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Race, Rights, and Justice



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to which collections of individuals belong. For instance, the category “corporation” is a collective type of which the Exxon Corporation is a token or member. Similarly, the category “organization” is a collective type, a token of which include corporations such as Exxon, associations such as the American Philosophical Association, etc. Membership in a collective is different contingent on the sort of collective it is. I shall define an “aggregate” as a collection of persons loosely associated with each other. Implied in “loosely associated” is the idea that there are no recognized or formal membership conditions required of aggregates. A *conglomerate*, on the other hand, is a collection of persons into a diversified whole. On this construal, what separates aggregates from conglomerates is that the latter have wholeness or shared common interest among members (typically related to a specific goal or set of goals), which the former lack. A shared common interest is an interest held in common by each individual member of a collective. For example, institutions such as the University of Arizona are not referred to as “aggregates” because they have a complex structure of rules, offices, and a collective function that generates a collective interest connected to or directed at a common goal: education. Nor are corporations such as Exxon or The Journal of Philosophy, Inc. plausibly understood as aggregates.⁵

Prior to proceeding to an analysis of the nature of collective moral rights, it is important to understand the nature of moral rights in general. What *is* a moral right? As noted in the previous chapter, I concur with Joel Feinberg that a moral right is a valid moral claim, which is conferred on someone or something by the principles of an enlightened conscience.⁶ If it is an absolute and nonconflicting moral right, then there is never a time when it can be legitimately infringed or violated. If it is a *prima facie* moral right, then its

those usually thought to apply to the larger community of individuals; and (c) members of a conglomerate fill different defined roles by virtue of which they exercise certain powers over other members, where a change in the identity of some such member does not necessarily involve a change in the conglomerate’s identity (French, *Collective and Corporate Responsibility*, pp. 13–14). See Narveson, “Collective Rights,” 340f, for yet another categorization of collectives.

⁵ This is not to say, though, that every corporation is or has an organizational structure. If I, as an author, am incorporated for legal purposes, this hardly necessitates that all corporations have such a structure. For the most part, however, multipersonal corporations possess such organizational structures. It is the numerically large conglomerate, which is the primary concern of this project.

⁶ I assume that such principles exist and that, in principle, moral agents are able to know them. I also assume a moral rights realist stance for purposes of this book. For my primary aim is *not* to address the concerns of the moral rights skeptic. I do not, for instance, concern myself with refuting the Benthamite claim that moral or natural rights are “nonsense upon stilts.”

strength is determined by the strength of the moral principles, which confer it on the right holder.⁷

Furthermore, a moral right is a moral guarantee against the setting back of the right holder's interest and/or claim.⁸ Like any other right, a moral right has both a subject (the right holder) and an object (an agent against whom the right holds). A collective moral right always has as its subject some collective, though its object may or may not be a collective. For example, a corporate-collective may have a right to sue either a competing corporation or an individual. A collective moral right is distinct from a collective

⁷ This notion of a moral right is largely taken from various statements made in Joel Feinberg, *Social Philosophy* (Englewood Cliffs: Prentice-Hall, 1973); Joel Feinberg, *Rights, Justice and the Bounds of Liberty* (Princeton: Princeton University Press, 1980); Joel Feinberg, "In Defense of Moral Rights," drawing upon the Romanell Phi Beta Kappa Lectures, 1990, in Joel Feinberg, *Freedom and Fulfillment* (Princeton: Princeton University Press, 1992), Chapters 8–10; Joel Feinberg, *Problems at the Roots of Law* (Oxford: Oxford University Press, 2003), Chapter 2.

