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Responsible citizens of responsible states

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ABSTRACT

Avia Pasternak's book makes a significant contribution to our understanding of citizen responsibility for historical wrongs. This review nevertheless offers some scepticism about resting citizen liability exclusively on the idea of intentional participation. It argues that the necessity of the state possessing continuing legal responsibility over time is so intrinsic to the function of statehood that the question of citizen liability should be seen as part of the general theory of political obligation. So seen, fair play duties provide a more plausible general ground for citizen liability, even when adapted to unjust regimes. The model of intentional participation may by contrast harbour a muted connection between the ideas of blameworthiness and responsibility that the book in the main wishes to deny. And the practical problems of resting responsibility on intentional participation alone are substantial. Pasternak's major contribution, untouched by this critique, is to explain how the special obligations undertaken by intentional citizenship strengthen and extend beyond that more foundational duty of responsible citizens.

KEYWORDS Pasternak; citizen responsibility; collective responsibility; fair play; intentional participation; the state; public debt

Introduction

Avia Pasternak's *Responsible Citizens, Irresponsible States* is a model of excellent scholarship, exploring a fundamental problem with economy, clarity and with a powerful and original thesis. The core problem is whether it is fair to burden present-day citizens of states with the obligation to remedy their state's past wrongdoing (e.g. state-sponsored genocide, oppression, war of aggression). The state's remedial duties entail compensation, rehabilitation, reparative measures, and commitments of non-repetition (pp. 27–28). How are citizens (defined broadly at pp. 69–70) connected to the wrong, and when is it unfair to require them to contribute? The most obvious candidates for remediation are those who actively contributed to the wrongdoing (e.g. leaders, generals, ministers, high level bureaucrats). A *proportional* (or

'blametracking') distribution of responsibility would stop here. Pasternak is right in arguing that tracing actual blame would be appropriate, but ultimately insufficient to cover the scale of reparations. Her book thus makes the case for a non-proportional distribution that burdens most of the state's citizens, regardless of direct association with the wrongdoing. But is this fair?

Her answer is 'yes' if citizens are active, intentional participants in state activity, because in doing so they become 'inclusive authors' in the common projects undertaken by states (ch. 2). They also share in the state's current and active obligations to remedy its past wrongs (ch. 7). '[W]hen citizens orient their participatory intentions around the idea of the state itself as an authoritative agent with legal and political authority' she argues, 'they are the inclusive authors of a wide range of its policies, including policies they disagree with or are unaware of.' (p. 85). The attributive link is manifested through 'citizens' subjective attitudes' towards the state (p. 76). 'Genuine participation', means that citizens do not view their participation as being against their will. Those who would reject their citizenship status if they could are not to be regarded as inclusive authors of the state's actions and hence not liable, strictly speaking, to a non-proportional distribution of responsibility for previous wrongs (p. 76). Such participation can occur through voting, participating in education, and manifold other ways (ch. 3).

Where I part from the author is in founding citizens' remedial duties on intentional participation in the state. I think it attaches to all those subject to the state's jurisdiction, regardless of intentionality, and it does not apply so strict a limit on liability for historical wrongs. I will nevertheless conclude by outlining the major contribution I consider the book to have made.

The state, obligation, and fair play

The book assumes the state committed the wrong and sets up the central problem as follows: 'Given that the state is the moral agent that committed the wrongdoing, may it distribute the burden of addressing this wrong among its members?' This approach seems to consider reparations for a state's grave wrongdoing as distinct from the question of responsibility for all other of the state's past liabilities. Yet I do not see them as distinct. Citizens carry the obligation to submit to taxation to fund all other of the state's past (valid) obligations - debts, contractual and treaty obligations, compensation for injury and accidents, and, the whole suite of remedies for state responsibility for breaches of international law. At a mundane but important national level, this includes pension liabilities for civil servants, state contracts, leaseholds on land, employment contracts among so much else that depends on legal continuity over time. With that in mind, explaining why citizens should fund the discharge of the state's previously undertaken obligations (or its

wrongs) is in reality to ask why they should recognise the authority of states as independent corporate legal personalities that stretch backwards and forwards in time. The basic answer is that we should because the entity of statehood is not viable or secure unless it can carry those obligations and liabilities across time, and fund their discharge through taxation.

