceptably paternalistic. In the second case, the question is whether A ought to err on the side of assuming that, under the circumstances, those individuals would consent to the annexation, or on the side of assuming that they would not. It seems to me that, the more grievous the rights violations at issue, the more plausible it is to assume that those individuals would consent if they could. Once again, however, this would not count as a case of *paternalistic* interference.³

Lippert-Rasmussen's third objection to my putative rejection of paternalistic annexation appeals to the view that, on my theory of cosmopolitan morality, individuals in their daily lives must try and abide by its principles. Cosmopolitan morality, in other words, does not merely impose duties on institutions and on individuals in so far as they are part of those institutions. It also requires a cosmopolitan *ethos*. There thus may well be cases where B's population should, in deference to the cosmopolitan ethos and in acknowledgement that annexation would better serve the human rights of those who live on T_B simply renounce their sovereignty claim over T_B and submit to the annexation. This is an interesting point. It applies to the issue of annexation some

of the claims I make, in a different context, about individuals' obligations of justice in their daily life. But it does not weaken my views against paternalistic annexations: for, once again, in so far as individuals so motivated would in effect consent to the annexation, the latter would not count as paternalistic.

Secession and Population Displacements

Annexation is not the only way in which a state might break up in the aftermath of war: so is secession. In his article, Wellman argues that, in the light of my own cosmopolitan principles, I should endorse post-war secession in a greater range of cases. His argument to that effect leads him to put pressure on my account of territorial rights.

An account of secession presupposes an account of state legitimacy. Cosmopolitan political philosophers face the difficult task of either rejecting the state altogether (which seems as implausible as defending political anarchism), or of making normative space while recommending a wholesale transformation of the state system as it currently exists (which seems vulnerable to insuperable feasibility concerns), or of defending the state system as it is (which seems wildly out of step with the intuition that, surely, the state system is so egregiously unjust that one cannot possibly accept it).

My account of state legitimacy in *CP* is not as clear as it could have been, and I am grateful to Wellman for giving me an opportunity to set the record straight. I agree that the system of states as it currently stands is egregiously unjust at the bar of cosmopolitan justice (and by non-cosmopolitan lights too, for that matter.) Accordingly, I do not have a principled objection, at the bar of *justice*, to reorganising it. In fact, justice requires that it be reorganised, such that only states whose officials do in fact effectively enable their residents to enjoy their human rights and discharge their duties are legitimate. Clearly however, the transition costs accruing from a wholesale transformation of the state system would be so enormous that, *all things considered*, we ought to keep much of the state system as it is – certainly, by resisting large scale forcible territorial transfers. This, note, is not a pragmatic objection to wholesale transformation: it is a normative objection, in that it would be *wrong* (or so I contend) to impose those costs. Note, too, that I say that we ought to keep 'much' of the state system – not all of it. Some states are so egregiously unjust, or so inefficient, that, all things considered, they ought to be dismantled, if not by breaking them up altogether, at least by profoundly reforming them: the concession that we may have to accept an all-things-justified unjust considered state of affairs, and not aim for a just one, does not imply that anything goes.⁴

Some states, thus, are legitimate, while others are not. On my account of state legitimacy, though, it seems that secession is in principle justified whenever a set of institutions would be effective at securing the rights of the individuals over which it would exercise jurisdiction and at getting those individuals to discharge their duties of justice. As Wellman argues, a separatist movement need not show that the individuals it claims to represent are suffering an injustice at the hands of the state, in order rightfully to secede: it only needs to show that, once constituted into a state, it would be effective in that sense, and that the remainder state itself would still remain effective in that sense too. I agree with Wellman there, as I in fact explicitly note in the book (*CP*, p. 133). The question, then, is whether the fact that the demand for secession occurs

in the aftermath of a war or in peacetime makes a difference to the force of that demand.

Wellman seems to think that war does make a difference, on the grounds that it causes huge population displacements, thereby changing the composition of the 'self' in self-determination. As it happens, although I agree with Wellman that population displacements are crucial to secession, I do not think that war, *per se*, makes a difference. What matters is whether or not the demand for secession arises following and in response to massive population displacement – however those displacements were caused, whether by a war or, for that matter, by a natural disaster. If, as a result of population displacements, the agents who are called upon to decide whether to secede lack a right to live on the seceding territory in the first instance, then (Wellman presses) it is not enough, for a demand for secession to be legitimate, that the resulting state would be effective at bringing about justice.

