

Historical injustice in immigration policy

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Historical Injustice in Immigration Policy

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sagepub.com/journals-permissionsDOI: [10.1177/00323217211065557](https://doi.org/10.1177/00323217211065557)journals.sagepub.com/home/psx**Rufaida Al Hashmi** 

Abstract

The history of immigration policy is marked by the wrongful and discriminatory exclusion of certain groups of people. In this article, I argue that descendants of those who were wrongfully excluded have a *pro tanto* right to immigrate to the state in question as reparation. I begin by identifying the two main approaches theorists generally take to establish a claim for reparation: the inheritance approach and the counterfactual approach. In the first section, I argue that the inheritance approach does not offer a promising argument for reparations for descendants of those who were wrongfully excluded. In the second section, I argue that the counterfactual approach, by contrast, does. In the third section, I respond to the objection that this *prima facie* claim for reparation can be undermined by current circumstances. In the fourth section, I show why this reparation should be offered in the form of immigration rights.

Keywords

immigration, historical injustice, reparation, discrimination

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Introduction

In the philosophical literature, there is ‘near consensus’ that states are not permitted to exclude would-be immigrants on the basis of race or ethnicity (Fine, 2016).¹ This is true not just of proponents of open borders, who in any case believe that most if not all of the selection of immigrants is morally impermissible, but also of proponents of closed borders (Blake, 2005; Miller, 2005; Wellman, 2008). Yet such criteria were in fact widely used in the history of many states’ immigration policy (Fine, 2016). In the US, the use of such criteria can be traced at least as far back as the Chinese Exclusion Act of 1882, which prohibited all immigration of Chinese labourers. It is clear that ‘racism prompted this action’ (Reimers, 1998: 11). The Act was largely based on the view that Chinese immigrants were ‘socially and morally inferior to whites’ (Reimers, 1998: 12). It was only in 1943 with the Magnuson Act that the exclusion was repealed. In 1917, Congressional legislation barred the entry of Asian Indians after a few thousand of them arrived in the

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United States mostly as agricultural workers and were met with intense hostility and protests against their presence (Reimers, 1998: 14). A few years later, Congress passed the notorious Immigration Act of 1924, otherwise known as the National Origins Act, which gave immigration visas to just 2% of the total number of people of each nationality in the United States as of the 1890 national census. The Act aimed to exclude immigrants from Southern and Eastern Europe. Congress was drawing on the view of many prominent eugenicists that people from northern and western Europe were superior (King, 2002).

The UK also implemented policies that excluded immigrants on the basis of ethnicity or race. The Aliens Act of 1905 was passed to exclude the large numbers of Jews escaping pogroms in Eastern Europe. In an 1893 House of Commons debate, the Conservative MP for Thanet, Mr James Lowther, spoke about his trepidation about the 'Jewish race' and his fears that the country was being 'overrun' by 'destitute foreign immigrants' (Hansard, 1893). Decades later, parliament passed the Commonwealth Immigrants Act of 1968, which prevented Kenyan and Ugandan Asians with British passports from entering the country. As the 'Africanisation' policy in Kenya threatened those without Kenyan citizenship with expulsion, thousands of Asian Kenyans with British passports planned to leave for Britain. In opposition to the Act, Richard Crossman noted that:

[a] few years ago everyone there would have regarded the denial of entry to British nationals with British passports as the most appalling violation of our deepest principles. Now they are quite happily reading aloud their departmental briefs in favour of doing just that (Hansen, 1999).

Crossman was pointing out that the UK was in effect 'denying entry to British citizens because of the colour of their skin' (Hansen, 1999: 819).

As we can see, countries such as the UK and the US have in the past employed immigrant selection criteria based on ethnicity or race, which we all take to be unjustifiable. What does this mean for present-day immigration policy?² I will argue that descendants of those who have been wrongfully excluded have a *pro tanto* right to immigrate to the state in question. I will assume a right is *pro tanto* if it is one that can sometimes be infringed all-things considered, and a right is absolute if it cannot be infringed under any circumstances.³ I will begin by identifying the two main approaches theorists generally take to establish a claim for reparation: the inheritance approach and the counterfactual approach.⁴ In the first section, I argue that the inheritance approach does not offer a very promising argument for reparations for descendants of those who were wrongfully excluded. In the second section, I argue that the counterfactual approach, by contrast, does. In the third section, I respond to the objection that even if we grant that there is *prima facie* a claim for reparation, this claim can be undermined by current circumstances. In the fourth section, I argue that immigration rights should be offered as one form of reparation. It is important to emphasise that my argument does not imply that there aren't more urgent reparative claims such as those to do with slavery or colonialism.⁵ It is nevertheless important for philosophers to draw attention to, as we will see, significant and nontrivial reparative claims.

