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Race, Rights, and Justice



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In order to clarify further my defense of Moral Rights Collectivism, it is useful to compare it to the most developed philosophical treatments of collective rights: those of Raz and Larry May, respectively.

It is helpful to understand how the Principle of Collective Moral Rights is similar to Raz's analysis. "A collective right exists," argues Raz, "when the following three conditions are met:"

First, it exists because the interests of human beings justify holding some person(s) to be subject to a duty. Secondly, the interests in question are the interests of individuals as members of a group in a public good and the right is a right to that public good because it serves their interest as members of the group. Thirdly, the interest of no single member of that group in that public good is sufficient by itself to justify holding another person to be subject to a duty.⁴⁸

Raz's account concerns the *existence conditions* of collective rights, and the Principle of Collective Moral Rights concerns the conditions under which one is justified in attributing a moral right to a collective (a conglomerate). But the existence conditions, if valid and satisfied, just do inform one when it is justified to make a collective moral right ascription.

However, while Raz's analysis is a purely interest-based model of collective rights, the Principle of Collective Moral Rights is not. There is no logical inconsistency in holding both an interest and a choice model of rights in general, if by this one means simply that a collective's having a legitimate moral *interest* is not a necessary condition of its possessing a moral right.

A plausible theory of collective moral rights also evades the problem of political atomism. Atomism is the social contract theory that arose in the 17th century with Thomas Hobbes and John Locke. It holds that society consists of individuals for the fulfillment of individualistic ends. It asserts the priority of the individual agent and her rights over societal goods. It affirms an instrumentalist view of society, i.e., the society is valuable only to the extent that it serves individual welfare. Furthermore, it holds the "Primacy of Rights Thesis": it is fundamental to ascribe certain rights to individuals instead of their obligation to belong to society [Charles Taylor, "Atomism" in *Philosophy and the Human Sciences: Philosophical Papers*, Volume 2 (Cambridge: Cambridge University Press, 1985), pp. 187–210]. But this is a difficulty that is relatively easy for the collective moral rights theorist to evade since she is in part arguing that if rights are valuable, then collective (as well as individual) rights are valuable.

Moreover, *a plausible theory of collective moral rights should provide jointly necessary and sufficient conditions of plausible collective moral rights ascriptions.* At least, a full-blown theory of collective moral rights must succeed in doing this.

Although adequate answers to each of these problems is required of any plausible and full-blown theory of collective moral rights, I do not attempt to provide complete replies to each of these quandaries. Instead, I seek to give a foundation of a justified theory of collective moral rights, one which makes plausible the claim that collective moral rights ascriptions are sometimes justified.

⁴⁸ Joseph Raz, "Right-Based Moralities," p. 53.

Although the idea of collectives as claiming agents is a dubious one, this does not preclude a collective's being restructured to satisfy the conditions of collective agency and claiming. Nor does my argument here preclude the idea of subcollectives (albeit small ones) being claiming agents. Surely it does not stretch the imagination to say that university Boards of Directors and Regents claim and act both as individuals and as collectives. The question here, however, is whether *numerically large* collectives (nations, multinational conglomerate corporations, etc.) act as claiming agents. More specifically, there is no logical contradiction between the interest model's point that rights are protected interests and the claim model's idea that rights are protected claims.⁴⁹

Nevertheless, while Raz sets forth *jointly sufficient* conditions for the existence of collective rights, the Principle of Collective Moral Rights uses "to the extent that" to connect its analysandum and its analysand. Although a collective either has a moral right or a valid moral claim or it does not, the conditions under which it may be justified to ascribe a moral right to it may vary and admit of degrees. "To the extent that" captures this idea. The Principle of Collective Moral Rights, while not a complete analysis of justified collective moral rights attributions, is a plausible propaedeutic for a full-blown analysis. There is, then, a considerably greater degree of completeness present in the Principle of Collective Moral Rights than in Raz's analysis. Nevertheless, it would be wrong to think that Raz's analysis, along with Feinberg's notion of individual rights, does not inspire the Principle of Collective Moral Rights. Finally, while on Raz's analysis of collective rights, a "right" is a right to a "public good" (i.e., safe roadways, clean air and water, etc.), the Principle of Collective Moral Rights realizes that not all rights (not even all moral rights) the subjects of which are collectives have as their contents public goods in Raz's sense of "public goods." Surely a corporation's moral right to be paid in full for goods provided and services rendered under legitimate contract or agreement is *not* a public good in Raz's sense. Neither is the content of the collective moral right to secede a public good in his sense. Thus my analysis of collective moral rights is somewhat broader in scope than Raz's. The content of a moral right is not restricted to a public good.

