

## Citizenship as strict liability: a review of Avia Pasternak's *Responsible Citizens, Irresponsible States*

Bennet Francis

Department of Philosophy, University of Twente, Enschede, Netherlands

### ABSTRACT

States commit wrongs that demand redress. In her recent book, Avia Pasternak considers the circumstances under which it is legitimate to impose the cost of redress upon the state's citizens at large. Her answer is that it is legitimate to impose reparative burdens on citizens only when they participate in their state intentionally, specifically, when they intend to play their part in maintaining state institutions. The book thus has revisionary implications for current international legal practice, given reparative burdens are currently imposed upon states no matter their internal relations. The book's persuasive argument will be of interest not only to scholars of normative political theory and social ontology, but also international legal theorists. That said, its core claim that citizen participation must be 'genuine' would benefit from further specification through future scholarship.

### ARTICLE HISTORY

Received 14 September 2022  
Accepted 16 September 2022

### KEYWORDS

State wrongdoing; citizen responsibility; strict liability; group agency; complicity; reactive attitudes; Avia Pasternak

In 1991, following the US-led coalition's successful campaign to drive Saddam Hussein's forces from Kuwait, the UN established a commission compelling Iraq to pay into a compensation fund for the victims of its aggression. In February 2022, the United Nations Compensation Commission (UNCC) held a special session of its Governing Council declaring the final fulfilment of its mandate. For just under 31 years, then, Iraq continued to pay compensation for damages caused by the Ba'athist regime, long after the regime had fallen and Saddam himself had been executed in circumstances that could scarcely have been foreseen in 1991.

In her book *Responsible Citizens, Irresponsible States*, Avia Pasternak acutely argues that the current practice of public international law is in tension with the best interpretation of normative theory when it comes to states' duties to compensate victims of state wrongdoing. Because current practice treats all states as having equivalent legal personality, it is insufficiently sensitive to internal differences in the relationship between a state and its people. These differences, she argues, have crucial implications for the assignment of remedial duties. For though states may be group agents capable of bearing liability, it is the people, ultimately, who pay.

**CONTACT** Bennet Francis  [b.j.francois@utwente.nl](mailto:b.j.francois@utwente.nl)  University of Twente, Enschede, Netherlands

© 2022 The Author(s). Published by Informa UK Limited, trading as Taylor & Francis Group.  
This is an Open Access article distributed under the terms of the Creative Commons Attribution License (<http://creativecommons.org/licenses/by/4.0/>), which permits unrestricted use, distribution, and reproduction in any medium, provided the original work is properly cited.

The background normative question raised by the case of the UNCC, the question Pasternak's book seeks to answer, is this: in what circumstances, and in what form, can reparative burdens justifiably be imposed upon citizens for wrongs perpetrated by their state? One response considered is what she calls *proportional distribution*. If individual state officers, for instance senior members of the state executive, including the armed forces, have themselves perpetrated wrongs, then there is a strong *prima-facie* case that the cost of discharging the state's remedial duties should be distributed to them in proportion to their wrongdoing.

But as Pasternak points out, proportional distribution faces several practical hurdles. It is very difficult to track wrongdoing to specific individuals given complex institutional structures and complex international wrongs. Even if tracking succeeds, a 'responsibility shortfall' (cf. Fabre 2016) may remain: it may not be justifiable to distribute the full cost of the state's remedial responsibility to the individuals it was possible to identify. *Non-proportional* distribution – passing on the costs to citizens at large – presents itself as a way of addressing this shortfall. The worry, however, is that non-proportional distribution represents a kind of scapegoating, where citizens suffer something close to vicarious punishment for the crimes of others. The precise question, then, is whether *non-proportional distribution* can be justified.