Before I begin, I will set out the two important assumptions I make. The first is that I assume that backward-looking reparative considerations have normative force in immigrant selection. One reason for this is that the reparative argument creates directed duties to particular individuals, whereas more general duties, such as the general imperative to protect vulnerable immigrants, does not specify which states should admit which immigrants. Second, I assume that it is sometimes possible to identify the descendants of those

that have been impacted by such policies. There are in fact plenty of records of the individuals who have been excluded by such immigration policies. For example, when the Commonwealth Immigrants Act of 1968 was passed, many newspapers included the full names of some of the Kenyan Asians that were impacted by the Act (BBC, 1968; Lone, 1971). To take another example, the National Archives in Washington D.C. hold a variety of immigration documents relating to the Chinese Exclusion Act such as affidavits, photos, letters to immigration officials, and transcripts of interrogations.⁶ It includes documents that Chinese would-be immigrants received that notified them that their application for admission to the United States was denied.⁷

There is one more issue that needs to be clarified before I proceed. I noted at the start that there is a consensus among political theorists that excluding would-be immigrants by ethnicity or race is morally wrong. However, there are different views about the nature of this wrong. On one view, what's wrong is that prospective immigrants are denied entry. On another view, what's wrong is the reason for which they are denied entry: they are, in effect, unfairly discriminated against (Miller, 2005: 204). On a third view, racially selective immigration policies wrong citizens, not the immigrants themselves (Blake, 2005; Wellman, 2008: 139). It is true that these views would affect my argument. For the purposes of this article, I will assume that would-be immigrants are wronged by such policies because they are denied entry on unfair grounds. This is fairly intuitive. For example, it might be at the discretion of a certain company whether to offer a job or not. However, if they choose to do so, we do think that they wrong applicants if they deny applicants the job on unfair grounds, even if none of the applicants have a right to the job. The same is true of the immigration case: would-be immigrants are wronged because they are denied entry on unfair grounds and in particular on the basis of their ethnicity or race. I will later return to the question for why the appropriate response is immigration rights even if we assume for the sake of argument that none of them had a right to immigrate.

Section I: An Inheritance Approach

To begin with, I will examine whether we can use the inheritance approach to make the case for reparations for descendants of those who were wrongfully excluded. I will argue that the problems with such an approach, while perhaps not fatal, suggest that we should look elsewhere for an argument for such a claim to reparation. The inheritance approach in general tells us that individuals have a right to reparation 'by virtue of being heirs to possessions that would have been theirs if the injustice had not been done. By being deprived of their inheritance the injustice has violated their right to possession' (Thompson, 2001: 120).⁸ As Janna Thompson (2001: 120) points out, this view 'seems to rely on the idea of concrete possession that can be handed down, like an heirloom'. So, for example, this view applies well to cases of historical injustice that involve wrongfully seized property. It might justify the practice several European countries have adopted of giving back Jewish-owned properties seized before or during World War II to their rightful owners or their descendants. Again, the idea here is that the descendants have a right to the property because they have inherited an entitlement to it.

However, not all reparative claims can be cashed out in terms of inheritance. Consider, for example, the sexual exploitation of 'Comfort Women' by the Japanese army.⁹ There was no possession, so to speak, that their descendants would have had the injustice not occurred. The exploitation they endured is not something that can be cashed out in terms of a possession that should later have been inherited. The issue is thus whether there

might be an entitlement to compensation that, arguably, could be inherited. The question in our case is whether immigration rights that were wrongfully withheld can be said to be a sort of possession that is passed down from forebears.

We can distinguish between two sorts of immigration rights that are relevant in this context: rights to entry or rights to citizenship. The first, a right to entry, is relevant in certain cases of wrongful exclusion in the history of immigration policy. These cases are ones in which entire groups of people that belong to a certain ethnicity or race were prevented from entering. It was a right to entry that was wrongfully withheld from, for example, at least some of the Chinese labourers who were intending to immigrate until the Chinese Exclusion Act was passed. But a right to entry does not seem to function as a possession that is passed down from forebears, primarily because entry rights more broadly are not thought to be inheritable. For example, suppose that a mother has a pass to use a private park that expires after 2 years. Now suppose that she dies with her entry right unexpired. We do not think that her daughter can claim that entry right for the unexpired period. The most she could perhaps claim is to have the pass fee reimbursed. If the general nature of entry rights is that they are not normally inheritable, then it is unclear why the same is not true of a right to entry for states. In practice, entry rights are indeed not inheritable and we do not seem to have the intuition that they should be either.

Consider the second form of immigration right that is relevant in our case: citizenship. This is relevant for another sort of injustice in the history of immigration selection policy that, while rare, is nevertheless important to consider. For example, it is relevant in the case of the 1968 Commonwealth Act, which was implemented to prevent Kenyan Asians from entering the UK as they sought to escape the 'Africanisation' policy Kenya was pursuing (Hansen, 1999).¹⁰ Most importantly for our purposes here, the British government announced it would no longer accept their passports, in effect stripping their British citizenship. Should we view citizenship as something that can be inherited from forebears that were wrongfully excluded?¹¹ To begin with, in most countries, citizenship is inherited only from parents.¹² What rationale underpins this norm, and could it be extended to inheriting citizenship from ancestors in our case? Joseph Carens (2013) offers an intuitive explanation for this norm by pointing out that children of resident citizens will grow to have a deep relationship to that state. The political community they grow up in will be formative to their identity, they will feel that they belong to that community, and they will grow up expecting that they will exercise their political agency within it as an adult. He concludes that, 'granting [children of resident citizens] citizenship at birth is a way of recognising that relationship and giving it legal backing' (Carens, 2013: 24). However, the obvious difference between this case and ours is that it is far from clear in our case that the descendants of those who were wrongfully excluded from a certain state will develop any relationship with that state. This is particularly salient in our case because their ancestors have never even lived in the state in question to begin with but were only wrongfully excluded. Thus, it is reasonable to assume that many of these descendants will not have a strong connection, if any at all, to the state in question. It is very likely that the state that their great grandfather belonged to is not one they learned about, speak the language of, reside or work in, and so on. While a strong relationship to the state explains the norm that children of resident citizens should inherit that citizenship, it will often not extend to individuals inheriting citizenship from ancestors that were wrongfully excluded. The view that one can inherit citizenship from a forebear who was wrongfully excluded therefore does not seem to be a very convincing one. While these issues may not be fatal, I will show that there is a more promising approach, the counterfactual approach.