⁸ These are Feinbergian senses of legal and moral rights applied to collectives. By this I mean that there is textual evidence in Feinberg that supports each view of the grounding of rights. However, I combine the respective "interest" and "claim" views of rights, seeing no logical problem in my holding that a right may be possessed to the extent that, other factors obtaining, the subject of the right has a valid interest and/or a valid claim, either or both of which justify protection from infringement or violation. A similar sort of hybrid view of rights is recognized in Hartney, "Some Confusions Concerning Collective Rights," p. 303. But there are those, like Hartney and L. W. Sumner, respectively, who suppose that collective rights are possessed only by collective and choosing agents. Hartney, "Some Confusions Concerning Collective Rights," p. 309; L. W. Sumner, *The Moral Foundation of Rights* (Oxford: Clarendon Press, 1987), p. 209. The difficulty with Sumner's position is the difficulty with the claim position on rights in general. That is, the claim position seems to deny rights status to individuals such as infants, in that they are not choosing or project-pursuing beings. However, most find it counter-intuitive that infants not be afforded rights, especially moral rights. The same kind of argument might be made in favor of collective moral rights. There is perhaps less of a problem in ascribing certain moral rights to highly organized conglomerates than there would be in the cases of, say, groups lacking such organizational and decision-making structures. But this would not preclude out of hand the ascription of certain moral rights to groups lacking a highly organized decision-making structure. For such rights might be grounded in the groups' having valid moral *interests*, which are sufficient to impose a moral duty on others to not interfere with the collective's exercise or enjoyment of the right.

Lesley Jacobs argues for a notion of collective moral rights in which collective rights are derived from more basic individual rights, and where individual rights serve to protect individual *integrity*, rather than their protecting interests and/or claims (Jacobs, "Bridging the Gap Between Individual Rights With the Idea of Integrity," pp. 377–381). On Jacobs' view, individual rights are "abstract" and more basic than collective rights, which are "derivative" of individual rights. I take this to be a version of Moral Rights Individualism, as I note below.

legal right. A collective *legal* right is one conferred by legal rules on some collective as a legal guarantee against the infringement of that collective's interest/claim, as the case may be. Like a collective moral right, a collective legal right has a subject and an object.⁹ A right is typically a right to *X*, or a right to *do X*.

Prior to turning my attention to an analysis of collective moral rights, it is essential to clarify what it means to say one is *justified* in making certain moral rights ascriptions to collectives. Briefly, to be *morally justified* in doing something means that the weight of moral reasons in favor of *what one does* (or believes) at a given time and in a given circumstance outweighs the moral reasons against what one does (or what one believes). This is an objectivist and noniterative notion of moral justification.

I am concerned with the question of whether or not it is justified to ascribe to certain collective moral rights, making such collectives the subjects of rights.¹⁰ As Michael McDonald puts it, "With collective rights, a group is a rights-holder: hence, the group has standing in some larger moral contexts in which the group acts as a right-holder in relation to various duty bearers or obligants."¹¹ This does not necessitate that such collectives are the exercisers of their rights, as McDonald goes on to mistakenly aver: "In a liberal state, right-holders must be more than merely passive beneficiaries of rights; rights-holders must be active exercisers of their rights."¹² However, a right holder is not the same as a right claimer. Whether or not I am in a utopian rights-respecting regime, I may possess some rights, which are never *de facto* disrespected. Hence I have no *need* to exercise or claim them. Yet I surely do not cease to *possess* such rights. One must take care not to conflate rights possession with rights claiming. My concern is not so much with how collective moral rights are exercised, but my argument pertains

⁹ It is worth noting that a collective right may be conferred by both moral and legal rules, such as when a corporation has a right to have its contractees honor that to which they agree.

¹⁰ Leslie Green distinguishes two senses of collectivism about rights. There are "the rights of collective agents and rights to collective goods." My argument concerns the plausibility of collective rights where certain collectives are right holders. This corresponds roughly to Green's category that only collective *agents* are plausible candidates for rights ascriptions. Green states, "only the second can fulfill the political function generally assigned to collective rights and that even it can do so only partially" (Green, "Two Views of Collective Rights," p. 315).

¹¹ McDonald, "Should Communities Have Rights? Reflections on Liberal Individualism," p. 220.