The question at hand therefore seems to me to be deep into the philosophical territory of political obligation itself, about the legitimate authority of the state. Do citizens owe either a general or prima facie duty to obey the law that taxes them, and recognise the authority of the state to that extent? If they do, whether in general or on a prima facie basis for particular policies or areas, the duty of citizens to sustain the past obligations and remedy the past wrongs of the state becomes bound up with that broader question. Pasternak disagrees – and given her understanding of this area of political theory such disagreement must be taken seriously. First, she argues that her 'concern here is not with the question of whether citizens should comply with their state's decisions, but with the prior question of whether the distributive effect is justified in the first place.' (p. 6). Yet in my view the distributive effect will be justified if it follows from a legitimate state decision (to tax) that should be followed. Since in my contention it is hard to separate the answer to that question from the answer of whether citizens should bear responsibility for all of the state's valid obligations, it means the question is within the territory of political obligation.

Pasternak's second reason for putting political obligation to one side is that the problem of distributive effect arises not just in states that are reasonably just (i.e. the central case for legitimate political authority) but also in those that are not reasonably just and so where general duties to obey the law do not apply (p.6). It will help to set out the theory of obligation I have in mind before addressing this potent concern.

I am attracted by a theory of fair play, which could be adapted to a defence of the need for the state and its subsisting legal personality (Dagger, 2018; Klosko, 2004). There are manifold ways in which citizens benefit from statehood such that they can legitimately be taxed to fund it, regardless of whether they identify with the state. Legal dispute resolution, transport, health services, schools, social services, management of disease, foreign trade and basic market regulation figure among the services typically provided by most modern states. Even in non-democratic regimes, coming now to the second of Pasternak's objections, some prima facie fair play duties to support public institutions through taxation will apply. If schools, hospitals and public sector pensions depend on it, citizens should pay taxes to support them. It will, in particular, also make sense for citizens to pay taxation even to a non-democratic regime if the regime proposes to use it to right a past wrong.

It is true that the duties to support the state's repayments and other public services arise in such a context from independent moral obligations rather than any general duty to obey the law of that unjust state. Yet the dynamics of fair play are the source of both kinds of obligations, in a guite material way to this discussion. I think it would be wrong to believe that the prevailing view that fair play duties only ground a general duty to obey just or nearly just regimes implies that there are no fair play duties to support mostly just state institutions or laws even when administered by unjust regimes. The question of mutual benefit from those institutions, as well as the need for their continuation, arises in that context as well. Neither does anything in my view deny the existence of potent duties to resist unjust regimes in ways that don't jeopardize those needed public institutions (Delmas, 2014). It would, however, cast doubt on the use of selective tax refusal as a particular strategy of resistance (cf. Delmas, 2014, p. 481). The advantages of this view for the topic of historical wrongs is that discharging valid obligations to right those wrongs is simply part of the package of burdens that come with the benefits of membership of states.

Blame and responsibility

One question is why is there so intense a focus on the subjective intentions of citizens to participate in the state? While the book distinguishes between what I will call *blameworthiness* and (non-culpable) *responsibility*, there is a perhaps muted underlying connection between them in much of the discussion. Richard Vernon's contribution in this volume divides discussion of the topic in the literature between ascriptive and intentional theories. I suppose my intuitions land squarely in the former camp, for reasons given above. My sense is that those attracted to the intentionality theories are attracted to the notion that a state's citizens in a deep and very attenuated sense are, in fact, blameworthy in some way because they voluntarily bought into the tainted goods of citizenship. I suspect that lies at the base of Pasternak's affirmed intuition that there is a special case for believing that a state's citizens should carry special responsibility for the state's past actions, rather than the international community as a whole. (ch. 1, pp. 144–145). A fully no-fault scheme, in other words, doesn't seem to fit.