Section 2: A Counterfactual Approach

The second main approach for establishing a claim for reparation is the counterfactual approach. This approach asks, 'are some currently living persons better off, and some worse off, than they would be in a counterfactual world where historic injustice did not take place?' (Butt, 2013: 246). This is a fairly intuitive approach. For example, if someone stole my possession a few weeks ago, it seems important to ask what would have happened had it not been stolen in order to determine what compensation I am owed. So, if a student's laptop was stolen right before their exam, we would think they are owed some compensation because they would have been able to study for the exam, had it not been stolen. Such counterfactual reasoning has been applied to many cases of historical injustice. Boxill and Boxill (2003) apply it to the case of African Americans. They note that African Americans arguably would have had more wealth and more education had their ancestors not been enslaved (Boxill and Boxill, 2003: 125). The more general point is that the descendants of victims of an injustice would have been better off had the injustice not occurred. This seems to apply to the case of historical injustice in immigration selection policy. For example, consider the notorious National Origins Act the US implemented in 1924. Recall its aim, which drew on the view of many prominent eugenicists to exclude Southern and Eastern Europeans. In many cases, those who would have immigrated to the US had it not been for the Act missed out on jobs, social and cultural connections, educational opportunities and so on. So, we can reasonably expect that descendants of these Southern or Eastern Europeans are worse off because their ancestors were prevented from moving to a place that had more opportunities for them.

Before I further explain this account, it is important to clarify why I focus on the descendants *and* unjust immigration policies specifically. First, why do I focus on the descendants of those who were excluded by unjust immigration policy rather than more generally on whoever happened to have ended up being worse off as a result of these policies? It might be true that there are people, other than these descendants, who are made worse off by such policies. For example, if the Chinese Exclusion Act were not in place, some members of a family would have moved to the US and sent back remittances to China, just as other immigrant groups often do. These remittances might have benefitted family members who never would have thought of immigrating and their descendants. This approach would say that they are also owed compensation, but, since this group of people will be much more difficult to identify, I set this issue aside and focus on the descendants of those who were excluded by such policies. Second, why do I focus on unjust immigration policies that excluded entire groups of people rather than also the wrongful denial of the ability to immigrate for individuals? For instance, imagine that my grandmother was denied entry to the UK 100 years ago, not because of a racist immigration policy, but because of a clerical error. She should have been allowed in but, by mistake, she was not. This approach would indeed tell us I am owed reparation, but again the focus on unjust policies is important because it helps us more easily identify a large group of people that are left worse off.

In order to flesh out this account, we need to answer three questions. First, what exactly is the relevant counterfactual? Consider the descendant of a Chinese labourer who was excluded by the Chinese Exclusion Act. Is the relevant counterfactual one in which this labourer had not been wrongfully excluded or one in which this labourer *and* all other Chinese labourers not been excluded? In other words, should the focus of the counterfactual be on the individual or the group? The counterfactual would clearly differ depending

on whether it is only one person that was not excluded or whether it was a large group of people that were not excluded. I take the relevant counterfactual to be the one in which the entire group targeted by the discriminatory policy was not excluded. Given that I focus on policies that discriminated against entire groups of people, it is natural to focus on the counterfactual world where this entire group of people had not been excluded. Moreover, it is not very intuitive to imagine a counterfactual world where there was a discriminatory policy that excluded an entire group yet an individual from that group somehow was admitted.

The second question is who exactly is in this group? Is it, for example, the group of all Chinese labourers in the case of the 1882 Act? The answer is that my argument only applies to those whose forebears would have wanted to migrate had it not been for the unjust policy. So, the victims of the Chinese Exclusion Act of 1882 were not *all* Chinese labourers but only those who would otherwise have applied for entry. It is clearly only those who would have wanted to immigrate to the US that would have been counterfactually better off had it not been for the discriminatory policy. Those that did not want to immigrate anyway would not have been affected had the discriminatory policy not been enacted. As I mentioned earlier, there is evidence of people that went through the selection process – and so wanted to immigrate – but were barred by these policies.

However, there are two complications here. First, should we also say that it is the group of individuals that not just wanted to immigrate but also would have actually been admitted had it not been for the discriminatory policy? It does make sense to say that if, say, a Chinese labourer would not have been admitted according to legitimate selection criteria at the time had it not been for the discriminatory policy, then they would not have counterfactually been better off had it not been for the policy. However, it is clearly difficult to determine who of the individuals that we know wanted to immigrate would have also been admitted to the state.¹³ Second, what about those who never went through the selection process? Presumably there are many who would have wanted to apply for admission but did not do so because of the discriminatory policy. The problem here is that even though they would have wanted to immigrate, there will again rarely, if ever, be any evidence of that. It is important to emphasise that those that are owed reparations are those that would have wanted to immigrate, including those that did not even go through the selection process, and would have been admitted had it not been for the unjust policy. However, given that it will be difficult, if not impossible, to determine who would have indeed been admitted and who would have gone through the selection process, the state will have to grant a right to reparation for all descendants of those who we know would have wanted to immigrate, as an imperfect application of this argument.