When discussing the restitution of territory and individuals' right to return in *CP* (pp. 131–143), I argue (drawing on Jeremy Waldron's important work on this issue) that the passing of time does make a difference.⁵ In particular, the descendants of members of community A who, during or immediately after a war, came to live on B's territory (T_B) wrongfully, have strong claims not to be expelled from T_B . On this precise point, my argument relies on Anna Stilz's influential account of territorial rights, whereby the latter are grounded in occupancy of the land – that is to say, in living, forming relationships, embedding oneself in various social, professional, familial, and economic networks, on the land.⁶

Wellman is sceptical. Attachment, he claims, simply is not enough to ground rights of possession, of which territorial rights are a kind. In so interpreting my argument, particularly in the light of the example of David and his deep attachment to Susan's car, he has intuition on his side. For many would agree that however strongly attached David is to Susan's car – attached to the point that, without possession of *this* car he would not have a flourishing life – he simply does not have a right that Susan give him the car, let alone to take it from her without her consent, let alone to pass it on to his daughter. Should he steal it, he ought to return it; should he pass it on to his daughter, she ought to return it. By analogy, Wellman argues, citizens_A who have wrongfully come to live on T_B , at the time of the initial dispossession lack claims to live on T_B and to make decisions about its future. They ought to return T_B by leaving it, and (crucially) so do their descendants.

However, my claim is not that *being attached* to T_B grounds rights over it. My claim is that, *prima facie* long-term occupancy of T_B does, with all that occupancy denotes.⁷ For the analogy to work, two conditions must be met: (1) David's and his daughter's possession of Susan's car specifically is a necessary condition of their leading a flourishing life in the same way as making a life somewhere specifically, in the thick sense described above, is a necessary condition of (most) people's life being flourishing; (2) under those conditions, David and his daughter nevertheless ought to return the car.

It is hard to imagine how the first condition could be met. I worry that this particular kind of case is so idiosyncratic that it makes for a bad principle. At this juncture, Wellman might be tempted to respond that what does the work is not occupancy (or possession) *per se*, but human flourishing. If so, then (he might insist), there is no principled distinction between wrongful occupation and other kinds of unjust

holdings, and David's and his daughter's case must therefore be treated in exactly the same way as unjust occupiers and their victims.

On objective conceptions of human flourishing, to which I am drawn, David's life could not genuinely be described as flourishing, depending as it does on the possession of a particular car – and the two cases are therefore relevantly disanalogous. Likewise with his daughter. But let me grant the point that their preference is not a valueless preference and thus does contribute to their flourishing. To see whether this particular idiosyncratic case tells us something important about population displacement and their normative implications, we must consider three categories of citizens_A: (a) those who are morally responsible for the fact that, at the time of the initial dispossession (*t1*), they came to live on T_B; (b) those who came to live on T_B at the time of the dispossession but were not morally responsible for it (for example, the children of those wrongdoers); (c) the cohorts of descendants of the first generation of wrongful occupiers.

With that distinction in mind, I accept Wellman's point that citizens_A ought to return T_B, indeed ought to leave T_B, to the extent that they are responsible for occupying T_B at *t1*. The same holds of David (*CP*, p. 124). But I part company with him regarding the other two categories. Consider the situation of citizens_A who were forcibly moved to T_B at *t1*. Wellman agrees that they should not be made to leave while they are young children; but they can be made to leave while adults. He does not provide an argument for that view. I can only reiterate mine, to the effect that there are sacrifices one cannot expect individuals to make for the sake of rectifying past injustices. Tearing them asunder from the lives they have built on T_B, when they themselves are not responsible for the fact that they have started building a life there, is a sacrifice too far. The point applies, *a fortiori*, to the descendants of the first generation of wrongdoers. Crucially, by parity of reasoning, I believe that David ought not to be made to return the car if he is not responsible for having it in his possession, and nor ought his daughter – *at least on the assumption that for them to lose this particular car would make their life less than flourishing*.