¹² McDonald, "Should Communities Have Rights? Reflections on Liberal Individualism," p. 225.

(for the most part) to the issue of whether or not some collective possesses a moral right (a conceptual problem). The aim of collective moral rights is to protect *collective* moral interests and/or claims, even though it might be true that in the process of respecting such interests and/or claims, individual ones are protected. Are collective moral rights attributions justified?

Competing Models of Collective Moral Rights

Imagine the United States of America and the Congress of American Indian Nations (CAIN: a federation of ethnic groups/nations that includes the Diné, Zuni, Hopi, Apache, Seneca, and other American Indian ethnic groups/nations) noncoercively entering (i.e., as secondary agents: those who act on behalf of others) into a nonfraudulent agreement and signing a treaty whereby for one century a certain corporation is to be allowed to mine gold from the mountains of an already designated (by the U.S. government) tribal reservation. So for the century that the corporation mines the gold, having from the outset of the agreement “secured permission” from the CAIN to build a small town to house its employees, making it easier to attract and retain qualified personnel a few generations of miners have come and gone, and everyone—except for the CAIN—has forgotten about the treaty. The century in question is nearing its end, and the CAIN (the legal “landlords” of the said territory) reminds the corporation, its employees, and the U.S. that they will have to relinquish the land.

The current employees and the corporation, including the government of the U.S., are taken by surprise. *They*, as individuals, never made such an agreement with the CAIN! They do not even remember any such agreement being made. The Anglos in the territory have developed the land “in their own image,” unaware of the treaty. How could “their” property and jobs be stripped from them by these nations, the CAIN? Nevertheless, when the treaty is produced, it is clear that the U.S. and the CAIN signed it both knowingly and without coercion. In fact, each year the government of the U.S. sent the nations a “treaty cloth” in order to demonstrate the validity of the agreement, which was one stipulation of CAIN. The American Indians, it seems, are now collectively laying claim to their legal and moral right to the property in question. The corporation, by way of the U.S. signing the treaty, shared with the CAIN a certain set of temporary legal and moral property rights to the land. These rights were possessed by the American Indians (as established by the U.S.’s relocation of the American Indians) to among other places, the piece of land in question. Moreover, the U.S. possessed the right to protect the corporation’s temporary property right to use the land.

Thus it seems *on the face of things* justified to speak of collectives such as corporations, nations, and ethnic groups having rights such as property rights—rights conferred, moreover, by legal and moral rules.

Moral Rights Individualism

One might argue, however, that collective moral rights attributions are unjustified. Just as there are competing models of more general matters attributing moral properties to collectives, there are more specific instances of these views concerning the justifiability of collective “Moral Rights Individualism.” Moral Rights Individualism is a species of a more general Moral Individualism. It is the view that it is not justified to attribute moral rights to collectives as individuals are the sole basis for such moral attributions because individuals are the sole basis of moral personhood. It seeks to reject collective moral rights ascriptions because there is insufficient moral reason to ground them. That is, there are no valid moral rules which would confer moral rights on *collectives*, though such moral rules do exist and confer rights on *individuals*. John Ladd holds a variant of the individualist position when he writes of formal organizations that “They have no moral rights. In particular, they have no *moral* right to freedom or autonomy. There can be nothing morally wrong in exercising coercion against a formal organization as there would be in exercising it against an individual . . . it would be irrational for us, as moral persons, to feel any moral scruples about what we do to organizations.”¹³ Similarly, Moral Rights Individualism is captured in what Hartney refers to as “value-individualism:” “only the lives of individual human beings have ultimate value, and collective entities derive their value from their contribution to the lives of individual human beings.”¹⁴

¹³ John Ladd, “Morality and the Ideal of Rationality in Formal Organizations,” *The Monist*, 54 (1970), p. 508.

