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Race, Rights, and Justice



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such responsible agents may have been elected by the people in some meaningfully democratic way. This is true not simply because of the widespread problem of the diffusion of responsibility in social contexts, but because of the fact that the citizens may not have (or could not reasonably be said to have) known about the workings of the primary responsible agents of the harmful wrongdoings in question. The most that can be said here is that, to the extent that the citizens of that country could and should have known about what their elected leaders did that might or would likely lead to harmful wrongdoings of others, that is the extent to which the citizens should be held liable and have a duty of addressing the problems adequately. But this is at best a secondary form of responsibility.

It would seem reasonable under the circumstances to adopt a differentialist model of addressing serious instances of substantial nonnatural injustice. First, all primary responsible agents have duties of compensation toward those they have seriously and wrongfully harmed. Only subsequent to depleting all of their personal assets in addressing an injustice for which they are primary responsible agents would it be justified to hold citizens of the responsible country liable for compensatory damages, and this is largely because of the deeper pockets that groups have.⁵⁹ This strategy ensures that those who make the worse decisions and have them carried out are held accountable for what they do to significantly and wrongfully harm others. So if global need is caused by, say, a policy of the U.S., then the first question to ask is who enacted and directly supported the policy and should have known the deleterious effects it would have on others. Another key question is who, of secondary agents, knew or should have known about it. In some cases, holding primary agents responsible for their harmful wrongdoings is sufficient to solve even problems of poverty. After all, if the primary agents are high-level government and corporate executives, there are plenty of personal assets for resolving, or come close to resolving entire circumstances of need, at least in many cases. Only after all such personal assets are depleted in compensating for the damages incurred should any attempt be made to approach those indirectly responsible for their part in the wrongful harms. Assumed here, of course, is a plausible principle of proportional compensation according to which all wrongful harms should be compensated according to the levels or degrees of responsibility of those who are responsible (liable) for them. Thus most or much of the compensation should be paid, if possible given the situational factors of the case, by those most responsible for the creation of the injustice in the first place. This plan is not meant to

⁵⁹ After all, in many cases the compensatory pockets of such primary responsible agents, no matter how deep, will not be sufficient to adequately compensate their victims.

address (or deny the importance of) the cosmopolitan liberals' concern with equality of opportunity. Rather, it is to address the harms themselves and those directly responsible for them.⁶⁰

Those wrongfully harmed have rights to compensation, while those primarily responsible have duties of compensation. And no theory of governmental or corporate limited liability carries sufficient moral weight to override these factors.⁶¹ In their single-minded search for principles of distributive justice, the cosmopolitan liberals seemed to have downplayed, if not given short-shrift to, principles of compensatory justice. An example of this is found in Pogge's attempt to address the "effects of a common and violent history:"

The present circumstances of the global poor are significantly shaped by a dramatic period of conquest and colonization, with severe oppression, enslavement, even genocide, through which the native institutions and cultures of four continents were destroyed or severely traumatized. This is not say (or deny) that affluent descendants of those who took part in these crimes bear some special restitutive responsibility toward impoverished descendants of those who were victims of these crimes. The thought is rather that we must not uphold extreme inequality in social starting positions when the allocation of these positions depends upon historical processes in which moral principles and legal rules were massively violated. A morally deeply tarnished history should not be allowed to result in *radical* inequality.⁶²

One difficulty with this approach is that it wrongly construes the solution to the problem, not as one of reparative justice in terms of compensation as outlined above, but in terms of equal opportunities for those who are the least advantaged by historic injustice. In short, it subsumes any putative right to compensatory justice under the presumed right to equality.

To see the problematic nature of this position, one need only think about it in terms of current U.S. law. Currently under the law in the U.S. those who wrongfully harm others can be held liable under certain circumstances for

⁶⁰ Note that I do not mention those who, perhaps as secondary responsible agents, benefit from such harmful wrongdoing of their government gone awry. This is because it is unclear precisely why merely benefiting from harmful wrongdoing qualifies one as a compensator of it, absent some other relevant responsibility relevant factor. I thank an anonymous referee for bring this problem to my attention.