May's argument concerning collective rights may be plausibly reconstructed as follows:

⁴⁹ These notions of the interest and choice models are taken from Jeremy Waldron, "Introduction," Jeremy Waldron, Editor, *Theories of Rights* (Oxford: Oxford University Press, 1984).

- (1) To have a moral interest is generally to be in a position justifiably to assert a claim to X.⁵⁰
- (2) Such claims are justified when the object of the claim is something which is a good for that person, and something which that person wants.⁵¹
- (3) Interests are in common when the wants of all group members include or would include X.⁵²
- (4) If it is legitimate for group members to want X, then they, as a group or a group representative, may stand justified in claiming the group's right to X, over and above each individual's (of the group) claiming X.⁵³
- (5) A harm is the setting back of an interest.⁵⁴
- (6) "When harm can be substantiated, then the entity which is harmed is thought to have a basis for making claims upon society or individual human beings for the redress or suspension of the harmful practices."⁵⁵
- (7) Some groups (corporations, certain ethnic and "minority" groups) can be harmed (vicariously).⁵⁶
- (8) Therefore, some groups (corporations, certain ethnic and "minority" groups) at times have grounds for making claims against others. These claims constitute rights possessed vicariously by such groups.⁵⁷

May goes on to argue that group solidarity and common external identification by others creates group members' interests, which serve as the basis of rights claims. These claims are made because of "group-based" harms, namely, harms to people because of their membership in a certain group.⁵⁸ Moreover, a harm is group-based or collective when the actual or perceived structure of a group makes all group members directly or indirectly (vicariously) harmed whenever one group member is harmed (or, I might add, when it is correctly *understood* by the group that one of its members is harmed).⁵⁹ A group has an interest, according to May, when adding up the individual

⁵⁰ Larry May, *The Morality of Groups* (Notre Dame: University of Notre Dame Press, 1987), p. 114.

⁵¹ May, *The Morality of Groups*, p. 114.

⁵² May, *The Morality of Groups*, p. 114.

⁵³ May, *The Morality of Groups*, p. 114.

⁵⁴ May, *The Morality of Groups*, p. 112. May borrows this notion from Joel Feinberg, *Doing and Deserving* (Princeton: Princeton University Press, 1970), and *Rights, Justice, and the Bounds of Liberty*.

⁵⁵ May, *The Morality of Groups*, p. 112.

⁵⁶ May, *The Morality of Groups*, p. 113. See also Shapard, "Group Rights," p. 302.

⁵⁷ May, *The Morality of Groups*, p. 113.

⁵⁸ May, *The Morality of Groups*, p. 115.

⁵⁹ May, *The Morality of Groups*, p. 116.

interests of group members does not capture the common interest, and when reference to the group must be made in order to fully explain the interests of its members. It is not simply that a group member is treated in such and such a way on the basis of that member's possessing a certain property, but also that those who possess that property are treated by those external to the group as a coherent group. This latter fact justifies ascriptions of interests to groups.⁶⁰

For May the sorts of collective that can have interests (and rights) are, prototypically, corporations and certain ethnic and "minority" groups, as stated or implied in (7) and (8), respectively. While ethnic groups have interests based on the strong feelings their members have for each other, corporations have interests vicariously because (i) they can be harmed, and (ii) they engage in joint action.⁶¹ Indeed, "[t]he corporation is capable of decisions, actions, interests, and rights—but only *vicariously* so."⁶² May avers that interests expressed in and consistent with the corporate charter, though individual interests (i.e., interests possessed by individuals in the corporation) are nevertheless corporate ones.⁶³

May's way of handling the challenge of Moral Rights Individualism is by attempting to refute the reductionist thesis it employs. Focusing on property rights, May argues that corporate property rights cannot be fully explained by reference to the aggregate rights of both stockholders and managers of the corporation.⁶⁴ He writes: "As long as it is possible for the corporation to evade full liability because of the limited liability of its members, even taken collectively, then it is not possible to reduce corporate property rights to individual [property] rights."⁶⁵ In other words, because liability for corporate negligence is limited to the property of the corporation itself (instead of being extended to the property of its members), the corporation is seen as a legal or juristic person. In fact, it is the typical case of a juristic person.⁶⁶

⁶⁰ May, *The Morality of Groups*, p. 117. Compare Jeremy Waldron's claim that since there is no adequate account of a social good's desirability in terms of individual group members, there is no point in saying that the good is any single member's right to pursue [See Jeremy Waldron, Editor, *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man* (London: Methuen, 1987), pp. 186–187].