Before we explore the third important aspect of this account, it is worth considering a potential challenge to my argument so far. Is it always true that if X commits an injustice against Y, and Y would have obtained some benefit had it not been for this injustice, then X ought to provide Y with this benefit? Suppose, X, a racist police officer, only targets criminals from a given ethnic minority Y.^a X therefore targets Y, who is indeed about to steal the Picassos from a museum. Here, like the immigration case, X would have received certain benefits, that is, the Picassos, had it not been for the unjust act, the discriminatory targeting. But obviously this does not mean that they have a right to the opportunity to steal the Picassos. If a wrongdoer needn't give a victim the benefits they would have had, had it not been for the injustice, then perhaps states needn't give descendants the

^a I am grateful to Mollie Gerver for discussion on this point.

immigration rights they would have had, had there been no discrimination. However, notice that the reason why the wrongdoer need not give the robber the Picassos that they would have had had the injustice not occurred is that they have no right to the Picassos and would obviously not have a legitimate right to the Picassos even if they steal them. This explains why, in the Picasso case, the wrongdoer need not give victim the opportunities they would have had, had it not been for the injustice. Thus, the reason that the overarching principle applies in the immigration case and not the Picasso case is that in the immigration case, unlike the Picasso case, some would have actually had a legitimate right to enter had it not been for the discriminatory policy. In other words, some would have been admitted and would have therefore had a legitimate right to enter had it not been for the policy.

The third question, and the one I will focus on for the remainder of this section, is the *benefit* the descendants counterfactually would have had had their ancestors been admitted. My argument is that the descendants would have been better off had it not been for the discriminatory policy. However, one might argue that it is not clear that we know what the forebears would have done had they in fact been admitted to the state they were excluded from. Jeremy Waldron considers a similar point about the significance of human choice in the debate on historic claims to land:

Suppose (counterfactually) that a certain piece of land had not been wrongfully appropriated from some Maori group in New Zealand in 1865. Then we must ask ourselves, What would the tribal owners of that land have done with it, if wrongful appropriation had not taken place? . . . Would they have hung on to the land and passed it on to future generations of that tribe? Or would they have sold it – but this time for a fair price – to the first honest settler who came alone? And if the latter, what would he have done with it? Sold it again? Passed it on to his children? Lost it in a poker game? (Waldron, 1992: 9).

Waldron's point here is that we do not know what the owners of the land would have done had it not been wrongfully appropriated. This undermines a claim for reparation for the descendants because we do not know that they would have in fact been counterfactually better off had the injustice not occurred – because, for example, their forebears could have given away the land. One might make a similar objection to my argument. One might argue that I am assuming that 'what a person should have may be determined by certain actions which neither he nor anyone else has actually performed' (Sher, 1981: 11). That is, I seem to be assuming that had the victims of historical injustice in immigration selection policy been admitted, they would have made the most of the opportunities in the new state, worked hard, earned more money, and made a better life for themselves. But obviously, as Waldron points out, we do not know that the victims would have done all of this. It is clearly controversial that we should compensate their children for all of the possible effects of the opportunities that were denied them.

In response, it is crucial to clarify what I am arguing that the descendants should be compensated for. I am not claiming that the descendants of victims of historical injustice in immigration selection policy are owed the money, the careers, or the degrees they would have had had they enjoyed the opportunities in the receiving state. My claim is only that they are entitled to compensation for loss of the counterfactual opportunity set that they would have had now had their forebears been admitted. They would have had more educational, employment, social, and cultural opportunities. It is important to note that the 'the counterfactual opportunity set' could mean two things: (a) the specific

opportunity set that would have been available to person P and their ancestors not been denied admission or (b) an opportunity set that is at least as good as that opportunity set described in (a). The relevant one, we can assume, for the counterfactual approach is (b): this is the sense in which the person has been made worse off. So, in this sense, descendants are owed reparation for being denied the counterfactual opportunity set they would have had had their forebears been admitted.¹⁴

But what if the forebears had been admitted to the state that excluded them but then chose to move elsewhere after? A large number of the Chinese who did move to the United States ended up moving to Mexico, for example (Romero, 2010). Would this not support a Waldron-style claim that we do not know whether the descendants would have been in the same state and enjoyed the opportunities there even had they been admitted? In other words, even if we focus only on the opportunities the descendants would have had, we do not know whether the descendants would have had them had their forebears been admitted because the latter could have moved elsewhere. In response to this, we can simply respond that we care about what would have likely happened.¹⁵ Most people would have likely stayed in that state. They were applying to immigrate to the state so it seems plausible to say most would have wanted to stay. And even if they chose not to stay, they would have likely moved on to somewhere that was better still. In other words, it is reasonable to assume that they would not have chosen to move to somewhere worse. Thus, we can assume that most of the group of people who applied to immigrate to a state would have stayed or at the very least left to a state with more opportunities. The objection that the forebears might have chosen to move elsewhere is therefore not very persuasive.

