

# COMMENT ON MEIR DAN-COHEN, *SKIRMISHES ON THE TEMPORAL BOUNDARIES OF STATES*

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## I

### SUMMARY

Meir Dan-Cohen's elegant article<sup>1</sup> addresses a question central to the symposium of which it is a part: How can nations get past their pasts? The article first refines this question, then identifies and aims to solve a philosophical puzzle that it raises.<sup>2</sup>

Suppose members of a group or nation have wronged members of another group or nation. The latter will naturally tend to feel anger, resentment, hate, or other "reactive attitudes."<sup>3</sup> These feelings would not be brute emotional states; they would be justified stances. Yet there would seem to be instances in which victims ought—in a moral rather than a purely prudential sense of "ought"<sup>4</sup>—to *relinquish* these attitudes even though they were once justifiably held. Thus the refined question: What are the circumstances under which members of a nation ought to relinquish their hostility toward another nation that once perpetrated a wrong against them?

Now for the puzzle. Dan-Cohen observes that sentiments like resentment are necessarily past-oriented, even if they are also present- or future-oriented.<sup>5</sup> An attitude of continuing resentment might be justified even if the adverse effects of a past wrong have completely disappeared, and even if there is no reason to worry about any future victimization. So the issue of when to relinquish negative reactive attitudes cannot turn simply on changes in the

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1. Meir Dan-Cohen, *Skirmishes on the Temporal Boundaries of States*, 72 *LAW & CONTEMP. PROBS.* 95 (Spring 2009).

2. *Id.*

3. P.F. Strawson, *Freedom and Resentment*, 48 *PROC. BRIT. ACAD.* 1 (1962), *cited in* Dan-Cohen, *supra* note 1, at 5–6).

4. Dan-Cohen, *supra* note 1. Thus, Dan-Cohen stresses that the sort of act of attitude-relinquishment he has in mind is distinct from, say, the act of abandoning a negative reactive attitude as a psychological coping strategy or as some other sort of bow to practical constraints on one's ability to live with those attitudes.

5. *Id.* at 100.

wrongdoer's present demeanor or behavior, or on assurances about its future behavior. It would seem to follow, according to Dan-Cohen, that for victims to have grounds on which to relinquish resentment, something about the past has to be changed.<sup>6</sup> Yet now we seem to face an insurmountable problem in explaining how the abandonment of these attitudes is even possible. The past cannot be changed—what's done is done.<sup>7</sup>

Undaunted, Dan-Cohen proffers a solution to his puzzle that turns on an example connecting judgments about the significance of changes in territorial borders for attributions of responsibility with those for changes in “temporal boundaries.”<sup>8</sup> He asks us to imagine that a pollutant is being generated within the nation of Arcadia, near a border between it and neighboring nation *N*.<sup>9</sup> The pollutant travels to and causes damage in *N*.<sup>10</sup> Arcadia is morally responsible for causing the damage.<sup>11</sup> At later time *t*, borders are redrawn, such that the pollutant's source is no longer located within Arcadia. At that point, he says, Arcadia will be deemed no longer responsible for pollution damage in *N* traceable to the source that previously had been located in Arcadia.<sup>12</sup>

To be useful, the Arcadia example requires further specification in at least three respects. As presented, it contains an ambiguity about whom or what is being held responsible for the pollution damage, and in doing so avoids thorny questions of individual and collective responsibility. Dan-Cohen says “Arcadia” can be held responsible for harm traceable to those pollutants released up to time *t*.<sup>13</sup> Does he mean the top leadership of the Arcadian government, mid-level bureaucrats charged with the responsibility of regulating the emission of pollutants, individual citizens who operated or failed to contain the source of the pollutant, or all Arcadian citizens at a given time (for example, the time at which the government or citizens of *N* complain of environmental damage)? Second, the identity of the aggrieved party or parties is unclear. Is it the government of *N*, the owner(s) of adversely affected land(s) in *N*, citizens of *N* who would have enjoyed using it had it not been polluted, or all citizens of *N*? Third, Dan-Cohen does not indicate whether the polluting activity was wrongful. If, for example, an unforeseen natural disaster caused the escape of pollutants from Arcadia to *N* before time *t*, one will be prone to suppose officials or citizens of *N* have no grounds for resentment.