Pasternak offers a persuasive, tightly argued case for a middle way between the *status quo*, according to which states can be assigned remedial burdens no matter the relationship between state and people, and the proportional approach, which respects moral individualist intuitions but may not provide adequate justice for victims. She does so by drawing a distinction between *intentional citizens*, who bear the right kind of relation to their state to warrant non-proportional distribution, and non-intentional citizens, who do not. By defending a theory of collective agency – based on the work of Christopher Kutz, but with some important innovations – Pasternak derives concrete proposals for reform of the practice of public international law, providing new lines of support for debates in international jurisprudence from the perspective of social ontology and normative theory. It is thus a book that should have cross-cutting impact on these fields. Her argument is supported through reference to social-scientific data in novel and compelling fashion. In what follows, I will present a summary of the overall structure of Pasternak's argument, before identifying some gaps which call for additional theoretical work.

Pasternak accepts the thesis that states, like corporations, are group agents capable of bearing responsibility for their actions and are the proper objects of blame when those actions involve wrongdoing. Thus, states are also properly considered morally liable for the redress of their wrongdoing, a duty which Pasternak disaggregates into duties of compensation (for assessable economic losses), rehabilitation (further care to address non-economic harm), reparation (incurring retributive penalties) and non-repetition (Pasternak 2021, 27–28). The state's fulfilment of these duties involves costs. How are they to be distributed? Pasternak acknowledges that advocates of proportional distribution – she cites Stephanie Collins (2016) and Eric Beerbohm (2012) – are in a sense right: proportional distribution is essentially the ideal response, and if the state's remedial duty can be discharged through proportional distribution alone, this is to be preferred (Pasternak 2021, 150).

Distribution of costs to citizens at large can only be justified if, and insofar as, citizens are willing participants in the state. *Pace*, for instance, Anna Stilz (2011), this is

not because they *authorize* the state to act on their behalf, but because they are themselves the *authors* of the state's policies. Pasternak attributes liability to citizens through a two-step process. First, the state is a group agent that bears responsibility for its wrongful action, because it meets the conditions of morally responsible agency (cf. List and Pettit 2011). Second, citizens bear remedial liability for the state's wrongful action because (and only if) they share participatory intention (cf. Kutz 2000) each to play their part in maintaining the state *as* a functioning group agent. State members who share this intention are what she called *intentional citizens*. This two-level outlook overcomes the objection (e.g. Lawford-Smith 2019) that citizens do not fulfil the conditions of membership for morally responsible group agents. It is sufficient, says Pasternak, that core state institutions constitute such an agent, and that citizens participate in the state in a more peripheral way (Pasternak 2021, 75).

Pasternak appeals to the justification of the practice of strict liability in tort law to explain the connection between participatory intention and liability for the outcome of collective acts, something she rightly notes was under-specified by Kutz (Pasternak 2021, 60). By choosing to participate in a collective act, we gamble away a portion of control over our ability to evade costs, in return for the chance to win benefits. Citizens who are coerced or deceived into adopting the intention to maintain state institutions are not liable for costs in Pasternak's view: intentional citizenship must be *genuine*, on her account, because (following Tony Honoré) strict liability must flow from an initial choice, the choice to accept unknown risks, and if we are radically deceived about those risks, we cannot be said truly to have accepted them.

Pasternak's two-level outlook allows her to argue that citizens are not liable for burdens incurred by state agents acting *ultra vires*, outside their legitimate authority. Such actions, the thought goes, are not properly the actions of the core group agent, and thus citizens do not in any sense participate in their production (Pasternak 2021, 83). This claim, however, is arguably in tension with the claim that intentional citizenship grounds liability for the same reasons that the law allows for strict liability. Suppose the head of a state's environmental protection agency (say, because of deliberate corruption) issues licences for oil drilling activity she knows to be dangerous, in dereliction of a statutory duty to prevent dangerous drilling. The drilling leads to significant trans-boundary harm for which external parties demand redress. Pasternak's view implies that because the official was acting in breach of the role assigned her as a member of the core group agent, it would not be justified to distribute remedial costs to citizens. But in parallel with strict liability, assigning the burden of clean-up to the state, and thus to its citizens, is arguably fairer than either of the alternatives: letting the costs remain with the victims, or asking the wider international community for help. The state bears responsibility for appointing the rogue actor in the first place, even if her rogue action was unforeseeable. According to the logic of strict liability, then, citizens are responsible for taking a risk by choosing to maintain structures of group agency that permitted such an individual to gain power.