One might also raise the famous so-called non-identity problem. The objection claims that had the injustice not occurred, the same people would not have been born. This is simply a biological fact: 'the existence of a given individual seems to hang on their having been conceived at a particular time, when a specific spermatozoon came into contract with a specific egg' (Butt, 2013: 248). The problem is then that, 'if a current day individual owes his or her very existence to a historic injustice, some ask, how can it be claimed that he or she has been harmed by the event in question and is owed compensation?' (Butt, 2013: 248). A prominent response to this in the literature is what we can call the subsequent-wrong argument (Herstein, 2008). My aim in introducing this is not to show that we can conclusively reject the non-identity problem but to point out that at least one of the prominent responses easily applies to our case. The subsequent-wrong argument notes that in addition to the initial historical injustice there is a further injustice being done by the failure to compensate the parents (Sher, 2005). This injustice occurs after the child is born. To illustrate, consider Daniel Butt's example of a couple who are victims of an injustice that significantly harms their material welfare. Now further suppose that they have a child. We can grant that the child should not be compensated for the initial injustice because they would not have been born had it not occurred. However, it seems clear that the child should be compensated for the wrongful failure to compensate the parents after the child is born. This is partly because had it not been for this later failure to compensate the injustice, the 'child may have grown up in an affluent, rather than an impoverished, environment' (Butt, 2013: 248).

We can make a similar point about descendants of victims of unjust immigration policy. That is, we can grant that the children born after the act of exclusion had occurred should not be compensated for the initial injustice of wrongful exclusion but claim that they should be compensated for the later injustice of the wrongful failure to compensate

the parents. To see this, consider the following example. Suppose my grandparent was wrongfully excluded from a state. Let us grant that my parent would not have existed had my grandparent not been wrongfully excluded. However, after my parent is born, my parent is wronged because they would have enjoyed the opportunities in the receiving state had my grandparent been given the immigration rights, which is the form of compensation that I will later argue for. Now consider the next generation. Let us again grant that I would not have been born had my parent not been wronged in this way. However, after I am born, I am wronged because I would have enjoyed the opportunities in the receiving state had my parent been given immigration rights. Of course, for this argument to work two things must hold at each link of the chain: that the individual would have moved had they been given immigration rights and that they would have taken their child with them. However, I do not believe that it is implausible to assume that many descendants would have ended up living in the state in question had their ancestors been given immigration rights. So, while we might say that the children should not be compensated for the initial wrong – because they would not have existed otherwise – it is clear they should be compensated for the ongoing failure to compensate – because it occurs after they are born and harms them. One prominent response to the non-identity problem therefore easily applies to our case.

Finally, there is one broad question to this approach that we should consider. Does this approach retain a tinge of the ‘inheritance’ approach that I take myself to be rejecting? The worry is that in employing the terms ‘descendants’ or ‘forebears’, I might be thinking of a claim to reparation that is passed along bloodlines, which would imply some aspects of the inheritance approach that I am rejecting. It is true that I am appealing to descent as a way of identifying the people who can make these reparative claims. However, I am arguing that the reason that they have these reparative claims is not because they have inherited them but because they would have been counterfactually better off in terms of opportunities had the injustice not occurred.

To take stock, my argument is as follows. Descendants of those that have been wrongfully excluded have a claim to reparation because they would have been better off had the discriminatory policy not been enacted. In particular, they would have been better off because they would have received the set of opportunities in the state in question had it not been for the discriminatory policy. It is at least those whose ancestors would have wanted to immigrate and would have been admitted that have this claim to reparation. However, because the latter criterion might be in practice difficult to be identify, a state will likely have to grant this claim to all those whose descendants would have wanted to immigrate had it not been for the discriminatory policy.

Section 3: A Change in Circumstances

I have argued that descendants of those who were wrongfully excluded are owed reparation for the opportunity set they would have had now had their ancestors been admitted. Before I show why this claim to reparation should be offered in the form of admission rights, I will explore whether this claim could be undermined by current circumstances. Waldron makes this point about cases of historical injustice more generally. To illustrate, he gives an example of a savanna where various groups are legitimately in possession of their respective water holes. Now suppose that ‘one day motivated purely by greed, members of group Q descend on the water hole possessed by group P and insist on sharing that with them’ (Waldron, 1992: 24–25). This is clearly a case of injustice. But now suppose

that all the water holes except the one originally owned by P dry up. Here the circumstances have changed, and it no longer seems, according to Waldron, that Q forcing P to share their water hole is a case of injustice. As Waldron (1992: 25) puts it, 'the initial injustice by Q against P has been superseded by circumstances'. Supersession occurs when 'an act which counted as an injustice when it was committed in circumstances C1 may be transformed, so far as its ongoing effect is concerned, into a just situation if circumstances change in the meantime from C1 to C2' (Waldron, 1992: 24–25).