¹⁴ Hartney, “Some Confusions Concerning Collective Rights,” p. 297. Hartney states:

Value-individualism is not a thesis about the ontology of groups, but about the ground of value. Value-individualism does not imply ontological individualism, i.e., the view that groups are reducible to their members. Even if ontological individualism is false, it does not follow that the value of the group has any foundation other than the well-being of individuals, just as the fact that most entities in the universe are not identical with individual human beings does not entail that their value (if any) has some other ground than their contribution to the lives of individual human beings (Hartney, “Some Confusions Concerning Collective Rights,” p. 299).

The challenge of Moral Rights Individualism may be put in the following way. Moral rights accrue to those who have certain capacities. Those who have such capacities will be members of certain collectives. Moreover, of any collective whose constituents have moral rights, it should not be said that that collective has moral rights. For the reason why such collectives are not believed to have moral rights is either that collectives fail to satisfy the necessary and sufficient conditions of justified collective moral rights ascriptions (an eliminativist position), or that collective moral rights talk is analyzable into, or reducible to, individualist terms without loss of meaning (a reductionist view). The value-individualism found in Hartney seems quite similar to the reductionist one when he argues that “There does not appear to be any category of right, which cannot, in principle, be held by individuals. And so, the conclusion is that, conceptually, there are no moral rights which inhere in collective entities.”¹⁵ Of course, there are other variants of this view.¹⁶

Moral Rights Collectivism

Moral Rights Collectivism, on the other hand, holds that it is justified to attribute some moral rights to certain collectives. It is a view about what makes an ascription of moral rights to a collective justifiable. It is clear to adherents of both Moral Rights Collectivism and Moral Rights Individualism that *individual* moral rights ascriptions are sometimes justified. But are collective (nondistributive) moral rights attributions justifiable? To be sure, there are other sorts of rights a collective might be said to have (such as political, legal, and human rights), but I will limit my discussion to whether or not it is justified to believe that certain collectives such as nations, corporations, and ethnic groups are the legitimate subjects of *moral* rights.

Toward an Analysis of Collective Moral Rights

In the remainder of this chapter, I will set forth an analysis of collective moral rights. While neither Moral Rights Collectivism nor Moral Rights Individualism disputes whether it is ever justified to ascribe moral rights to

¹⁵ Hartney, “Some Confusions Concerning Collective Rights,” p. 310.

¹⁶ Fernando Tesón, *A Philosophy of International Law* (Boulder: Westview Press, 1998), 132f.

individuals, a plausible defense of Moral Rights Collectivism is essential because it asserts what Moral Rights Individualism denies. It is necessary to provide a rationale for the claim that it is justified to attribute some moral rights to certain collectives. Solving the problem of collective moral rights is one of the preliminary and vital concerns of a more general and full-blown theory of moral rights.

Is one justified in arguing that the CAIN¹⁷ has a moral right to some lands? What one needs to answer this query is an analysis of justified collective moral rights ascriptions. Consider the following Principle of Collective Moral Rights: *A collective, C, possesses a moral right, r, to do or have something (respecting an interest or claim, as the case may be) at a given time, t_n, to the extent that:*

- (a) The balance of human reason confers on *C* a valid moral interest or claim at *t_n*;
- (b) that interest or claim justifies holding some (other) party subject to a moral duty at *t_n*; and,
- (c) *C* is a *conglomerate*, where its members see themselves as normatively bound to each other such that each does not act simply for herself, and that there is a shared understanding among members of the collective regarding its membership and secession-making.¹⁸

Now it is more reasonable for me to believe that the CAIN has a legitimate moral interest or choice than the negation of that claim. Why? Because this helps to explain why we think it is morally unjust for the U.S. to violate its treaty with the CAIN. If such a violation is morally wrong, it is because (among other things) the CAIN has a legitimate moral interest that it not be cheated concerning the terms of a valid treaty it has with the U.S. That is, the belief that genuine and legitimate (uncoerced) treaties between peoples should be honored in full neutralizes the belief that the CAIN has no legitimate moral interest or claim in regaining land taken from it by the government of the U.S. during the Jacksonian era (and perhaps beyond that period of U.S. history).

