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Race, Rights, and Justice



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out-group in U.S. society, which very much lies at the underbelly of the issue of affirmative action in the U.S.: “I felt myself slip in and out of shadow, as I became nonblack for purposes of inclusion and black for purposes of exclusion; I felt the boundaries of my very body manipulated, causally inscribed by definitional demarcations that did not refer to me.”³⁶

The nature and value of rights have an epistemic dimension. Rights possession is not contingent on knowing that one has a right, though exercising rights implies such knowledge.³⁷ This is a fact about rights that is often overlooked in discussions of them, leading to confusion.

Consider the case of privacy. In addition to Feinberg’s analysis of the nature and value of rights, I submit that *persons must, for purposes of their having human dignity and having it respected normally, know that they can claim privacy rights and know how to do so effectively*. For even if one knows that one has a moral right to privacy, one might not know that the legal system permits one to claim it. Furthermore, even if one knows that the system permits, or even encourages, one to claim a certain right under a given circumstance, one might not know *how* to claim the right effectively, that is, so that one’s right stands a good chance of being respected. But even this is insufficient for human dignity in a full sense. For *one must also have the ability to claim one’s right* over those who are setting back one’s interest, or against those who are about to do so.

Feinberg is correct, then, in arguing that the value of rights in general is that they provide a context for self-respect, respect for others, and human dignity. And this general value that rights possess seems to be true of the putative right to privacy also. But whereas Feinberg’s imagined society of those who possess no rights (“Nowheresville”) shows us of what a society without rights deprives its citizens, a society whose citizens possess no right to privacy lacks something even more significant.

³⁶ Williams, *The Alchemy of Race and Rights*, p. 10.

³⁷ This is a distinctively Feinbergian conception of rights, one found in Feinberg, *Social Philosophy; Rights, Justice, and the Bounds of Liberty; Freedom and Fulfillment*, Chapters 8–10; *Problems at the Roots of Law* (Oxford: Oxford University Press, 2003), Chapter 2. For more on rights, see Loren Lomasky, *Persons, Rights, and the Moral Community* (Oxford: Oxford University Press, 1987); David Lyons, Editor, *Rights* (Belmont: Wadsworth Publishing Company, 1979); A. I. Melden, Editor, *Human Rights* (Belmont: Wadsworth Publishing Company, 1970); James Nickel, *Making Sense of Human Rights* (Berkeley: University of California Press, 1987); L. W. Sumner, *The Moral Foundation of Rights* (Oxford: Clarendon Press, 1987); Judith J. Thomson, *The Realm of Rights* (Cambridge: Harvard University Press, 1990); Carl Wellman, *The Proliferation of Rights* (Boulder: Westview Press, 1999); *A Theory of Rights* (Totowa: Rowman and Littlefield Publishers, 1985); Morton E. Winston, *The Philosophy of Human Rights* (Belmont: Wadsworth Publishing Company, 1989).

Consider a society, not unlike Feinberg's Nowheresville, call it "Publicsville." In Publicsville, every citizen has an array of rights to possess property, raise a family, to certain medical benefits, etc. But what Publicsvillians lack is a right to *privacy*. Thus whatever one does, there is no safeguard against the public's intrusion into one's life at any level. This implies that to whatever one has a claim (say, to property, medical benefits, etc.), one has no claim against another for their disrespecting any information or act that one desires to keep private. In fact, Publicsville is so privacy-rejecting that it demands of its citizens to, say, reveal information about themselves upon either the request of other citizens or the government itself! A rather intrusive society, Publicsville frowns on attempts of citizens even to *seek* to keep private anything about themselves.

It would seem that what the citizens of Publicsville lack is a certain degree of control over their own lives, actions, and how others perceive them. It is certainly true that as a general principle, "the more one knows about a person, the greater one's power to damage him."³⁸ Moreover, it is arguable that the reason why such citizens cannot become true selves is that each is likely to exist under a fear of being "found out" for expressing or holding certain unpopular views, or for being intimate with others in ways that are deemed by others as being inappropriate, etc. In short, Publicsvillians lack a tremendous amount of personal freedom to determine their own destinies in terms of love, friendships, and the like. For it would appear that a certain level of privacy, and a right to it being respected, is necessary for one to even attempt to become an authentic (project-pursuing) self in society.