But persons and states are often responsible in a financial sense for the consequences of acts they took admirable precautions to prevent. This occurs under regimes of no-fault liability (e.g. in the corporate handling of hazardous substances), liability in nuisance for damage to a neighbour's property, liability of employers for the tortious acts of employees, and of firms for industrial accidents harming workers.

Admittedly, the difference between blameworthiness and responsibility is acknowledged throughout the book (see eg. p. 17) – it is the basis for the



distinction between proportionate and non-proportionate distributions of responsibility. Yet it still seems that the method of normative individualism (p. 92) and the model of 'complicity' developed by Christopher Kutz and adapted by Pasternak are meant to capture an element of direct moral individual responsibility for the collective wrongdoing. That can make great sense when contemplating criminal responsibility for state actions. But tying the very possibility of general responsibility to inclusive authorship of the state's activities generates its own pathologies and restricts the scenarios where liability can attach, with severe knock-on consequences.

The price of the intentional participation standard

One such consequence would be a significantly constrained capacity for many states to engage in meaningful legal relations. Pasternak argues that states can make citizens liable only when [the state's] treatment of their citizens, at the time at which they commit the wrongdoing, meets certain standards. When that is not the case, then neither they, nor the international community, nor their victims can demand that the state's citizens will absorb the costs of the state's crime, regardless of their personal involvement in it. (p. 201) What 'certain standards' are these? The question is explored in chapter 4, examining how authoritarian regimes can deny participation, engage in repression, and withhold information that enables genuine participation. Shortly, the safe bet is that intentional citizenship is a tough brief to argue in any non-democratic or authoritarian system. That comprised well over half of the world's nations until the 1980s, and continues to be a very significant number today.

Let's consider this standard in a forward rather than backward looking way. It could shut down finance and disrupt trade significantly. The consequences are not limited to responsibility for international crimes. It calls into question all of the state's past and future obligations, contractual (including investment), treaty, and compensation for unintentional harms. This effectively means that when the state seeks to transact, at home or abroad, the other party should need to consider whether a critical mass of citizens can be considered intentional participants in the state at the time of the transaction, if they are to be on the hook for the debt at a later time. In doubt, one suspects the answer should be no. Pasternak's discussion of intentional participation in semi-authoritarian regimes is forensic (pp. 112–124), but it ultimately leaves intentional participation in such states so questionable that the safe bet is to assume that they are not. The chances of any transaction being seen as non-binding by a future government are too significant – in commercial terms, too risky.

That may at first look like a morally compelling way of outcasting nondemocratic regimes, but the implications for international relations are very

significant. A majority of the world's regimes are still not consolidated democracies. Many such states could not, on this theory, raise debt on private markets or negotiate binding bailout packages bilaterally or with the international financial institutions, nor conclude bilateral treaties, whether for agriculture, settling boundary disputes, or undertake conditions for receipt of conditional foreign assistance. These are important tools for citizens, not just when an economy is imploding (affecting millions, causing riots and vast misery) but also for general economic development. If we apply the theory to past transactions, the equities of repudiating so many obligations need reckoning too. Many potentially innocent persons (e.g. pension funds) and states would be left without any remedy. At its worse, the temptation to resort to violent self-help (e.g. gunboat diplomacy) could rear its head again. On a more pedestrian level, pensions, state contracts, investments and other complex bargains could be unravelled.

I think Pasternak's theory would be better if that condition on historical wrongdoing were severed, and it could be without much violence to her theory. Present day intentional participation just applies to all inherited wrongdoing. Yet there are some other more mundane, but still important difficulties produced by an exclusive reliance on the idea of intentional participation in the state. I see four worth mentioning. First there is the question of why recalcitrant, anti-state citizens should be allowed to escape liability for the state's wrongs when in reality they benefit extensively from the fruits of statehood. Relatedly, the model of intentional participation still needs a justification for imposing liability on nonintentional participants. The civic minded are burdened while the free-riders are off the hook. Pasternak here offers a 'spillover effect' (pp. 151-152) liability, on a balance-of-equities type rationale. Yet non-intentional citizens will be encouraged by the general theory in the book to regard that as unfair.