For the sake of the argument, let us grant Waldron's claim that supersession can sometimes happen. Could it also happen in the case of historical injustice in immigration selection policy? To be more precise, I have suggested and will further defend in the following section, that this claim to reparation should be offered in the form of immigration rights. Now I will consider two ways one might argue that the circumstances have changed such that this claim is undermined. First, perhaps the circumstances changed in both the sending state and receiving state such that, by immigrating, descendants would be made worse off than they otherwise would have been. Think of states like Singapore, whose citizens are now relatively wealthy and who would have been denied entry to the US as part of the 'Asiatic barred zone' in the early 1900s. Or consider the citizens of Southern European states such as Austria, whose citizens were subject to restrictive quotas starting in the 1910s and 1920s, but which now has a higher standard of living than the US. In these cases, it is likely that by immigrating, these people would have been made worse off than they otherwise would have been. I grant that this is one way in which the injustice could be superseded. It is true that my conclusion is clearest in cases where people from country A were wrongfully denied entry to country B when A is, and remains, relatively impoverished and B is, and remains, relatively affluent, and that the argument does not obviously hold, however, when those from country A is now relatively more advantaged than country B.

There is a second way one might argue that supersession occurs in the case of historical injustice in immigration policy. Suppose that a state does want to give the descendants of those who were wrongfully excluded immigration rights as reparation. One might argue that, like the example of the wrongfully appropriated land, doing so comes at a very large cost. There are two ways of fleshing this out: in terms of the cost to other would-be immigrants or the cost to the receiving state. Consider first the cost to would-be immigrants. For example, suppose a state such as the US has already decided upon the number of immigrants it is willing to admit annually and is faced with the choice between someone who has a needs-based right to immigrate – suppose they are fleeing poverty – and someone who has a reparative right to immigrate – their forebears were wrongfully excluded by the state. One might wonder whether my argument implies that would-be immigrants with the reparative right should always be prioritised. On this line of thought, this would be an unfair cost to the rest of the would-be immigrants. However, the problem here only arises if we assume that these descendants have an *absolute* right to immigrate and that a state is not willing to increase its immigrant quota. As I stated earlier, I am arguing that these descendants have a *pro tanto* rather than an absolute right to enter, and a *pro tanto* right will have to be weighed against other considerations such as needs-based rights. Recall, I took an absolute right to be a right that can never be infringed, while a *pro tanto* right, in some special circumstances, can be.

Second, we can consider the cost to the state. The worry is that because there are many cases of wrongful exclusion in states' history of immigration policy, my argument might imply that there is a very large number of descendants that have a claim to reparation.

Hence, it might be thought to be too costly for a state to grant immigration rights to all these descendants. However, again, I am not assuming that these descendants have an absolute right to enter. Since I am arguing only for a *pro tanto* right to enter, these descendants will not all necessarily be owed admission into the state. There might be, as we discussed, competing claims from other would-be immigrants.

Section 4: The Currency of Reparation

The counterfactual approach tells us that reparation is owed to descendants of those who were wrongfully excluded because they would have been counterfactually better off in terms of opportunities. I have been assuming that reparation in this case should be offered in the form of immigration rights, and I will defend this assumption in this section. To begin, I assume that compensation is owed to those who have a right to reparation.¹⁶ But what does compensation require? Nozick gives the following canonical account:

Something fully compensates a person for a loss if and only if it makes him no worse off than he would otherwise have been; it compensates person X for person's Y's action A if X is no worse off receiving it, [than] if Y had not done A (Nozick, 1974: 57).

In our case, I will assume that a right to reparation includes a right to compensation because satisfaction for the damages the descendants suffered – a loss in opportunities – will require that they be made no worse off in terms of opportunities had the historical injustice in immigration selection policy not occurred.

While we might think that there are many ways that a state can compensate descendants for the set of opportunities they lost, I will argue that they should generally be compensated by immigration rights. To begin, we can draw on a distinction Robert Goodin (1989) makes between means-replacing compensation and ends-displacing compensation.¹⁷ Means-replacing compensation aims to 'provide people with equivalent means for pursuing the same ends (the same as before they suffered the loss, or as they would have pursued had they not suffered the disadvantage)' (Goodin, 1989: 60). An example of this is giving someone who lost a leg an artificial limb. Second, there is ends-displacing compensation, which aims to 'provide [people] with equivalent satisfaction through different ends' (Goodin, 1989: 60). An example of this is 'giving someone who has suffered a bereavement an all-expenses-paid Mediterranean cruise' (Goodin, 1989: 60).

Consider how this distinction maps on to our case. Both approaches grant that the descendants of historical injustice in immigration policy have a right to reparation because they counterfactually would have had more opportunities. The means-replacing compensation approach tells us that the descendants should be compensated by being provided the opportunities that they lost. This is done (at least in part) by giving the descendants immigration rights. By contrast, the ends-displacing compensation approach tells us that they should be compensated by being provided with other things such as money or other forms of aid.

One reason why we might think that ends-displacing compensation is desirable is that means-replacing compensation is not possible. So, in the example of the person who suffers a bereavement – suppose his wife died – means-replacing compensation is just not possible. The wife obviously cannot be brought back to life. Ideally of course the person can have his wife back, but he instead will have to settle for some other compensation such as the all-expenses-paid Mediterranean cruise. One might make a similar point here.