So if Feinberg is correct in arguing that rights are valuable for self-respect, respect for others, and human dignity, it also seems that a right to privacy is necessary for there to even be a self to respect! And if there is no self to respect, the concept of human dignity seems nonsensical. Thus if rights in general are necessary for self-respect, respect for others and human dignity, the right to privacy is needed to protect a citizen's interest in becoming or maintaining a *self to respect*. And this in turn is necessary for human dignity. As Charles Fried argues, "a threat to privacy seems to threaten our very integrity as persons."³⁹

³⁸ Stanley I. Benn, "Privacy, Freedom, and Respect for Persons," in Ferdinand Schoeman, Editor, *Philosophical Dimensions of Privacy* (Cambridge: Cambridge University Press, 1984), p. 226.

³⁹ Charles Fried, "Privacy [a moral analysis]," in Ferdinand Schoeman, Editor, *Philosophical Dimensions of Privacy* (Cambridge: Cambridge University Press, 1984), p. 205.

It would seem that the right to privacy, contrary to J. J. Thomson's claim that it is derivative,⁴⁰ is often part of a cluster of rights that is so fundamental that it might properly be termed a moral right, one to which each is entitled equally with others by virtue of one's status as a person. For it is necessary both for self-respect and respect for others, *and* for a citizen's attempt to become or maintain a self to respect.⁴¹ And if moral rights are those which seek to protect human dignity, then rights in general and the right to privacy in particular are crucial to the extent that they seek to protect from harm those who respect persons.⁴²

However, *just as it was insufficient for human dignity that one possess rights, or for one to even know that one has them, it must also be true that in order for human dignity to obtain, one must know that one can claim one's right to privacy, know how to do that effectively, and actually be able to claim one's privacy right.* For it is difficult to imagine a self that has no knowledge that the right to privacy can be claimed, or how it might be claimed effectively. Moreover, a self must be able to claim a right to privacy. Thus there may be laws about privacy, yet social circumstances (for instance, racism, sexism, etc.) might not permit such claims, even though they are morally valid.

With these basic ideas of rights in mind, we can now approach a long-standing problem in political philosophy concerning rights, political liberalism, and Marxism. It is a problem in how best to conceptualize the political marketplace of theories about how we ought to structure our legal and political institutions, and why. These are, by the way, fundamental questions that must be addressed in light of the ongoing attempts to construct a viable international legal system as substantial numbers of people in the world live under regimes that are, in one way or another, liberal or Marxist. If it can be shown that the traditional view of what separates liberal societies from Marxist ones is facile and problematic, then it can be replaced with a more plausible way to construe rights from these different perspectives, one that might guide international lawmakers in reaching consensus on the content of rules to govern the international order.

⁴⁰ J. J. Thomson, "The Right to Privacy," *Philosophy and Public Affairs*, 4 (1975), pp. 295–314.

⁴¹ This analysis of the moral value of privacy is not inconsistent with Rachels' claim that privacy is important in that it enables persons to control or regulate their own relationships with others [See James Rachels, "Why Privacy is Important," in Ferdinand Schoeman, Editor, *Philosophical Dimensions of Privacy* (Cambridge: Cambridge University Press, 1984), pp. 290–299. It is also congruent with the functional notion of the value of privacy found in Jeffrey L. Johnson, "A Theory of the Nature and Value of Privacy," *Public Affairs Quarterly*, 6 (1992)].

⁴² A similar point is made in Jeffrey Reiman, "Privacy, Intimacy, and Personhood," in Ferdinand Schoeman, Editor, *Philosophical Dimensions of Privacy* (Cambridge: Cambridge University Press, 1984), pp. 310–311.

The Traditional Interpretation of Karl Marx's Critique of Rights⁴³

It has been argued⁴⁴ by Allen Buchanan that in Marx's essays "On the Jewish Question" and "Critique of the Gotha Program," we find both an "internal" and an "external" critique of rights.⁴⁵ By "internal critique," Buchanan means a criticism that is provided from *within* the general framework of the belief system being appraised. An external critique, on the other hand, is one that is given from outside some or all of the fundamental beliefs of the targeted position.