If this is an inconsistency, it is not a grievous one, because of a link Pasternak draws between intentional citizenship and democratic institutions. 'Genuine' intentional citizenship tracks democratic institutions because undemocratic states are more likely to require manipulation and deception to maintain order. Following Pasternak's lead, we might further argue that if democratic institutions are working effectively, there is

diminished potential for rogue actors to initiate wrongs so grave that repairing them would place a significant burden on citizens. Democracy involves systems of oversight – at a minimum, democracy implies the ability to remove at least some ineffective officials. If democratic institutions are not working effectively, it is less likely that citizens will be genuine intentional citizens, meaning it is not legitimate to distribute burdens to them in any case.

Another objection Pasternak thoughtfully anticipates is that it is impractical to leave the question of liability for state wrongs down to citizens' intentions – which, we might think, are not easy to ascertain – especially as it was the impracticality of 'proportional' accounts that led Pasternak to look beyond them in the first place. If we cannot gaze into citizens' minds to discover their genuine intentions, have we got much closer to justifying the imposition of burdens upon them? Pasternak's answer is to turn to social-scientific evidence, specifically, citizen attitude surveys like Eurobarometer. These include components which invite respondents to report their degree of attachment to their country, with questions like 'How attached do you feel to Germany?'. In most countries for which survey data exists, Pasternak notes, a large majority of citizens report at least some positive level of attachment to their country – for instance, in no country surveyed by Eurobarometer did fewer than 80% of respondents report attachment, and in most it was above 90%. The Afrobarometer and World Values Survey report similar numbers (Pasternak 2021, 103–4).

Attachment, Pasternak argues, correlates with 'acceptance' of membership, which correlates with intentional citizenship. For most citizens, it is not the case that they would leave their country and stop helping to maintain its institutions if they could; rather, they affirm their membership, even regarding it as an important aspect of their identity. Thus, with the exception of non-democratic states, for which we have good reason to suspect expressions of affirmation may not be 'genuine', it is safe to assume intentional citizenship is widespread and thus in most cases the non-proportional distribution of reparative burdens is justified.

A worry might linger that such surveys do not test for Pasternak's criteria for intentional citizenship as precisely as would be needed to support such a strong conclusion. Might not reports of strong affiliative sentiments for one's country track feelings of national membership, for example, rather than affiliation with state institutions in particular? Might they in some cases even simply track love of place (a possibility Pasternak does not consider)? Pasternak's response is that for most people, 'country', 'state' and 'nation' are deeply interconnected concepts, and that even nationalist theorists accept that the state is the form in which the nation organizes itself politically (Pasternak 2021, 106). This answers the nationalist objection specifically, but arguably neglects the more general concern: that Pasternak needs evidence of more than just feelings of affiliation, she needs evidence of the intention to maintain state institutions, and one can exist without the other.

Pasternak, however, has the resources to respond to this concern, even if there was room to do so more forcefully in the book. Clearly, citizens intentionally participate in the state in several ways: obeying the law, voting, performing jury duty, etc. What we need is evidence that when citizens perform these activities, they do not do them simply because of coercion, but in counterfactual conditions where coercion was absent, they would do them anyway. Reported sentiments of affirmation at least partly fill this gap.

So too, as Pasternak notes, does a lack of active political opposition and protest. It is the combination of these elements, and not affirmation alone, that is supposed to warrant our assumption that intentional citizenship is widespread.