If the foregoing points are correct, then the population displacements caused by war do not weaken demands for secession in the ways and to the degree suggested by Wellman: the cosmopolitan account of state legitimacy on which I rely throughout my treatment of post-war justice does indeed yield a rather permissive account of secession.⁸ Whether this constitutes a *reductio* rather than a welcome implication of my argument is another matter.

4. Reckoning with the Past: Restitution and Remembrance

Restitution

In my reply to Wellman, I took it for granted that the return of territory and, more generally, the restitution of what was wrongfully taken during war is a *pro tanto* requirement of *post bellum* justice. It is, if you will, one way in which belligerents can and ought to reckon with the past. In his illuminating contribution to this symposium, Butt challenges my general account of restitutive justice as too restrictive: on this view, if I am right that the same principles of restitutive justice apply to non-war contexts as

to war contexts, then my restrictive account of those principles in the latter will counterintuitively disallow restitution in the former (for example, in the contexts of colonial appropriations or slavery). I place two restrictions on just restitutions. First, the claimants, who were in *de facto* possession of the property which was taken from them, must rightfully own the property. Second, it must be the case that claimants were harmed by the dispossession. When they themselves were dispossessed, they might be able to make that case. But their descendants are less likely to be able to show that they too were harmed – indeed the less so as time goes by: for as time goes by, descendants must inevitably appeal to counterfactual reasoning, with all its attendant epistemic and justificatory weaknesses. The reason, in turn, why I appeal to harm, is that I take rights to protect interests the frustration of which is harmful.

In his discussion of the second restriction, Butt does not deny that appeals to harm can ground restitutive claims. However, he deploys an additional argument in favour of restitution, which is not harmed-based and thus not vulnerable to the aforementioned criticism. On that approach, if I own some good *g*, I have an entitlement to it which I retain whether or not *g* is in my possession, and whether or not my lacking *g* is harmful to me. All we need to know in order to ascertain whether the descendant of a victim of theft has a claim is whether or not that person has inherited an entitlement to *g*. Given that counterfactual appeals to harm are irrelevant, we can rescue restitutive acts which would have fallen foul of such appeals, and broaden the reach of restitutive justice.

Butt's move is interesting. It relies on the claim that one can inherit an entitlement to *g* without actually inheriting *g* itself. But even if that is true, it does not follow that counterfactuals are irrelevant. In the house-burning examples, Butt claims that D *has* inherited an entitlement to B's picture, by dint of the fact that B has left him all of her possessions – and this irrespective of the fact that A stole the painting and that B's house burned before she died. I remain unconvinced. Were D to press a restitutive case against A, we might want to ask how confident we can be that B would not have changed her mind and disinherited D anyway half a day before she died, had the painting not been stolen and the house not burned. Granted, D might be able to adduce convincing evidence in support of his case. The point remains though that it is hard to see how we can avoid appeal to counterfactuals (though, admittedly, not harm-related counterfactuals.) In cases involving large-scale dispossessions and long chains of inheritors, such appeals are unlikely to succeed.

Suppose that I am wrong – that all we need to know is that, harm or no harm, the claimant was in rightful possession of *g* or rightfully inherited an entitlement therein. *If* Butt is right that my account of restitutive justice, appealing as it does to a harm-based account of rights in general and property rights in particular, is unduly and problematically restrictive, then I must either bite the bullet and accept that many instances of wrongful dispossessions will go unaddressed, or I must revise my account of rights in such a way that it need not appeal to harm.

Opponents of interest-based theories of rights will push me in the latter direction. They will urge me (and others) to abandon the view that rights protect interests. This does not strike me as promising: it simply is not clear to me what else rights could protect. The question, then, is whether interest-based theories of rights can accommodate harmless wrongdoings.

I do not have an answer to that question – which was notably raised by Joel Feinberg thirty years ago, but which has since been neglected.⁹ However, it is a crucially important one. Others will, I hope, take up the mantle. Meanwhile, let me turn to Butt's unease about the first restriction I impose on just restitution claims – namely that claimants must be in rightful possession of *g*. The difficulty here, I argue, is that the world as we know it is so profoundly unjust, so deeply marred by wrongful individual and collective dispossessions that very few restitutive claims are legitimate claims (*CP*, p. 128).