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6. *See id.* at 95 (asking whether and how past resentments can be overcome).

7. *Id.* This puzzle is not raised in a skeptical spirit. Dan-Cohen is not suggesting that practices like forgiveness and reconciliation are incoherent. Quite the opposite, he credits these practices as cogent, but wants to know how it is possible for them to operate as they do.

8. *Id.* at 101.

9. *Id.* at 101–03.

10. *Id.*

11. *See id.* (noting that Arcadia bears responsibility and is required to reduce the harmful effects and to pay damages).

12. *Id.*

13. *Id.*

In what follows, I will assume that Dan-Cohen has a case something like the following in mind. A public-works project is undertaken by the Arcadian government that involves excavations near the border with *N*. To the government's knowledge, the excavation could easily be done in a way that does not cause a release of damaging pollutants, yet is done so as to release pollutants that adversely affect public and private land in *N*. *N*'s resentment—anger, annoyance, and frustration harbored by both citizens and officials—is directed at top Arcadian officials who approved the project notwithstanding their knowledge that it involved the gratuitous release of pollutants. Later, at time *t*, Arcadia's borders are redrawn as a result of a treaty, such that the excavation ceases to involve the participation of Arcadian citizens or to be subject to the control of any Arcadian citizen or official, but instead is in the control of some other nation. With respect to post-*t* polluting activity, Dan-Cohen says, there would be no grounds for members of *N* to resent Arcadia.<sup>14</sup>

We can now appreciate the crux of Dan-Cohen's argument. As there can be the sort of change in territorial boundaries that serves to undermine the basis for continued negative reactive attitudes on the part of *N*'s officials and citizenry toward Arcadia, so there can in principle be a shift of Arcadia's "temporal" boundaries that likewise serves to undermine the basis for continued negative reactions on the part of *N*'s officials and citizenry. In some instances, the passage of time renders events that were once attributable to a political entity no longer attributable to it.

Dan-Cohen acknowledges a facial disanalogy between territorial and temporal boundaries. The redrawing of territorial borders involves observable changes in physical space, whereas changes in a nation's temporal boundaries do not.<sup>15</sup> The point in time when an event is no longer attributable to a nation cannot be observed in the same way that, in principle, a territorial border can be observed.<sup>16</sup> Indeed, by comparison, the notion of temporal borders seems elusive. But Dan-Cohen rightly argues that this disanalogy is only apparent. Territorial border changes are not just a matter of physical relocation; they are normative.<sup>17</sup> To say that the pollution caused by an activity is no longer Arcadia's responsibility because, as a result of a border change, the activity no longer takes place in Arcadia, is not to utter a proposition simply of geography, for it must also include political and legal claims about jurisdiction.<sup>18</sup>

According to Dan-Cohen, once we see that political-entity responsibility can disappear with changes in territorial borders, and that changes in territorial borders are normative rather than purely physical, we are in a position to solve

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14. See *id.* at 101–02 (noting how a boundary change can operate to relieve Arcadia of responsibility); see *id.* at 102 (arguing that hostile reactive attitudes should cease when Arcadia is relieved of responsibility through the redrawing of borders).

15. *Id.* at 103.

16. *Id.*

17. *Id.* at 104.

18. *Id.*

the philosophical puzzle of how the passage of time might permit a nation to be relieved of responsibility for a past wrong. When polluting activity *A* ceases to take place in Arcadia by virtue of a change in its territorial borders, Arcadia ceases to be responsible for it.<sup>19</sup> By the same token, when a shift in temporal boundaries causes an act or discrete sequence of events to no longer be the act of (present-day) Arcadia, Arcadia is no longer responsible for it.<sup>20</sup>