⁶¹ It might be asked whether the International Criminal Court or state governments ought to decide such cases of personal liability of government and corporate wrongdoers. As the ICC itself urges, all cases of global import are to seek adequate resolutions at the state levels prior to bringing such cases to the ICC. With this double-tiered system in mind, it is hopeful that most cases will be resolved fairly. I thank an anonymous referee for bringing this problem to my attention.

⁶² Thomas Pogge, *World Poverty and Human Rights* (London: Polity, 2002), p. 203.

compensatory damages. And if my amendment to Rawls' theory of global justice holds, then what are needed are remedial principles of compensatory justice to support the rights affirmed in his substantive principles of justice. Indeed, there is no conceptual absurdity in this idea, nor is it a practical impossibility even at the level of international law—assuming that an international system of justice is possible in the first place. But what Pogge asserts is that, instead of compensating those who are victimized by harmful wrongdoings, the perpetrators of the harmful wrongdoings are to pay no compensation whatsoever. His words “This is not to say (or to deny) that affluent descendants of those who took part in these crimes bear some special restitutive responsibility” simply undermine the point of compensatory justice and reveal how unconcerned Pogge is with it. His real concern is with distributive justice—apparently, even when history is clear as to the identity of the perpetrators of severe harmful wrongdoing! Moreover, Pogge's claim reveals that he does not understand that it is not only the wealthy descendants who would owe, but *any and all* such descendants, revealing once again his bias toward distributive justice and against compensatory justice. Furthermore, Pogge misunderstands the point of compensatory justice when he asserts that “A morally deeply tarnished history must not be allowed to result in *radical* inequality.”⁶³ Apparently, the implication here is that such a history of “grievous wrongs” might be allowed to result in something other than “radical” inequality. And he goes on to argue that “This is the moral rationale behind Abraham Lincoln's 40-acres-and-a-mule promise of 1863. . . .”⁶⁴

It is difficult to imagine a more distorted picture of U.S. history than Pogge's on what constitutes compensation. The U.S. government withdrew the suggestion of reparations to newly freed ex-slaves because it simply did not want to pay them in that it was too costly for those deemed first-class citizens. Most whites thought they owed nothing to legally freed mostly Africans, many Indians, and some others. After all, many of them with great political and economic influence had just lost their investments due to the abolition of slavery, and if they paid reparations to newly freed blacks, then they would have to answer the repeated calls for reparations on behalf of generations of Indians, which was quite out of the question as it was not in line with the terms of Manifest Destiny and the Doctrine of Discovery. And it would have left most whites in dire poverty because of how much they would have owed to those whose relatives they murdered or had murdered by the U.S. Army in order to steal millions of acres of land, and to those who were forced to do their labors, unpaid. But if compensatory rights are

⁶³ Pogge, *World Poverty and Human Rights*, p. 203.

⁶⁴ Thomas Pogge, “Real World Justice,” *The Journal of Ethics*, 9 (2005), pp. 38–39.

to be taken seriously, such compensation is *deserved* for those whose human rights are violated in such ways.

Rights to compensation have little or nothing to do with matters of inequality, normatively speaking. And it is this point that many cosmopolitan liberal philosophers cannot seem to fathom given their commitment to their particular yet vague ideology of equality. This underscores my suspicions about both the agenda of cosmopolitan liberals, namely, that they are inadequately concerned with compensatory justice. Hence they have no plans for or interest in reparations except insofar as they can (however mistakenly) construe them in terms of affirmative action programs, which have already been shown to be a category mistake.⁶⁵ They are simply concerned about equality instead of compensation and the true justice that it, when properly administered, can provide in terms of supporting autonomy and sovereignty rights. Indeed, my claim is that these liberals have at best articulated and defended half-truths about justice, for distributive justice without compensatory justice is grossly incomplete justice at best, as my argument is intended to make clear. For those who might construe this statement as hyperbole, consider the fact that continual denials of rights to compensation will always have the effect of withholding from right holders what is their due, which in turn is a significant injustice. I concur, then, with David Miller when he argues that cosmopolitanism does not err in making equality of central importance in dealing with world poverty. But it goes wrong in thinking that equality is all that is central to global justice.⁶⁶