Butt seems to think that, were we so to restrict the reach of restitutive justice, we would frustrate one of its important aims, to wit, overturning or otherwise addressing the effects of wrongdoings. Yet there is a plurality of reasons as to why we should not let so many wrongdoings stand, ranging from rule-utilitarian reasons for protecting rights in the future, to deontological appeals to the value of protecting important moral norms. My account, Butt claims, does not allow for the deployment of those reasons.

I do not think that this particular argument effectively undermines the claim that a successful claimant must be *g*'s rightful owner. Suppose we return to her that which was taken from her during the war, for example a valuable painting; suppose further that she herself was not its rightful owner, by dint of the fact that her possession of the painting was not in accordance with distributive justice. In returning the painting to her, we may perhaps protect moral norms against theft; but we certainly do not act in a such a way that a wrongdoing is *not* allowed to stand. On the contrary, we act in such a way that *one* wrongdoing – the initial distributive injustice – is allowed to stand, indeed is reinforced and legitimated over time. This is why I argue elsewhere that, in principle, we ought not to retribute looted artwork to those from whom it was taken.¹⁰

To be sure, in many cases we may want to retribute property to those from whom it was taken even though they were not its rightful owners. Butt is right that letting those acts stand exposes us to the moral hazard of providing wrongdoers with strong incentives to dispossess others, safe in the knowledge that, as time goes by, their victims and those victims' descendants would lose their claim to restitution. However, as Lippert-Rasmussen points out in his contribution, it does not count against the soundness of a moral norm that, in the world as we know it, the application of that norm would provide wrongdoers with incentives to commit injustices. The most that we can say, then, is that in the world as we know it, we may have reasons for restituting property even to those who did not rightfully own it; but we would still in so doing commit, or allow the commission of, some injustice.

Remembrance

I began serious work on this project in 2013, as many countries were preparing for their four-year long centennial commemoration of the First World War, and it seemed fitting to conclude the book with an account of war remembrance – all the more so as it is a neglected topic. For familial reasons, it is also very close to my heart, and I am particularly pleased that Stemplowska should have chosen it as the focus of her article.

In the book, I argue that we have compelling moral reasons to engage in shared commemorative practices. On the one hand, I suggest that a failure to remember war's victims publicly and openly is 'a failure to acknowledge the seriousness of the

wrongdoings to which they were subject and, thereby, a failure of respect' (CP, p. 296). On the other hand, commemorative practices, if properly shaped and conducted, might help us promote peace, by keeping us aware of the horrors of war. In her response, Stemplowska builds on my account to develop further and better desiderata for war remembrance. We should (she tells us) attend to the following questions: what and who should be remembered? How? By whom?

I agree with much of what she says – though not all. I should like to begin by articulating a worry about my account of war remembrance, to which Stemplowska briefly alludes in a footnote but which I actually think is central. As she points out, I frame my account in terms of moral reasons to engage in shared commemorative practices rather than duties to do so, though I also note that my arguments for war remembrance support duties as well as reasons (CP, p. 284). To whom, though, are those duties owed? By using the language of moral reasons rather than duties, I sidestep this question in the book. Yet it needs to be addressed. Most clearly, we owe those duties to the living – both those who survived the war and those who might fall victims to future wars if we do not strive, as much as we can, to promote peace.

But now two complications arise. First, we may think that we owe duties of remembrance to *future* victims, who do not yet exist. However, the claim that we owe it to them to promote peace (via our remembrance practices) supposes that they would be harmed by our failure to do so. Enter the non-identity problem. Perhaps they would not be harmed, though: for it may well be that a world in which we do engage in remembrance is one in which they would not exist, whereas a world in which we fail so to act is one in which they would exist. If existence in a less peaceful world is not worse than non-existence in a more peaceful world, then we will not harm them, and it is hard to see, then, how we could wrong them.