That said, establishing the absence of ‘genuine’ intentional citizenship in undemocratic states is more problematic than establishing its presence in democracies. It is a feature of Pasternak’s account that states’ democratic status tracks intentional citizenship only contingently and loosely. What really matters is citizens’ intentions, and whether those intentions would persist even without coercion, manipulation or deception. It is in principle possible for undemocratic states with high levels of political engagement to instantiate high levels of intentional citizenship.

This unfortunately means that some problematic edge cases for the attribution of intentional citizenship are also some of the most morally pressing. It is common for states with a tightly controlled press also to display high levels of political engagement and apparent affiliative attitudes on the part of citizens (think for instance, of certain communist states, and the successors of certain former communist states). What is more, a repressive media landscape shapes a state’s culture, creating systems of endemic attitudes and presuppositions that are not easily regarded as mere deceptions. Citizens buy into deceptions to various degrees. Perhaps whether they are deceived is ambiguous, perhaps there are feedback loops between citizens’ investment in state ideology and the extent to which they are willing to accept official misinformation.

When such countries commit international wrongs, it is reasonable for the victims to feel intense resentment against the delinquent state. Plausibly, resentment is felt against the state understood as a collective entity including the citizen body, not just against state institutions or leaders. Pasternak’s account implies general distribution of retributive burdens is inappropriate for repressive states because citizen participation is not ‘genuine’. Yet the appropriateness of resentment seems to track something of moral relevance to the question of distribution.

Our thoughts turn to Strawsonian reasoning here: reactive attitudes are essentially responses to a ‘quality of will’. If that quality of will is based on a misunderstanding (false information), resentment is ultimately groundless (once the mistake is corrected). But if it is part of a less easily corrigible system of attitudes, it becomes difficult to separate a misguided quality of will from overall character. The question of whether the quality of will is ‘genuine’ becomes irrelevant to the appropriateness of reactive attitudes. This arguably extends to the quality of will embodied by the intention to participate in a state engaged in wrongdoing. If citizens are deceived on particular points of fact, the revelation of which would obviously undermine their participatory intentions, then it is easy to see why reparative costs should not distribute to them. If, however, the delusion runs so deep that it is hard to imagine how it could be corrected without radical changes to the identities of the participants, then distributed reparative burdens are perhaps still fitting.

The further specification of the conditions of ‘genuine’ intentional citizenship is just one of the avenues for fruitful future scholarship to which Pasternak’s book points us. Whatever the outcome of such scholarship, the book’s call for reform of international practice – to lift burdens from the already burdened citizens of undemocratic states – is timely and compelling.

## Disclosure statement

No potential conflict of interest was reported by the author(s).

## References

- Beerbohm, E. 2012. *In Our Name: The Ethics of Democracy*. Princeton: Princeton University Press.
- Collins, S. 2016. "Distributing States' Duties." *Journal of Political Philosophy* 24 (3): 344–366. doi:10.1111/jopp.12069.
- Fabre, C. 2016. *Cosmopolitan Peace*. Oxford, New York: Oxford University Press.
- Kutz, C. 2000. *Complicity: Ethics Law Collect Age: Ethics and Law for a Collective Age*. Cambridge: Cambridge University Press.
- Lawford-Smith, H. 2019. *Not In Their Name: Are Citizens Culpable For Their States' Actions?* Oxford, New York: Oxford University Press (New Topics in Applied Philosophy).
- List, C., and P. Pettit. 2011. *Group Agency: The Possibility, Design, and Status of Corporate Agents*. Oxford, New York: Oxford University Press.
- Pasternak, A. 2021. *Responsible Citizens, Irresponsible States: Should Citizens Pay for Their States' Wrongdoings?* Oxford, New York: Oxford University Press.
- Stilz, A. 2011. "Collective Responsibility and the State." *Journal of Political Philosophy* 19 (2): 190–208. doi:10.1111/j.1467-9760.2010.00360.x.