That is, one might claim that means-replacing compensation is not possible in the case of wrongful exclusion in the history of immigration policy. What the descendants were mainly deprived of are the opportunities that come with growing up in a place with more opportunities for them. They have missed out on having more educational opportunities in their childhood that would have set them up for success later in life. And they would have missed out on the opportunities to study a wider array of subjects that would be more suited and fulfilling to them. As Shachar and Hirsch (2007: 254) put it, we live 'in a world where membership in different political communities translates into very different starting points in life'. There is nothing that these descendants could be compensated by that would constitute compensating like with like, as means-replacing compensation would require. In other words, we obviously cannot go back in time and give them the opportunities they would have had growing up in a certain state. So, like the bereavement example, we might have to *settle* for ends-displacing compensation.

However, this objection is not very forceful against the means-replacing compensation approach. The objection correctly points out that a state obviously cannot give the descendants the opportunities that they would have had from birth had the injustice not occurred. In other words, the state cannot give the descendants opportunities that are *equally* as good as what they would have had had they grown up in that state. However, a state can offer them the opportunities in the state currently, which while not equally as good, are still good enough. Part of means-replacing compensation is in fact attainable, so we do not really have to settle for ends-displacing compensation as the objection claims. Put differently, just because you cannot compensate someone for 100% of what they lost does not mean that you should not compensate them for, say, 75% of it. So, while the descendants cannot be compensated with the opportunities that are equally as good as what they would have had had it not been for the policy, they can still be compensated with the opportunities they would have had *now* in the state had the injustice not occurred, which is good enough.¹⁸ And this is done, as we mentioned, by giving them immigration rights to the state.

Yet one might wonder what this tells us about *other* cases. Suppose that one hundred years ago a university refused to admit women. This is clearly morally suspect, but would my argument not imply that this university must now grant admission to all of the descendants of those that were wrongly excluded? However, this is not a helpful analogy. What is distinctive about our case is that the descendants of those that were wrongfully excluded would very likely, as we discussed, now be living in the state in question. This is why, I argued, descendants are owed compensation for the counterfactual opportunity set they would have had in the receiving state had their ancestors not been wrongfully excluded. But the same is not true of the university example. That is, we would not think that the descendants would have ended up studying in that university or had a right to study there had their ancestors not been wrongfully excluded from it. This is why it does not follow from my argument that we owe these descendant admission rights to the university.

It is important to note that these immigration rights could be to the state that excluded their forebears *or* another state with equivalent opportunities. Consider why the latter policy might also be appealing. If what we care about is giving the descendants a certain opportunity set, then why can a state not arrange for another state that can provide a similar opportunity set to grant them immigration rights? So, suppose Kenyan Asians should be compensated for the loss of their counterfactual opportunity set. And suppose that the UK recognises this opportunity claim and that this should be met via immigration rights.

Now further suppose that the UK makes a deal with the Canadian government to let in those whose forebears were wrongfully excluded by British immigration policy. The UK government determines that Canada can offer them equivalent opportunities in terms of, say, educational or employment opportunities. So, here the UK government accepts that the Kenyan Asians should be compensated for the loss of their counterfactual opportunity set, but it is at least possible that this could sometimes take the form of immigration in *other* states.

One might argue that the problem with this is that it misses the point that a right to reparation means that the descendants have a claim against a *certain* state that should provide immigration rights. More generally, when we say person X owes reparation to person Y, we mean that person X specifically – and not anyone else – owes person Y that reparation. But this objection fails because, while compensation needs to be *initiated* by the offender, the offender does not need to provide it directly. Consider the following example. Suppose tribe A raids tribe B and steals all their resources. Now suppose that tribe A strikes a deal with tribe C in order to bring it about that tribe C gives tribe B the same amount of resources that they lost. Of course, tribe A still owes tribe B an apology at the very least, but once they do apologise the compensation seems adequate.¹⁹ Similarly, the state that committed the injustice owes the descendants an apology but if it brings it about that another state offers them the equivalent counterfactual opportunity set then this compensation is adequate.

However, there is an important caveat to my claim that the best way to compensate someone for the lost opportunities is through immigration rights, that is, means-replacing compensation, rather than money or other forms of aid, that is, ends-displacing compensation. One might argue that the descendants will likely value money or other forms of aid much more than immigration rights to that state. Consider a person of say age 50 now living in Kenya whose parents were refused entry to Britain in the 1960s. Suppose that they were now provided with the right to enter the UK. How much would that right be worth to the person? In many cases, probably very little. They would need to find a job, somewhere to live, and they would need to make social contacts, and so on. By contrast, suppose the same person is given a lump sum to start or expand a business in Kenya. That seems to make a much bigger difference to the opportunities that the 50-year-old has than providing him with a right to enter the UK. In other words, ends-displacing compensation would make a much bigger difference to the lives of the descendants than (merely partial) means-replacing compensation.

This objection in fact highlights an important caveat to our approach here. It points to two important aspects of compensation. First, in many cases compensation in the sense of only giving back the same thing that was lost will be insufficient. For example, if someone uses my bike without my permission when I have appointments to make, it will not be sufficient only to return my bike. Perhaps they might need to also, say, book me a taxi or drive me there so that I get to my appointments on time. This shows that in many cases simply giving back the goods that someone was deprived of, that is, restoration, might not be an appropriate form of compensation. As the objection makes clear, this could sometimes be the case in our context: restoring the opportunities that the descendants would have had is sometimes not adequate compensation. What we have to do in response to these cases, and this brings us to the second important aspect of compensation, is to offer the descendants a choice: either migrate to the state or receive a lump sum by way of compensation, or perhaps even both. In the bike example, it would not be adequate only to give me back the bike without giving me a say in how I should be compensated. For

example, I might prefer to be driven to my appointments in addition to being given my bike back. Thus, the more general point is that it is true that in some cases immigration rights, or means-replacing compensation, will not be adequate and giving the descendants a choice will be necessary. This follows from a broader point made about compensation and autonomy in the philosophical literature (Goodin, 1991). As Daniel Butt puts it:

significant concerns of individual autonomy give us good reasons to support principles and institutions of rectificatory justice which protect the capacity of persons to live autonomous lives by upholding their legitimate expectations, and reversing certain kinds of damages to them (Butt, 2009: 45).