⁶¹ May, *The Morality of Groups*, p. 120.

⁶² May, *The Morality of Groups*, p. 124.

⁶³ May, *The Morality of Groups*, p. 124.

⁶⁴ May, *The Morality of Groups*, p. 125. Even so, he argues, corporate property rights should not be afforded the same moral or legal status as individual property rights (p. 132).

⁶⁵ May, *The Morality of Groups*, p. 132.

⁶⁶ Kelsen, *General Theory of Law and State*, p. 96.

But legal persons, as Kelsen reminds us, are the subjects of legal rights and duties:

The legal person is the legal substance to which duties and rights belong as legal qualities. The idea that “the legal person has” duties and rights involves the relation of substance and quality.

In reality, however, the legal person is not a separate entity besides “its” duties and rights, but only their personified unity or—since duties and rights are legal norms—the personified unity of a set of legal norms.⁶⁷

This is a reconstruction of the basics of May’s view of collective rights. But how does my position differ from May’s? First, “something which is a good for that person” in (2) of May’s argument smacks of paternalism, while paternalism is absent from the Principle of Collective Moral Rights. Second, while May’s argument sets forth a sufficient condition for a collective’s having a right: that a group has an interest (a valid one, presumably), the Principle of Collective Moral Rights proffers degree-laden conditions for justified collective moral rights ascriptions, ones which serve as a foundation of a more complete analysis. Third, May’s position on collective rights speaks of rights in general, with some focus on corporate property rights. But my view emphasizes collective moral rights ascriptions and whether they are justified. In following Feinberg’s model of a claim-right in the narrow sense, May does not tell us what sorts of rights, besides property rights, certain collectives can have.⁶⁸ Certainly corporations, if they do have rights, have more than simply property rights. They have, for example, due process rights, rights to goods and services provided under proper contract, rights to free expression, etc.

The importance of May’s argument should not, however, be underestimated. It deserves credit for recognizing the importance of an argument for collective rights.

In sum, I have set forth an analysis of justified collective moral rights attributions. I then contrasted my view with those of Raz and May, respectively. Let us now consider and assess some crucial objections to Moral Rights Collectivism to determine its overall plausibility, as against the plausibility of Moral Rights Individualism.

Objections to Moral Rights Collectivism, and Replies

Even though it has been shown that the leading philosophical analyses of collective rights are ultimately inadequate, this is insufficient to show that my own version of Moral Rights Collectivism fares well. It is necessary,

⁶⁷ Kelsen, *General Theory of Law and State*, p. 93.

⁶⁸ May, *The Morality of Groups*, p. 112.

then, to consider the most important challenges to my position in order to discern its plausibility.

One general critique of the notion of collective moral rights is that their existence and exercise undermine the importance of individual moral rights.⁶⁹ Just as the interests and rights of a totalitarian majority undermines the interests and “rights” of dissenting minorities, there is a worry that making room for collective moral rights will leave little or no room for the moral interests and rights of individuals.

To this objection, it may be replied that one of the reasons for respecting collective moral rights is precisely to protect the moral interests of minority groups from tyrannical majority leadership. Moreover, the mere potential for collective moral rights abuse is not in itself a conclusive reason against the reasonableness of certain collective moral rights attributions.⁷⁰ Moral Rights Collectivism does *not* hold that collective moral rights necessarily override individual moral rights, as this first objection implies. Rather, it claims simply that collective moral rights ascriptions are sometimes justified. Whether or not a given collective moral claim or interest outweighs a given individual moral claim or interest must be decided in light of a robust theory of rights conflict (or, according to a robust theory of claims and interests conflict, as the case may be). For instance, a community’s moral claim to a right to safety need not outweigh a perceived criminal’s moral claim to be treated as an equal and not harassed because he is a member of a group perceived to be a threat to the community. It appears, then, that this first concern with collective moral rights is misplaced.