However, I would extend Miller's observation in the following way. Many cosmopolitan liberals seem to subscribe to a notion of equality that is too extreme for even many who have defended more reasonable and nuanced versions of egalitarianism. As Temkin argues quite apart from cosmopolitan liberalism,

Moral responsibility matters to the egalitarian. On my view, this is because the concern for equality is ultimately a concern about comparative *fairness*, and it is not unfair if I am morally *responsible* for being worse off than you. This is why prior wrongdoing can matter. If I am worse off than you due to my own prior wrongdoing, the inequality between us need not be unfair, or in any other way morally objectionable.⁶⁷

⁶⁵ J. Angelo Corlett, *Race, Racism, and Reparations* (Ithaca: Cornell University Press, 2003), pp. 164–165.

⁶⁶ David Miller, "Against Global Egalitarianism," *The Journal of Ethics*, 9 (2005), pp. 55–79.

⁶⁷ Temkin, "Thinking About the Needy: A Reprise," p. 431.

Thus it is not obvious that cosmopolitan liberals, whose theories of global (distributive) justice are grounded in some rather restrictive notion of egalitarianism, are working with a viable notion of equality. The cosmopolitan liberal notion of equality seems to be far to the extreme of many of those who have been analyzing the concept of equality before cosmopolitanism resurfaced in recent philosophical discussions. The cosmopolitan notion of global equality, it appears, is rather unmitigated and facile compared to the conceptions of equality of Richard Arneson,⁶⁸ John Broome,⁶⁹ G. A. Cohen,⁷⁰ Ronald Dworkin,⁷¹ Rawls, John Roemer,⁷² Samuel Scheffler,⁷³ Amartya Sen,⁷⁴ Peter Singer,⁷⁵ Temkin,⁷⁶ Peter Unger,⁷⁷ Bernard Williams,⁷⁸ and others.⁷⁹ This lends credence to Beitz's claim that "For the

⁶⁸ Richard J. Arneson, "Egalitarian Justice Versus the Right to Privacy," *Social Philosophy and Policy*, 17 (2000), pp. 91–119; Richard J. Arneson, "Equality and Responsibility," *The Journal of Ethics*, 3 (1999), pp. 225–247; Richard J. Arneson, "Luck and Equality," *Proceedings of the Aristotelian Society*, 75 (2001), pp. 73–90.

⁶⁹ John Broome, *Weighing Goods* (Oxford: Oxford University Press, 1991); *Weighing Lives* (Oxford: Oxford University Press, 2004).

⁷⁰ Cohen, *If You're an Egalitarian, How Come You're So Rich?; Self-Ownership, Freedom, and Equality*. For discussions on the latter book, see *The Journal of Ethics*, 2:1 (1998).

⁷¹ Ronald Dworkin, "What is Equality? Part 1: Equality of Welfare," *Philosophy and Public Affairs*, 10 (1981), pp. 185–246; "What is Equality? Part 2: Equality of Resources," *Philosophy and Public Affairs*, 10 (1981), pp. 283–345; "What is Equality? Part 3: The Place of Liberty," *Iowa Law Review*, 73 (1987), pp. 1–54; "What is Equality? Part 4: Political Equality," in Thomas Christiano, Editor, *Philosophy & Democracy* (Oxford: Oxford University Press, 2003), pp. 116–137.

⁷² John Roemer, *Equality of Opportunity* (Cambridge: Harvard University Press, 1998); *Theories of Distributive Justice* (Cambridge: Harvard University Press, 1996), Chapters 7–8.

⁷³ Samuel Scheffler, "What is Egalitarianism?" *Philosophy and Public Affairs*, 31 (2003), pp. 5–39.

⁷⁴ Amartya Sen, *On Economic Inequality*, Expanded Edition (Oxford: Oxford University Press, 1978); *Inequality Reexamined* (Cambridge: Harvard University Press, 1992).