To fill out the idea of a temporal border-shift, Dan-Cohen invokes a distinction between memory and history. Memory, he says, inescapably includes an element of reflexivity—when one recalls or describes a memory, one is linking oneself to the past event as a participant.<sup>21</sup> (“I was there.” “We did it.” “It happened to me.”) History, by contrast, is third-personal.<sup>22</sup> (“He was there.” “They saw it.” “It happened to them.”) One way to comprehend the idea of a temporal border-shift that justifies relinquishment of resentment for a past wrong is to identify, to the extent possible, a point at which that wrong ceases to be a part of a nation’s first-personal “memory” and instead becomes a piece of third-personal history.<sup>23</sup> Crucially, the past wrong is not erased or forgotten. Rather, it is “unremembered,” that is, disowned as “not *our* doing.”<sup>24</sup> The phenomenon of unremembering—transforming memory into history—is what permits the past to be changed in the relevant sense, such that victims of wrongs would have a moral reason to relinquish their negative reactive attitudes toward a nation that had once wronged them.<sup>25</sup> The point at which a past wrong becomes part of a nation’s history rather than its memory is the point at which victims ought to get past the past.

## II

### COMMENTARY

As we proceed to critical commentary, it will be helpful to issue a reminder as to the particular aspirations of Dan-Cohen’s article. It first poses the normative question of when a nation (or its people) should relinquish its (or their) negative reactive attitudes toward mistreatment at the hands of another nation (or its people).<sup>26</sup> This question generates the philosophical puzzle of how it is possible for actors to undo the past.<sup>27</sup> The article is then devoted to solving the puzzle by explaining that actors can undo the past in the particular sense of

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19. *Id.* at 106.

20. *Id.*

21. *Id.* at 109.

22. *See id.* at 109.

23. *See id.* at 112 (noting that British citizens no longer identify with the British victory over the French at Waterloo once the memory of the victory becomes third-person history).

24. *Id.*

25. *Id.*

26. *Id.* at 95–96.

27. *Id.*

dissociating a past event from a presently existing entity.<sup>28</sup> Having done so, it does not attempt to answer the initial normative question. This is not a criticism, just an observation: Dan-Cohen is not concerned here with identifying grounds for determining when an action or event qualifies as a piece of history.

What, then, of the philosophical puzzle and his proposed solution? Unfortunately, neither seems compelling. Part of the problem resides in yet another ambiguity contained within the territorial-boundaries analogy on which Dan-Cohen relies. Let us grant that a shift in Arcadia's territorial borders that results in a polluting activity no longer taking place "in Arcadia" provides grounds for concluding that Arcadia (or some or all of its citizens) is (or are) no longer responsible for the harms that the activity has generated in neighboring nation *N*. Whether this example makes the case for recognizing temporal boundary-shifts as a comparable ground for dissolving responsibility depends on what the example is meant to establish. If it is meant only to support a very modest claim about the *intelligibility in principle* of normative boundary changes, then it is sound enough. Here the aim would be to establish merely that we are, at least in one context, prepared to treat as real, rather than fantastical, the idea of not-purely-physical boundary changes. This in turn permits us to reject the idea that there is some sort of knock-down, blanket objection to the intelligibility of a proposition that other normative boundaries, including temporal boundaries, might change. But the intelligibility version of the territorial-boundary analogy does no more than this. It therefore leaves most of the work still to be done in figuring out whether we should actually accept that a shift in temporal boundaries is a reason for victims of wrongdoing to relinquish their resentment.

A stronger version of the analogy could establish not merely the intelligibility of nonphysical boundary changes, but also the *propriety*, at least *prima facie*, of recognizing temporal boundary-shifts as a ground for relinquishing negative reactive attitudes. Unfortunately, the stronger version fails. As Dan-Cohen recognizes, spatial border-shifts lack a critical entailment that, in his rendering, temporal boundary-shifts must have. The spatial border-shift in the Arcadia example at most absolves it of responsibility on a going-forward basis for pollution-related harm traceable to polluting activities *after* time *t*.<sup>29</sup> It does not absolve Arcadia of its responsibility for its pre-*t* polluting activity.<sup>30</sup> Yet the idea of temporal boundary-shifting is invoked to justify absolution for a *past wrong*.<sup>31</sup> Thus, the spatial border-shift example does not accomplish what the idea of the temporal border-shift is meant to accomplish: to provide grounds on which a victim of a completed wrong would have reason to relinquish her negative reactions to that wrong.