Second, the intentional participation model to me implies that ordinary citizens a few generations on from the wrongdoing should have duties extending beyond pecuniary reparation. They should make interpersonal apologies (e.g. at a dinner party) and consider holding commemorations or offer rehabilitation, because they are the inclusive authors of the state's wrongdoing. That will seem odd and possibly absurd for many citizens (though not for all, as I note in my remarks in the final section below). Third, the model maintains that intentional participation cannot ground a duty to assume responsibility for ultra vires acts (p. 24, p. 51, pp. 83-84). While Pasternak is aware that this departs from the ordinary rule in public international law, which she would question (p. 12), the significance may be underappreciated. Under this kind of rule, in the national context, it would be wrong to hold the state (and its citizens) liable for damages in relation to false arrest, wrongful imprisonment, police brutality, and malicious prosecution. Most public law cases where the government loses are instances of ultra vires actions, because they are ex hypothesi unlawful. But states nevertheless carry



obligations in respect of those actions, in most countries including compensation. Lastly, actual financial liability for the state's remedial obligations does not track subjective participatory intentions. Tax liability is distributed largely by capacity to pay, as it should be. It lies with residents rather than (voting) ex patriots, and it includes corporations that shouldn't be recognised as intentional participants. I think the model of intentional participation could imply a reconfigured and less egalitarian tax regime for funding the discharge of remedial obligations. Why should some pay more to cover others' voluntarily assumed moral responsibilities?

Is the alternative fair?

But what of the unfairness to citizens of burdening them with obligations on the rationale given above, when they make them suffer, perhaps despair? Pasternak's review of state compensation in chapter 6 draws attention to this issue. I agree with her that reparations should not have that effect, but on grounds of fairness and consequentialist considerations rather than because the citizens were not inclusive authors of those events. No human rights (including human social rights) (King, 2012) should be violated to effect payment of any debt. But that is as true of patriotic inclusive authors as much as it is of innocent third-party victims. And, as the lesson of the Treaty of Versailles taught, what outwardly appears a justified imposition of reparations on aggressor states can be wholly eclipsed by the negative consequences (Keynes, 1919). Nothing said above excludes a theory of insolvency that justifies restructuring or even cancelling valid obligations.

The salient role of intentional participation

Notwithstanding anything said so far, I am genuinely convinced that Pasternak's theory is a major contribution. She is right in arguing that in most states a strong majority of citizens are intentional participants in the state. And I think her arguments are compelling in respect of the special moral obligations undertaken voluntarily by them. Her theory therefore makes a major contribution to our understanding of the normative psychology of blame and responsibility for a state's wrongdoing. In particular, her account helps explain how citizens' remedial responsibility can vary in intensity. The more active one's intentional participation, the more intense and more personal is one's remedial burden. So, shortly after the atrocities, intentional participants in the state will carry more onerous remedial obligations than will those of later generations, even where these seem insufficient for a full proportional distribution. Even where criminal penalties seem out of place, their allocation of responsibility may include special duties to account (e.g. truth and

reconciliation), to accept punishments (e.g. restrictions on employment), or pay a higher contribution to fund reparation. And two generations after the wrongdoing, it is fair to consider flag-waiving intentional participants in the state as assuming more onerous remedial obligations than state-sceptics who must simply pay their share. The former in a sense 'gain standing' or may assume duties to make interpersonal apologies in private and public settings, to express shame in the first person, and to carry responsibility for initiating commemoration and recognition. Public servants in particular will carry intense obligations.

Pasternak's book also compensates for a flaw with ascriptive views of responsibility, by providing an alternative line of argument - namely, that intentional participation provides a persuasive voluntarist account of responsibility that applies to most citizens. Legal systems have for some time found it difficult to impose no-fault liability, even if most eventually do in limited contexts. Such liability is often seen as something of an irritant. I readily admit that Pasternak's more voluntarist theory of responsibility would be less irritating to the taxpayer than the one I have sketched out above.

Disclosure statement

No potential conflict of interest was reported by the author.

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