In our case, in order to respect people's autonomy – their hopes and plans for the future – it seems apt to offer a choice between immigration rights or a lump sum of money or perhaps both.²⁰ However, the point still holds that immigration rights are one option for the form of reparation that *should* be available to descendants of those who were wrongfully excluded.

Conclusion

In this article, I argued that past injustice matters in immigration policy. Specifically, I argued that individuals whose ancestors were wrongfully excluded have a pro tanto right to immigrate to the state in question as reparation for having been unjustly excluded. This is because they are owed compensation for the counterfactual opportunity set they would have had, had it not been for the discriminatory policy. I also argued, however, that this right to immigrate is not absolute and that states might have some limited discretion in how they discharge these duties. But claims to reparation based on past exclusion are one factor that needs to be taken into account in immigration policy.

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Notes

1. For instance, Sarah Fine (2016) notes, ‘there is near consensus that states are not permitted to discriminate between candidates for admission on the grounds of race and ethnicity’. Of course, this is not to say that these kinds of policies are a thing of the past.
2. I focus on past immigration policies that are uncontroversially wrong, so I do not explore whether there are present-day implications of other past barriers to immigration.
3. This is setting aside the question of whether there are any absolute rights to begin with (Gewirth, 1981).
4. I here follow Daniel Butt (2013). For a prominent defence of both views, see Bernard Boxill (2003).
5. See James Souter (2003) for an argument for asylum as reparation for past injustice.
6. Available at https://www.docsteach.org/documents/search?filter_searchterm=%22chinese+exclusion%22&filterEras=&filterDocTypes=&filter_order=&filter_order_Dir=&r=skNXcxRf5YbL&reset=1
7. See, for example, Case File for Ng Que; 5/16/1906; 14610/58; Chinese General Correspondence, 1898 – ca. 1911; Records of the Immigration and Naturalization Service, Record Group 85. [Online Version, <https://www.docsteach.org/documents/document/case-file-for-ng-que>, 28 April 2021]
8. For a prominent defence of the inheritance argument, see Bernard Boxill (1972).
9. For a more detailed exploration of this, see Catherine Lu (2011).
10. For more on this, see Sana Aiyar (2015).
11. One might think that this argument applies to a wider range of cases. Think of, for example, the descendants of guest workers in Germany and Austria. Many of these people are wrongfully denied citizenship, but they never had it to begin with. However, it is important to emphasise that I am considering policies that excluded people from entering the country to begin with, which distinguishes the sorts of cases I am considering from the guest workers case. I therefore set aside such cases.
12. There are exceptions to this norm. Some states have *jus sanguinis* citizenship principles that grant citizenship to those who descend from even distant ancestors who were born in the state. For example, Italian citizenship is granted by birth through the paternal line, with no limit on the number of generations, or through the maternal line for individuals born after 1 January 1948. Moreover, on the problematic nature of inherited citizenship, see Shachar and Hirsch (2007).
13. But this is not true of all cases. In the case of the Chinese Exclusion Act, it seems reasonable to assume that had the Act not been implemented, it is very likely that all Chinese labourers that wanted to immigrate would have been admitted given the fact that the 1882 Act was the first and for many decades later the only policy that restricted immigration to the United States.
14. It is important to emphasise here that I am introducing *not* the best theory of historical reparations simpler but the theory of historical reparations that best justifies rectification for the history of exclusionary immigration policies.
15. This is in fact how compensation claims work more generally. For example, suppose I steal your car, and then return it to you after a month. Besides getting the car back, we think that you are owed compensation for the opportunities you have lost in the meantime. But for that, we need to know what you would have done if you have had the car, and that involves likelihood estimates. So, for example, you cannot claim that you would have won some car rally if you’re not normally a rally driver.
16. I focus on compensation, but it is not necessarily the only reason why reparation here should take the form of immigration rights. Another potentially reason has to do with the expressive function of such a policy. That is, such a policy would allow a state to repudiate its past wrongful immigration policy. However, I set this aside here and focus on compensation.
17. This distinction roughly maps onto Onora O’Neill’s (1987) distinction between compensation and restitution.
18. I leave it open whether in addition to admitting these immigrants (if they desire admission), the state should offer other special integration programmes (such as language courses and occupational training) that help approximate access to the substantial opportunities these people would have had if they have grown up in that state.
19. This is a common thought in the literature. As Tyler Cowen (2009: 26) puts it, ‘a third party typically is allowed to pay off a debt, but not to remedy a moral injustice of this kind’.
20. See also Amigetti and Nuti (2015), who consider the democratic deliberation of past wrongs.

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