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28. *See id.* at 107–14 (discussing the transition from memory to history).

29. *Id.* at 101.

30. *Id.*

31. *Id.* at 102.

There is another problem with Dan-Cohen's argument apart from the weakness of the spatial boundaries metaphor, one which resides in the framing of the puzzle that the metaphor is meant to help solve. Suppose that victims' reactive attitudes are ineluctably past-oriented. Does it follow that alteration of the past is a necessary condition for overcoming them? Surely not. The question instead—as Dan-Cohen at one-point seems to acknowledge<sup>32</sup>—is whether there are grounds *at present* for dissociating a nation from a wrong that was at one time attributable to it. Such a dissociation is certainly an intelligible idea, and Dan-Cohen effectively uses the memory–history distinction to help capture it. Still, recognition of its intelligibility does not offer a solution to the initially stated but irrelevant conundrum of “how to change the past.” Instead, what we are concerned with is the terms on which past acts can appropriately be attributed to a present actor.

There are also reasons to question whether the particular form of dissociation that Dan-Cohen describes by means of the memory–history distinction is really apt for victims of past wrongs. Here it will be useful to consider a counterpart for individuals to the exculpatory mechanism he envisions for nations. Imagine a person who argues that a victim of his wrong should no longer bear ill-will toward him because he has been “born again.” Imagine further that there is behavioral evidence backing this claim—that since committing the wrong, the wrongdoer has chosen selflessly to devote himself to a life of good works. And then imagine that, whenever this person is asked about the wrong he committed, he states with sincerity and some justification, “That was not my doing. That was the doing of someone I used to be. I do not deny that it happened, nor do I make excuses for it. Yet I insist that it is an event in which ‘I’—meaning the person I am now—did not participate.” This sort of claim would aim for the type of dissociation between agent and wrong that Dan-Cohen contemplates for nations or peoples. Should we conclude that the victim of this wrongdoer now ought to relinquish her resentment toward the wrongdoer because the wrong can in some sense be said to belong to history rather than to the memory of the wrongdoer?<sup>33</sup>

We should not. If the question at hand were whether the wrongdoer can legitimately point to his transformation as a ground for disavowing the past wrong, the conclusion might be “yes.” That is, our imagined repentant wrongdoer seems to make a credible argument that he should be entitled to dissociate himself from the past wrongful act in some contexts, for some purposes. For example, he might be entitled to ask of new acquaintances or

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32. *Id.* at 100 (“The belief that the past is unchangeable pertains only to . . . the events themselves. This does not preclude the possibility that the subject might change, particularly in such a way as to no longer be the subject of these events.”).

33. This sort of plea differs subtly from a plea in which a wrongdoer offers an excuse asserting he “was not himself” at the time of the commission of the wrong because of a condition such as a mental illness. The latter sort of excuse seeks absolution by dissociating the wrong from the agent who did it, but the grounds for dissociation are not that changed circumstances have somehow rendered the wrongdoer a new agent who bears no responsibility for acts committed by the agent he once was.

prospective employers who happen to learn of the past wrong that they ignore that event in forming their assessments of him. But if the question instead concerns the conditions under which the victim should relinquish her negative reactive attitudes toward this person, the opposite answer seems more compelling. The victim is *entitled* to continue to regard this person as the same person who wronged her—to deny the “born-again” person his attempt to dissociate himself from the past wrong. Dan-Cohen seems to believe that if a nation can disconnect itself from its past wrongs, then it is appropriate for victims to “move on” and abandon any remaining ill feelings toward wrongdoers.<sup>34</sup> But the issue of disavowal is distinct from the issue of relinquishment. The latter turns as much on the reasons that victims may have for letting go of their reactive attitudes as it does on the reasons that bear on the wrongdoer’s culpability for past wrongs. Victims, in other words, enjoy a privilege to continue to associate the wrong with the wrongdoer, even though the wrongdoer can identify moral reasons that disfavor continuing that association.<sup>35</sup>