A second concern about collective moral rights might be that respect for them in addition to individual moral rights proliferates the language of rights unnecessarily.⁷¹ And with the proliferation of rights claims and attributions comes a confusion regarding the place of rights in both political and moral theory and in society. Collective moral rights attributions are unnecessary, if not downright confusing.

However, this worry about collective moral rights rests on the dubious assumption that an adequate theory of moral rights can admit of simplicity in regards to rights attributions. Moreover, this concern simply begs the question against collective moral rights. Why not argue that general views

⁶⁹ Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), p. 194.

⁷⁰ A similar point is made by Shapard, “Group Rights,” p. 306.

⁷¹ The caution against the proliferation of rights is registered in Sumner, *The Moral Foundation of Rights*, Chapter 1; Lomasky, *Persons, Rights, and the Moral Community*, pp. 4–7, 82, 224, and 229.

of individual rights, instead of collective rights, proliferate moral rights talk unnecessarily? These points tend to neutralize the force of this second objection to Moral Rights Collectivism. A *prima facie* case is made for the plausibility of Moral Rights Collectivism based upon the plausibility of a collectivist (nondistributivist) notion of the moral right to civil disobedience.

Furthermore, it might be argued that the real question about collective moral rights ascriptions is a metaphysical one that concerns the moral personhood and status of collectives. Some argue against the plausibility of the claim that moral rights may be attributed to a collective independently of the moral rights of the individuals it serves. Thus, unlike an individual's right to life, there is no collective and nondistributive moral right to life, or any other collective moral right, because collectives are not moral persons.⁷²

In reply to this objection, the moral rights collectivist might plausibly argue the following. First, if being a moral person entails possessing moral properties, then it begs the question against Moral Rights Collectivism to argue that collectives do not have moral rights because they are not moral persons. Second, if one accepts the claim that nonhuman animals (nonpersons) can have moral rights without providing an adequate reason why collectives (nonpersons) cannot plausibly be ascribed moral rights, then this poses a problem for such a position. For the moral personhood of a putative right-holder, then, is not a necessary condition of justified moral rights ascriptions. Thus, that collectives are not moral persons (i.e., are artificial persons) in itself does not preclude them from plausibly being attributed moral rights on the assumption that nonhuman animals are correctly ascribed moral rights.

It might also be argued that my analysis of collective moral rights serves as an internal critique of a more general rights theory. By doing this, my view tries to incorporate collective moral concerns into a more general framework of rights. Perhaps, it might be argued, the very framework of rights is inadequate to capture moral concerns having true value. This implies that it might be more plausible to adopt an external critique of rights theories, one that does not construe rights as essential to human values and social living.

Given the complexities of a rights-skeptical standpoint, such a position is tempting. However, I remain unconvinced that rights are valueless. From what thesis would it follow that rights ought to be rejected in favor of some perspective which would omit rights from the central core of value in human

⁷² A similar position to this is argued by Rafalko in regards to corporations and rights (Rafalko, "Corporate Punishment: A Proposal," pp. 917–920). Contrast Rawls, who considers certain collectives such as nations, provinces, business firms, etc. to be "persons" [John Rawls, "Justice as Fairness" *The Philosophical Review*, 67 (1958), p. 166; *A Theory of Justice*, p. 521].

existence? Surely this result would not follow from the supposition that certain rights, when respected in specific circumstances, promote individualism or atomism. For these sorts of cases simply show that such “rights respecting” needs rethinking *in those circumstances*. But it does not follow that rights *per se* ought to be rejected. What external critiques of rights *do* tell us is that the very foundations of rights need rethinking, yet on grounds other than purely individualistic ones. My view of collective moral rights begins to take political and moral philosophy in this direction, suggesting that *if* rights (in particular, moral rights) are important, then so are collective moral rights. It is precisely such a proposition the plausibility of which forces us to restructure our conceptions of social and political life.

Finally, it might be argued with Jan Narveson and Jacobs (respectively) that collective moral interests and/or claims are derived from the aggregate interests or claims of the members of the collective. Moreover, this derivative status of moral collective interests or claims renders the notion of collective moral rights untenable.