The "Internal Critique"

Buchanan's version of Marx's *internal critique* of rights is as follows. According to Marx, the so-called "rights of man" are legal rights⁴⁶ and are regarded as a species of human rights.⁴⁷ Marx claims, "the rights of man

⁴³ For a condensed version of this section of this chapter, see J. Angelo Corlett, "The Marxist Critique of Human Rights," in Rhonda K. M. Smith and Christian van den Anker, Editors, *The Essentials of . . . Human Rights* (London: Hodder Arnold, 2005), pp. 247–249.

⁴⁴ Allen E. Buchanan, *Marx and Justice* (Totowa: Rowman and Littlefield Publishers, 1982), pp. 50–85.

⁴⁵ R. G. Peffer [*Marxism, Morality, and Social Justice* (Princeton: Princeton University Press, 1990), pp. 324–28] holds the view, considered and rejected by Buchanan, that Marx rejects rights as such in "On the Jewish Question" (1843), but condemns only "bourgeois" rights in "Critique of the Gotha Program" (1875). The implication here seems to be that Marx may have toned down his critique of rights over the years.

Note that Peffer's interpretation of Marx on rights is similar to Buchanan's in insisting that Marx criticizes rights as such in "On the Jewish Question." However, their respective views differ when it comes to the matter of whether or not Marx criticizes only bourgeois rights. For Buchanan denies what Peffer affirms, namely, that Marx criticizes only bourgeois rights in his later work.

Others who agree that what Marx writes about rights is essentially negative and that he sets forth a general critique of rights include Feinberg, "In Defense of Moral Rights," and John Tomasi, who attributes to Marx the claims that "Rights are conflict notions. . . . rights are no more essential to healthy human groupings than band-aids are to healthy human bodies" [John Tomasi, "Individual Rights and Community Virtues," *Ethics*, 101 (1991), p. 521]. Also see James W. Nickel, *Making Sense of Human Rights* (Berkeley: University of California Press, 1987), pp. 116–117 for a view of Marx and rights similar to Buchanan's.

⁴⁶ Buchanan, *Marx and Justice*, p. 60.

⁴⁷ Buchanan, *Marx and Justice*, p. 61.

are valuable only for egoistic, isolated man.”⁴⁸ Marx nowhere advocates the replacement of the defective capitalist right to private property with a superior communist right to property.⁴⁹ Marx calls talk about rights “absolute rubbish” and “ideological nonsense.”⁵⁰ In communism, Marx believes, the sources of conflict will be so diminished that there will be no need for a system of rights claims to *guarantee* the individual’s freedom to enjoy his share of the social product or to *guarantee* him a share of control over the means of production.⁵¹ The right to equality is not in fact egoistic, contrary to Marx.⁵² Marx assumes that any society where there is potential for interpersonal conflict warranting a system of rights, the purpose of which is to limit such conflict, is defective.⁵³ Only this assumption is adequate to explain Marx’s “scorn for rights in general, his attack on *all* the rights of man, . . . and his deliberate refusal to characterize communism as a society in which an appropriate conception of rights is effectively implemented.”⁵⁴

There is, according to Buchanan, a degree to which Marx’s critique of the rights of man carries over to the “rights of the citizen.”⁵⁵ Marx avers that the rights of the citizen give free reign in private life to differences in wealth, education, . . .⁵⁶ Advocates of the rights of the citizen, Marx argues, help perpetuate the illusion that the state is above clashes of class interests in society.⁵⁷ These last claims in Marx together imply that in communism the rights of the citizen will no longer be needed.⁵⁸ For Marx, the rights of the citizen exist only in opposition to the rights of man, and the rights of the citizen are needed only where the rights of man are needed and valued.⁵⁹

⁴⁸ Buchanan, *Marx and Justice*, p. 62. Nickel argues that Marx claims that the “rights of man” are egoistic in three ways. First, they perpetuate an egoistic mentality. Second, they encourage right holders to decide issues that affect others purely on the basis of their private interests. Third, they divide people so that the development of community is thwarted. See James W. Nickel, “Marxism and Human Rights,” *42nd Annual Northwest Conference on Philosophy*, University of Oregon, Eugene, 1990.