Second, we may think that we owe duties of remembrance to the dead. Yet, as Stemplowska correctly points out in the aforementioned footnote, I have argued against posthumous rights and duties elsewhere. There, I claim that the interest theory of rights, which I endorse, cannot accommodate those rights and duties.¹¹ If I am right, then we do not owe duties of remembrance to the dead. Nor in fact do we owe it to the living, here and now, to remember them once they are dead. On reflection, I find this conclusion deeply counterintuitive, particularly in the light of Stemplowska's moving opening *vignettes*. At the same time, it still seems hard to see how, on the interest theory of rights, one can harm, and thus wrong, someone who no longer exists at the point at the point at which we act.

Taken together, the worry about future generations and the worry about the dead bring us back to a suggestion I raised in my response to Butt's piece. Butt believes that arguments in favour of restitutive justice which do not appeal to the harm done to victims fare better, in some respects, than harm-based claims. In my response, I speculated, in a concessive move, that proponents of the interest-based theory of rights might profitably seek to accommodate harmless wrongdoing. If the difficulty with grounding duties to future and dead victims lies in appeals to harm (as I suspect it does), perhaps we would do well, on this count too, to investigate this kind of wrongdoing.

Setting this problem aside, there is much about which Stemplowska and I agree. In particular, I agree with her, on reflection, that when remembering victims of war (who, on her account and on mine, include many of war's combatants, and not merely innocent civilians), we should focus not merely on the manner of their death and the

suffering they endured, but on their whole lives. As she notes, so to shift the focus of our remembrance practices is compatible with my overall account. In fact, I would go further: it does better justice to that account, for to honour and respect victims properly is to recall them wholly to our mind, as much as we can, with their fears, regrets, desires and aspirations – as powerfully expressed by Israel Lichtenstein and Nahum Grzywacz.

War remembrance, I stressed in the book, is not merely a moral act: it has, indeed ought to have, emotional valence. We ought not merely state publicly that this atrocity occurred, that x million people died, that the war started and ended on such and such dates. We should remember all that, and particularly victims, with sorrow or at the very least regret. Stemplowska agrees that our emotions are amenable to moral evaluation. On her view, however, I place too much prescriptive emphasis on sorrow as the dominant emotion of war remembrance. Our emotions about war in general and recent wars in particular are complex, not least because they are shaped by our own experiences (or lack thereof) of war. They include anger, joy, and relief as well as sorrow, and are often felt by the same person simultaneously. According to Stemplowska, there is no reason to focus on sorrow.

I agree with Stemplowska that a full account of war remembrance ought to be sensitive to the richness of our emotions. At the same time, my focus in the book is on the commemoration of wars of the distant past, whose participants, I write, are dead or soon will be (*CP*, p. 283). When I recall to my mind the First World War, in which so many died needlessly, I feel some anger at their plight – but far less so than I experience when I reflect on the 2003 invasion of Iraq. Nor do I feel *joy* at the war's ending in November 1918. Admittedly, this might be a sign of emotional stuntedness. It seems to me, however, that the more time has elapsed, the less complex those emotions are as a matter of fact, and the less prescriptive one ought to be; it also seems to me that of all the appropriate emotions one ought to experience when remembering the First World War and those that came before it, regret at the very least is one. That is what I was trying to capture in the book.

I suspect that Stemplowska and I are not as far apart on this as it might seem. We also both think that we should commemorate wars in which our ancestors fought on the unjust side or committed particularly egregious deeds (though she is more explicit on this point than I am in the book). But we do disagree, sharply I think, on the question of who should be remembered. My account of war-remembrance is avowedly victim-centred. I say comparatively and regretfully little about perpetrators. In a particularly interesting passage, Stemplowska ponders whether perpetrators who are not also properly seen as victims, must be remembered at all. She invites us to contemplate the possibility that we might not make the names or faces of those perpetrators – who, let us not forget, were culpable for what they did – part of our collective remembering. Indeed, she suggests that we ought to think about them, if at all, only instrumentally – ‘to highlight the things done to victims’.