The moral rights individualist might argue, however, that this reasoning shows that there is a legitimate moral interest by some party in regards to the above U.S.-CAIN example. But it does not show that the subject of the moral interest is a *collective*, namely, the CAIN. For all we know, the subject

¹⁷ The CAIN is a federation of nations, as well as a federation of ethnic groups.

¹⁸ This point is borrowed from McDonald, "Should Communities Have Rights? Reflections on Liberal Individualism," pp. 218–219.

of such an interest may be each and every member of the CAIN (but not the collective itself, nondistributively). Thus the above example fails to illustrate a collective moral right in the requisite sense. It is concluded, argues the moral rights individualist, that all the legitimate collective rights that exist are derivable from individual rights, making collective rights talk superfluous or otiose.¹⁹ Is this reasoning sound? Are collective rights just a manner of speaking that is shorthand for more complicated language concerning a set of individual rights?

The following, I argue, *is* an example of a collective (nondistributive) moral right. It is not necessarily a right that is exercised jointly with the other members of the collective. Nor is it a collective moral right because it serves the interests of the individual members of the collective. Consider the moral right of the CAIN to secede from the U.S. (say, because of constant and severe injustices perpetrated against the CAIN by the latter). This is a moral right because the balance of human reason confers on the CAIN (collectively) a valid moral interest that *it* be treated fairly, for usurpation (based on the Doctrine of Discovery and Manifest Destiny) and other significant injustices are morally odious.²⁰ Now what makes this a *collective* moral right is that it is difficult, if not impossible, to make sense of the moral right to secede on distributivist grounds in that the right to secede, where it does accrue, entails having a morally valid claim to or interest in a certain territory.²¹ If there is a moral right to secede, then it is a collectively held right (though, as I explain below, a collectively held right need not be exercised collectively). But then it is not an individual right, which each American Indian claims for herself or himself, but a collective moral right, which certain individuals claim in order to protect the interests of the collective to which they belong.²² Thus it appears that Moral Rights Collectivism is sound; if secession

¹⁹ Narveson, "Collective Rights," p. 329. Jacobs affirms certain collective moral rights, though the status of such rights is always derivative from more fundamental individual moral rights. "[M]oral rights are valuable because they are capable of protecting the integrity of individuals" (Jacobs, "Bridging the Gap Between Individual and Collective Rights With the Idea of Integrity," p. 376). This makes collective rights contingent on or reducible to the rights of the individual, for collective rights then function solely to protect individual integrity, according to Jacobs.

²⁰ Furthermore, it seems plausible to hold that the Diné Nation (collectively) has the moral right to secede from the U.S., say, for purposes of self-preservation and where its self-preservation is truly threatened.

²¹ This is commonly referred to as the "Territoriality Thesis" [Allen Buchanan, *Secession* (Boulder: Westview Press, 1990)].

²² For a more detailed discussion of the moral right to secede, see J. Angelo Corlett, *Terrorism: A Philosophical Analysis* (Dordrecht: Kluwer Academic Publishers, 2003): Philosophical Studies Series, Volume 101, Chapter 4.

is a moral right at all, then it is a collective (not distributive) right. Similar reasoning may be adduced for collective rights to, say, reform a democratic constitution, or to impeach a corrupted official, or to political revolution of the kind described in the U.S. Declaration of Independence. So there seems to be good reason to think that there are not only collective legal rights, but collective moral rights also. For it seems to stretch the bounds of credulity to think that the natural and legal rights to secession, revolution, impeachment, etc. are adequately captured by the language of Moral Rights Individualism.