But this objection seems to assume that individual moral interests and/or claims are in some way *basic* and are *themselves undervived*. Even if collective moral interest or claims are derived from individual ones as stated in the objection, it does not follow straightaway that certain collectives have no valid moral interest or claims that require protection. Moreover, at least some individual moral interests and/or claims are derived from collective ones. Yet one would not argue that such interests or claims somehow lose significance because of their derived status. As a faculty member of a university, I have certain moral interests or claims I would not otherwise have if I was not serving in such a capacity: the interest in being treated fairly as a faculty member, academic freedom, etc. To this point, the moral rights individualist must be careful not to reply that the reason collectively derived individual moral rights *are* rights is because individuals are the basic unit of society and morality. For that begs the question against the moral status of collectives.

Moral Rights Collectivism seems to withstand these criticisms.⁷³ If the above arguments succeed, then Moral Rights Individualism is problematic and there is a *prima facie* case made out for Moral Rights Collectivism.⁷⁴

⁷³ If McDonald is correct, certain other individualist (liberal) challenges to Moral Rights Collectivism run afoul (McDonald, “Should Communities Have Rights? Reflections on Liberal Individualism,” 229f.).

⁷⁴ There are questions that would require adequate answers by a full-blown theory of collective rights, queries which I did not take on in these pages. First, there is the matter of justifying legal and other nonmoral collective rights ascriptions. Second, there is the question of whether or not Rights Realism (the view that rights are ontological con-

My primary target in this chapter is Moral Rights Individualism. As one author points out, it is strange that (moral) rights individualists have few problems in holding that rights possessed by individuals imply certain moral duties are imposed on certain collectives. He argues that collective rights are not endorsed by many rights individualists because they believe that the interests of individuals override competing interests of collectives.⁷⁵ However, if such collectives truly possess moral duties, then on what grounds should they be denied candidacy for possessing moral rights? Moreover, I have argued that the moral right to secede, if it does exist, is a collective (nondistributive) right, and I set forth and defended an interest/choice model of justified collective moral rights.

My arguments have significance for social and political philosophy. Insofar as liberals and communitarians argue about whether or not individual rights or community virtues exclude each other, Moral Rights Collectivism seems to carve out a hybrid position, which affirms both individual *and* collective rights. In arguing that some collectives have valid moral interest or claims, I am claiming that such interests or claims ought to be respected and protected by a system of legal rules. Thus I am arguing that collective moral rights serve to ground collective legal rights. Both individual and collective moral rights must be respected by any plausible social and political theory. Surely there is no logical contradiction in affirming both that certain individuals and certain collectives are the proper subjects of moral rights attributions. Political philosophy should make a place for both sorts of rights, without granting *a priori* primacy to either class of rights. I am attracted by the liberal concern for individual rights. However, to the extent that certain collectives have valid moral interests or claims, they *do* possess some moral rights. It is precisely these rights that should also form part of the foundation of a plausible moral and political philosophy, and a reasonably just domestic or global legal order.

stituents of the universe) itself is plausible. A complete theory of rights, it seems, must answer these and other important queries.

⁷⁵ Green, "Two Views of Collective Rights," p. 315.

Chapter 7

Humanitarian Intervention and Indigenous Rights

A second guideline for thinking about how to carry out the duty of assistance is to realize that the political culture of a burdened society is all-important; and that, at the same time, there is no recipe, certainly no easy recipe, for well-ordered peoples to help a burdened society to change its political and social culture.—John Rawls.¹

Having in the previous chapter analyzed the nature of collective moral rights, I shall now discuss the humanitarian intervention in terms of whether or not a certain country has a moral right to intervene into the affairs of another, and if so, under what conditions it would be justified for it to claim and exercise the right.

As discussed in Chapter 4, recent philosophical debates regarding global justice in part revolve around issues of global inequality and whether or not it is a requirement of global justice that societies be made “equal” in some substantive manner. By “equal” is meant whether societies ought to be made internally equal and externally equal, where “internal equality” refers either to the equal opportunity within each society (consistent with John Rawls’ difference principle²) or *de facto* equality within them (some versions of cosmopolitanism subscribe to this view), and where “external equality” refers to societies themselves being made “equal” to one another in either of the requisite senses.

Whatever else international law requires for its moral underpinning, it must require global justice between societies. And this in turn amounts to,

This chapter is dedicated to the people of Colombia in the hope that peace will reign there soon.

¹ John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999), p. 108.

² John Rawls, *Collected Works*, Samuel Freeman, (ed.) (Cambridge: Harvard University Press, 1999); *Political Liberalism* (New York: Columbia University Press, 1993); *A Theory of Justice* (Cambridge: Harvard University Press, 1971).