⁴⁹ Buchanan, *Marx and Justice*, p. 63.

⁵⁰ Buchanan, *Marx and Justice*, p. 64.

⁵¹ Buchanan, *Marx and Justice*, p. 64.

⁵² Buchanan, *Marx and Justice*, p. 64.

⁵³ Buchanan, *Marx and Justice*, p. 64.

⁵⁴ Buchanan, *Marx and Justice*, p. 64.

⁵⁵ Buchanan, *Marx and Justice*, pp. 64–65.

⁵⁶ Buchanan, *Marx and Justice*, p. 64.

⁵⁷ Buchanan, *Marx and Justice*, pp. 64–65.

⁵⁸ Buchanan, *Marx and Justice*, p. 65.

⁵⁹ Buchanan, *Marx and Justice*, p. 65.

According to Buchanan, then, Marx holds that the rights of man are valuable only for egoistic persons in a capitalistic society. I shall refer to this as Marx's (alleged) "Rights Egoism Thesis." Marx also holds, according to Buchanan, that both the rights of man and the rights of the citizen have no value and place in communism.⁶⁰ I shall refer to this as Marx's (alleged) "Rights Nihilism Thesis." Marx's supposed argument for these two theses about rights, as presented by Buchanan, may be summarized as follows:

- (1) Rights are legal guarantees for such freedoms as those specified by the rights of the citizen and the rights of man, and they are needed only where there is a potential for serious infringements of freedoms.
- (2) Such infringements of freedoms can arise *only* from clashes of class interests and the egoism to which class conflict gives rise.
- (3) There will be no classes in communism, hence no clashes of class interests, and no egoism as a result.
- (4) Thus, there will be no need in communism for the rights of man (or those of the citizen) as legal guarantees.⁶¹

The "External Critique"

Marx's *external critique* of rights, argues Buchanan, takes the form of a series of replies to the question, "Does Marx reject only certain bourgeois rights, but not rights *per se*?" Buchanan's answer to this query is negative.

First, says Buchanan, Marx nowhere says bourgeois rights will be replaced by other rights in communism.⁶² Second, Marx heaps scorn on equal rights and other rights as well.⁶³ Finally, in his "Critique of the Gotha Program," Marx says the *very concept of a right* implies equality, but when an equal standard is applied to individuals, they are treated unsatisfactorily. This, argues Buchanan, is Marx's critique of rights *as such*.⁶⁴ Buchanan cites as his textual support for this claim the following passage from Marx:

But one man is superior to another physically and mentally and so supplied more labour in the same time, or can labour for a longer time; and labour, to serve as a measure, must be defined by its duration or intensity, otherwise it ceases to be a standard of measurement. This equal right is an unequal right for unequal labour. It recognizes no class differences, because everyone is only a worker like everyone

⁶⁰ Buchanan, *Marx and Justice*, p. 65.

⁶¹ Buchanan, *Marx and Justice*, pp. 66–67.

⁶² Buchanan, *Marx and Justice*, p. 68.

⁶³ Buchanan, *Marx and Justice*, p. 68.

⁶⁴ Buchanan, *Marx and Justice*, p. 68.

else; but it tacitly recognizes unequal individual endowment and thus productive capacity as natural privileges. It is, therefore, a right of inequality, in its content, like every right. Right by its very nature can consist only in the application of an equal standard insofar as they are brought under an equal point of view, are taken from one definite side only, for instance, in the present case, are regarded only as workers and nothing more is seen in them, everything else being ignored. Further, one worker is married, another not, one has more children than another, and so on and so forth. Thus, with an equal performance of labour, and hence an equal share in the social consumption fund, one will in fact receive more than another, one will be richer than another, and so on. To avoid these defects, right instead of being equal would have to be unequal.⁶⁵

Foundations of an Alternative Interpretation of Marx on Rights

Prior to assessing Buchanan's arguments, it is important to be mindful of some crucial distinctions concerning Marx and rights possession. First, one might contend that Marx failed to acknowledge that persons have rights. Second, one might hold that Marx held a position one of whose unacknowledged (and possibly unrecognized) implications is that persons have no rights. Third, one might aver that Marx acknowledged that none of the rights of persons should be enforced by institutional structures of law. Fourth, one might argue that Marx held a position one of whose unacknowledged (and possibly unrecognized) implications is that none of the rights of persons should be enforced by institutional structures of law. And with each of these views, one must ask whether or not Marx is thinking about rights *per se*, rights in capitalism, or rights in communism. This complicates matters considerably beyond the rather simplistic analysis set forth by Buchanan that asks in general and, it turns out, bifurcated terms whether or not Marx condemns rights *per se* or whether or not there is room for rights in a genuinely Marxist regime.