The case of a natural person seeking to disclaim a past wrong sheds light on a related weakness in Dan-Cohen’s argument for permitting nations to dissociate themselves from past wrongs. The difference tracks one between biography and history. In assessing the acts of the person who wronged her, a victim benefits from a conventional moral principle or assumption that the biological life of one person is a single life rather than multiple lives. Although it may be the case that there are people whose lives are properly understood as multiple lives, a victim in most circumstances will be justified in declining to accord that treatment to an individual who has done her wrong. There does not seem to be any comparable presumption of attribution with respect to the “lives” of nations. Indeed, the opposite presumption probably applies—that the actions of persons in a given era or generation are *not* the acts of persons who live in later times. This presumption is what permits subsequent generations of citizens of the same political entity to say, with substantial credibility, that a wrong committed by their forefathers was the wrong of their forefathers, not theirs. Of course it might still be the case that, as heirs to those forefathers, members of later generations owe some responsibility to the original victims or to heirs of those victims. For example, to the extent the wrong of the forefathers have enriched their heirs, the latter may have an obligation to make restitution to the victims or their heirs. Still, this is not to say that the wrong in question was *the doing of the heirs*.

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34. Thus, at one point Dan-Cohen frames his inquiry as one that aims to identify the conditions that would “require” victims to relinquish their negative reactive attitudes. Dan-Cohen, *supra* note 1, at 96.

35. This, of course, is not to say that victims are morally entitled to act on their negative reactive attitudes toward the wrongdoer in all the ways they might wish. At a minimum, however, they may justifiably refuse to associate with him, to deny him forgiveness, and the like.

By isolating the basic difference in personal and political identity just described, it is clearer that the resolution to the normative question with which Dan-Cohen is concerned will *not* turn on the identification of standards for determining when a nation has ceased to be the nation it once was. Instead, it will turn on the articulation of principles that determine when it is appropriate to attribute some derivative or secondary form of responsibility to a person (or nation) for a wrong perpetrated in the first instance or more immediately by another actor or actors. The issue, in other words, is not whether the actor can dissociate himself from a past wrong by *disowning* it—by rendering it “history” rather than “memory.” It is whether, even granted that the wrong is a bit of “history,” the present-day person (or nation) can nonetheless be held to account for it on a theory of complicity or inherited responsibility.

Finally, Dan-Cohen probably errs in framing the puzzle of reconciliation among nations in the face of past wrongs as the problem of when it is appropriate for victims to *relinquish* their negative reactive attitudes. Relinquishment sets an extremely high bar—one too high for both international relations and interactions among individuals. This point is best appreciated by means of a contrast between Dan-Cohen’s notion of relinquishment and the conception of forgiveness influentially articulated by Jean Hampton.<sup>36</sup>

Writing about individuals, Hampton describes forgiveness as a successful effort on the part of a victim to separate her judgments about a wrongdoer’s wrongful act from the wrongdoer him- or herself. On her account, forgiveness involves an overcoming of hatred for the actor who has committed the wrong, such that the victim is prepared to deem the wrongful act to be uncharacteristic of the actor. The forgiven actor is one who is deemed by the victim as not “rotten” to the core.<sup>37</sup> The wrongdoer is not forgiven on the grounds that he can disavow the wrong as not his. This is why Hampton believes that a victim can forgive a wrongdoer yet still desire to see the wrongdoer punished for the wrongful act.<sup>38</sup> Forgiveness does not involve recognition of the wrongdoer as a different being from the one who perpetrated the wrong. Rather, the forgiving victim recognizes that the wrongdoer, notwithstanding his wrong, is a human with a capacity for goodness who, as such, ought to be deemed worthy of being treated with civility and respect notwithstanding the past wrongdoing.

It already asks a lot, in the charged realm of international relations, to expect Hamptonian forgiveness. To go further—to look for grounds that would warrant the entire relinquishment by victims of the negative reactive attitudes they hold toward their wrongdoers—is to seek a standard of reconciliation befitting angels, not humans.

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36. JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 35 (1988).

37. *Id.* at 83.

38. *Id.* at 157–58.