One, but certainly not the only, version of Moral Rights Collectivism is implied in Karl Marx's critique of capitalism. In the previous chapter, we saw that it is a grave error to misread Marx's critique of certain rights as a general critique of rights. Moreover, if we examine Marx's general critique of capitalism, we find that Marx seems to imply that there are some collective moral rights ascriptions that are justified when made in reference to a communist society. One such right is the citizens' (collective) moral right to self-determination.²³ This right is implied in Marx's own characterization of communist society: "Collectively they would freely choose to produce the bounty of communist society and individually they would freely choose which particular productive activity to engage in."²⁴ That such a right is a moral right follows insofar as this principle is grounded in the balance of human reason or the principles of an enlightened conscience (as Feinberg would put it in general rights terms), granting the communist citizens a valid claim to such free choice. Moreover, Marx's famous condemnation of the private ownership of the means of production seems to imply both that no individual is morally justified in owning the means of production, and that such ownership is prohibited in communism. In turn, however, this seems to imply that in communism there is a collective right to the "ownership" of the means of production. It is not ownership *per se* that Marx condemns, it is *private ownership* of the means of production, which, he argues, lies at the root of exploitation and alienation in capitalist society. Thus Marx stands as an example of one who seems to hold a version of Moral Rights Collectivism.²⁵

Note that it is not a tenet of Moral Rights Collectivism that every right is a collective one, or perhaps with equal absurdity, that every collective right trumps individual rights (nor that every individual right trumps collective

²³ For an argument in favor of this specific collective right, see Margalit and Raz, "National Self-Determination." The authors do not, however, discuss this as a Marxist right.

²⁴ Allen E. Buchanan, *Marx and Justice* (Totowa: Rowman and Littlefield Publishers, 1982), p. 48.

²⁵ Karl Marx and Frederick Engels, *Collected Works*, 52 Volumes (New York: International Publishers, 1975–1990).

ones, for that matter). Nothing about Moral Rights Collectivism states anything about the qualitative value of such rights in contradistinction to one another. Moral Rights Collectivism is a position that argues that Collective Moral Rights exist, and that some decision-making groups tend to possess them. Nor does Moral Rights Collectivism affirm the position that collective rights are always exercised with due care and diligence, morally speaking. It holds that there are individual rights and there are collective rights. But it says nothing about which rights trump others. The reason for this is that Moral Rights Collectivism recognizes that a rights context and all that it relevantly entails must determine which rights, if any, trump others and why.

However, not everything commonly referred to as a “collective moral right” is that which (like the right to secede) is collective (nondistributive). Some such rights, one might argue, are collective *and* distributive, such as the moral rights to both civil disobedience and to privacy. For just as both individual persons have a moral right to civil disobedience and to privacy, so do (one might argue) religious and political groups. For instance, Martin Luther King, Jr., claims the moral right to civil disobedience for blacks, Latino/a-Americans, etc., and it seems justified to ascribe such a right both to those groups and to their respective constituent members. That the right to civil disobedience is both a collective and individual right is echoed in the words of Rawls: “By engaging in civil disobedience a minority forces the majority to consider whether it wishes to have its actions construed in this way, or whether, in view of the common sense of justice, it wishes to acknowledge the legitimate claims of the minority.”²⁶

Surely it stretches credulity to hold that the use of “minority” by Rawls cannot refer to a group, but to individuals only. For what often makes civil disobedience a powerful weapon against oppression and injustice is that it is a moral right possessed by a collective (as well as by individuals). The possibility of collective and distributive rights is of some philosophical importance, but I shall not undertake an investigation of it here. I mention it as another possible category of moral rights. Still other moral rights are

²⁶ John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), p. 366. Just as, on Rawls’ view, there is a collective right to civilly disobey the law, there are also collective duties, such as that of humanitarian assistance [John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999), 106f.].

On the other hand, it is quite possible to think of collectives such as corporations that have certain privacy rights that are not shared by their constituent members. Indeed, one of the complaints today in U.S. constitutional studies is how corporations have appropriated the Fourteenth Amendment’s protection of the right to equal protection under the law, an amendment the original intent of which was clearly to protect ethnic minorities, not corporate power.