Now Buchanan does not clarify precisely what he himself means when he claims that Marx rejects rights *per se*. Yet it is clear that he interprets Marx as rejecting rights *per se*, i.e., both in capitalism, communism, and in any other social order. In contrast to Buchanan, I argue that Marx rejects only *some* rights-claims *in capitalism*, and that Marx holds a position one of whose unacknowledged (and perhaps unrecognized) implications is that persons do have some rights. I shall further argue that it is not inconsistent with Marx's

⁶⁵ See *Karl Marx: Selected Writings*, Edited by D. McLellan (Oxford: Oxford University Press, 1977), pp. 568–569.

philosophy to add that at least some such rights ought to be protected by legal rules. Later on it will become clear why I attribute this view of rights to Marx.

Difficulties with Attributing the “Internal Critique” to Marx

Let us consider the plausibility of Marx’s alleged internal critique of rights. Are the Rights Egoism Thesis and the Rights Nihilism Thesis plausible? The best way to decide this is to consider the soundness of (1)–(4) above, an argument which is supposed to support them.

Even if (1) is true, (2) is false. Marx does believe that infringements of freedoms do arise out of clashes of class interests (and the egoism to which such clashes give rise), but it is tenuous to ascribe to Marx the unfounded belief that clashes of class interests are the *sole* source of such infringements. Why must Marx believe that clashes of class interests are the “*only*” source of egoism? Cannot clashes of *individual* interests also give rise to egoism? Cannot infringement of freedoms result from a weakness of the will, quite apart from egoism? Cannot such infringements result from a miscalculation of the consequences of one’s own actions, without such actions being egoistic in any meaningful sense? How can Marx be saddled with (2) in light of these obvious possibilities? Buchanan gives no citation from Marx to support his attribution of (2) to Marx. Taking all these considerations together, Buchanan’s attributing (2) to Marx is a violation of the principle of interpretive charity. Thus (1)–(4) fail as a plausible ascription to Marx.

But (1)–(4) are also not properly attributable to Marx because from the supposition that there will be no classes in communism, and hence no clashes of class interests, it fails to follow that egoism will be eliminated. Again, egoism might result from the illegitimate pursuit of *individual* interests in communism. To assert that Marx holds (3) is uncharitable in that it is an invalid inference,⁶⁶ not to mention the fact that Buchanan fails to inform readers as to the basis of this attribution to Marx.

Buchanan might reply that Marx *does* state that there are different individual interests in communism, but that there will be such harmony of interests that rights conceptions are not needed to maximize the common good.⁶⁷ However, there are problems with this reply. First, it assumes that Marx is a utilitarian (or somewhat of one) in that the purpose of communism is to “maximize the common good.” But Marx does not give us a sufficiently de-

⁶⁶ Unless, of course, it can be *shown* that Marx holds such a position.

⁶⁷ Buchanan, *Marx and Justice*, pp. 166–167.

tailed picture of a communist regime such that this utilitarian description of it is justified. Moreover, it is unclear that a communist society, in Marx's sense, would undermine the separateness of persons and self-respect in the way that utilitarianism does.⁶⁸ Second, Buchanan's use of "such harmony of interests" implies a utopian view of communist society, something Marx goes to great lengths to denounce in the *Communist Manifesto*. Third, Buchanan wrongly assumes that Marx thinks there is "no need" for rights where there is no clash of (class) interests and egoism. But this confuses the need to exercise a right with the need to respect rights. One can do more than exercise a right. One may simply enjoy having one's right respected, something which does not require a clash of interests or egoism. In fact, even if (contrary to fact) Marx did claim that communism will be a utopian society, the claim that a communist society needs no rights is false. For such a society, just is one in which the rights of everyone are perfectly respected. Furthermore, rights have significance even when no claim is asserted. Voluntary decisions not to assert claims to rights can provide meaning to certain virtues.⁶⁹