I am uneasy about this proposal. In the Acknowledgements of my earlier book *Cosmopolitan War*, I mention my maternal grandmother, who together with her parents and sister had to share the family house with five German soldiers between 1940 and 1944. Only very late in life did she feel able to share her story with me. At the conclusion of this difficult conversation, she urged me never to lose sight of our enemy's humanity. In this she certainly was not alone: she would have found a like-minded ally

in (to name but one) Simone Veil, who survived Auschwitz yet lost most of her family in the camps, and who (relevantly here) staunchly argued in favour of reconciliation with Germany (and indeed served as the very first President of the elected European Parliament). We ought to heed that advice. Our enemies are not evil, even those who are culpable for what they did and cannot on any plausible description be regarded as victims. They have not forfeited all claims to be treated, alive or in death, with restraint. Remembering them by name, seeing their face and knowing their individual stories might help strengthen our resolve so to treat them. Moreover, and relatedly, there is less that separates us from culpable perpetrators than we might like to think. For all we know, under similar circumstances, we too would have all too easily succumbed to the social, economic, political and familial pressures which led those soldiers to fight unjustly. We too would have killed, perhaps even committed atrocities – or at the very least been passive and silent accomplices. Remembering culpable perpetrators in as much detail as we can might help us remain aware of our moral fragility. And that, it seems to me, is as good a reason as any to do so.

5. Concluding Thoughts

Although I could not do justice to all of the objections raised in their articles, I have learnt a lot from my five critics. Given the chance, I would revise some of my arguments in the light of their penetrating comments. I would also explore further lines of inquiry. In particular, I would scrutinise more closely the vexed question of the moral status of a state: for all that I disagree with Pasternak, I do think that cosmopolitan individualists need to account better than they have done so far for the fact that politics is an essentially collective endeavour. Under pressure from Lippert-Rasmussen and Wellman, I would also delve more deeply still into the ethical issues raised by the ways in which groups of agents come together into a new political community through annexation, or break apart into several such communities through secession. Urged by Butt and, more obliquely Stemplowska, I would investigate the extent to which, if at all, the interest-theory of rights can accommodate harmless wrongdoings – particularly in so far as this might help us make progress with developing accounts of restitutive justice. Finally, I would pay more attention to the complex emotional texture of remembrance practices.¹²

Cécile Fabre, All Souls College, Oxford, OX1 4AL, UK. cecile.fabre@all-souls.ox.ac.uk

NOTES

- 1 C. List & P. Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (Oxford: Oxford University Press, 2011).
- 2 For reasons set out in Section 2, this does not commit me to endorsing corporate state agency.
- 3 The crucial point in this paragraph is that there is an important distinction between cases in which there is strong evidence of consent and cases in which there is not. Nevertheless, those considerations raise further and very difficult questions, such as, *inter alia*, (a) whether consent is deemed to have been issued or withheld only if done unanimously, or just if a majority consents/withholds consent, or just if a minority does so, (b) what collective mechanisms if any ought to be in place in order to judge that a set of agents

- has/has not consented to a particular decision, and (c) under what conditions if any is such consent binding on both dissenting agents and third parties. I cannot address those issues here.
- 4 I make a similar point when drawing a distinction between a just peace and peace that is justified all things considered. (See *CP*, pp. 17–20.)
 - 5 J. Waldron, ‘Superseding historic injustice’, *Ethics* 103,1 (1992): 4–28.
 - 6 A. Stilz, ‘Nations, states, and territory’, *Ethics* 121,3 (2011): 572–601.
 - 7 I say *prima facie*: as I conceded earlier, Lippert-Rasmussen might well be right that, sometimes, displacement better furthers the interest in occupancy.
 - 8 One, moreover, which is compatible with humanitarian and preventive annexations.
 - 9 J. Feinberg, *Harmless Wrongdoing: The Moral Limits of the Criminal Law* 4 (Oxford: Oxford University Press, 1988).
 - 10 This does not imply that those who took the artwork may keep it. See C. Fabre, ‘Looted artworks: A portrait of justice’ in D. Edmonds (ed.) *Philosophers Take on the World* (Oxford: Oxford University Press, 2016), pp. 34–36.
 - 11 C. Fabre, ‘Posthumous rights’ in M. Kramer, C. Grant, B. Colburn & A. Hatzistavrou (eds) *The Legacy of H.L.A. Hart: Legal, Political and Moral Philosophy* (Oxford: Oxford University Press, 2008), pp. 225–238.
 - 12 I am grateful to Jonathan Parry, Jeremy Williams and an anonymous reviewer for the *Journal of Applied Philosophy* for very helpful comments on an earlier draft of this reply.