Thus Buchanan does not succeed in showing that Marx holds (3) [or that Marx has to hold (3) to avoid contradiction]. Moreover, (3) is not an unproblematic claim quite apart from whether or not Marx holds it. This makes the argument consisting of (1)–(4) unsound. It follows that, for all Buchanan claims, neither the Rights Egoism Thesis nor the Rights Nihilism Thesis have been shown to be held by Marx.⁷⁰

It also follows that each is unsupported, since while (1)–(4) serve as Buchanan's reasons why Marx holds the Rights Egoism Thesis and the Rights Nihilism Thesis, respectively, Buchanan gives no citation from Marx to show Marx holds (1)–(4). Thus one has insufficient reason to think, based on the unsoundness of (1)–(4), that Marx believes either the Rights Egoism Thesis or the Rights Nihilism Thesis.

But consider some of the remaining claims of Marx's alleged internal critique of rights. Buchanan's claim that Marx nowhere advocates the replacement of defective capitalist *rights to property* with superior *communist rights to the same* is an *ignorantio elenchi* insofar as it is intended to support either Marx's alleged Rights Egoism Thesis or the Rights Nihilism Thesis. From the supposition that Marx is silent on an issue, it hardly follows that Marx cannot have anything to say, affirmative or not, about that matter. Speaking

⁶⁸ John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), pp. 183–192.

⁶⁹ Feinberg, *Rights, Justice, and the Bounds of Liberty*, p. 156.

⁷⁰ It does not follow, however, that there may be no other reasons why Marx might hold either the Rights Egoism Thesis or the Rights Nihilism Thesis, or both!

about the right to liberty, for example, just because Marx does not say that such a right has a place in communist society does not mean that it *cannot* have a place there. For Marx did not provide a blueprint description of communism. Marx can be charged with incompleteness in describing the communist society, but he has not precluded the possibility and importance of some rights in communism.

Furthermore, simply because Marx had harsh words to say about some rights, this does not entail that Marx believes that no rights may have a place in a communist society, or that they are valuable only for egoistic persons in capitalism. For Marx is simply responding to certain claims about rights and manifestoes of capitalist societies, societies where there is, he would hold, an illusion of liberty, equality, etc. Recall that when Marx sits down to write “On the Jewish Question” and “Critique of the Gotha Program” he is not writing philosophical treatises on the nature, value, and function of rights as such. Rather, he is discussing certain problems that arise for a capitalist way of making sense of rights. The very style of Marx’s writings alerts the reader to at least this much, warning her to remain aware that Marx’s words are rarely aimed at systematic theory construction, though they are often the result of careful and insightful criticism of capitalist society. To interpret Marx’s negative words on rights as Buchanan does is to construe them as all Marx could have or would want to say about rights, which seems to be another violation of the principle of interpretive charity.

Moreover, even if it is true that in communism “the sources of conflict will be so diminished,” it does not follow, nor does Buchanan give us reason to think Marx believes, that “there will be no need for rights” as legal guarantees of individual freedom. A system of legal rights can exist in communism even if there is no conflict present there. The absence of conflict may be a sign that rights are consistently respected and enjoyed. There is more to the importance of rights than one’s claiming them.

Furthermore, Buchanan offers no textual support for his claim that Marx “assumes that any society in which the potential for interpersonal conflict is serious enough to warrant the establishment of rights to serve as limits on conflict is a deeply defective society,”⁷¹ yet this claim is so absurd that to ascribe it to Marx is yet another violation of the principle of interpretive charity. Even if it is true that Marx holds that any society where the potential for interpersonal conflict warrants a system of rights to limit such conflict is defective, it hardly follows from this that communism has no place for the enjoyment of moral or human rights, which are respected by all. Moreover, Buchanan argues that only such a belief is adequate to explain Marx’s “scorn

⁷¹ Buchanan, *Marx and Justice*, p. 64.