⁷⁵ Peter Singer, "Famine, Affluence, and Morality," *Philosophy & Public Affairs*, 1 (1972), pp. 229–243.

⁷⁶ Larry Temkin, *Inequality* (Oxford: Oxford University Press, 1993).

⁷⁷ Peter Unger, *Living High and Letting Die* (Oxford: Oxford University Press, 1996). See especially pp. 8–10 for an argument for the incompleteness of Singer's argument for assisting those in need.

⁷⁸ Bernard Williams, *In the Beginning Was the Deed* (Princeton: Princeton University Press, 2005), Chapter 8.

⁷⁹ Christopher Lake, *Equality and Responsibility* (Oxford: Oxford University Press, 2001); Michael Otsuka, *Libertarianism Without Inequality* (Oxford: Oxford University

subject of political equality, the need for closer theoretical attention is especially acute.”⁸⁰ And this places the burden of argument on cosmopolitan liberals to defend their version of equality—especially one that either omits considerations of compensatory justice, or devalues them absent supportive argument.

Imagine being an American Indian or a descendant of African slaves in the U.S. Also imagine being informed by Pogge that what you really need is to be made “equal” (in some equal opportunity sense) to U.S. whites, many of whose forebears were significantly responsible for the genocide, enslavement, and part of the greatest land theft in human history that greatly effects your life situation and prospects even today. This means that many of such descendants benefited from such evils by the bequeathals of lands and other forms of wealth, unlike American Indians and blacks. Also bear in mind that it is the “culture” of the U.S. that systematically and intentionally destroyed the cultures of the said people. To be fair, also imagine Pogge insisting that the U.S. has a duty to create a system of life that would provide you with an equal opportunity in life. Would you not think that Pogge’s plan would fall far shy of what compensatory justice requires, not only in the genuine amounts of compensation owed, but also in terms of effectively forcing cultural integration with those who are descendants of the evil people who murdered, enslaved, and stole what is now the territory of the U.S. from your ancestors? It is here where the paternalistic cultural imperialism of Pogge’s cosmopolitanism rears its ugly head. While Rawls simply neglects to include any principles of compensatory justice in his statement of principles of international justice, Pogge implies that there is no room for any hearty ones in his theory of global justice. Pogge quite readily indexes equality to what the West regards to be minimally required for (distributive) justice. But such a notion neglects equality of *compensatory and cultural opportunities* independent of Western dominance. Why would anyone desire to become a part of a global scheme of equality that denied rights to compensation and cultural freedom that would best ensure, if anything can ensure, liberation from the oppressive forces of at least parts of the West?

Pogge addresses the Objection from Western Imperialism:

Press, 2003); Hillel Steiner, “How Equality Matters,” *Social Philosophy and Policy*, 19 (2002), pp. 342–356. The notion of equality of opportunity is criticized in Matt Cavanaugh, *Against Equality of Opportunity* (Oxford: Oxford University Press, 2002). Also see Andrew Levine, *Rethinking Liberal Equality* (Ithaca: Cornell University Press, 1998), for a critical assessment of some theories of equality. For a historical account of recent egalitarian reforms in the United States, see J. R. Pole, *The Pursuit of Equality in American History* (Berkeley: University of California Press, 1978).

⁸⁰ Charles Beitz, *Political Equality* (Princeton: Princeton University Press, 1989), p. ix.

When human rights are understood as a standard for assessing only national institutional orders and governments, then it makes sense to envision a plurality of standards for societies that differ in their history, culture, populations size and density, natural environment, geopolitical context and stage of economic and technological development. But when human rights are understood also as a standard for assessing the *global* institutional order, international diversity can no longer be accommodated in this way. There can be, at any given time, only *one* global order. If it is to be possible to justify this global order to persons in all parts of the world and also to reach agreement on how it should be adjusted and reformed in the light of new experience or changed circumstances, then we must aspire to a *single, universal* standard that all persons and peoples can accept as the basis for moral judgments about the global order that constrains and conditions human life everywhere.⁸¹

But this reply to the antiimperialism objection to cosmopolitan liberalism both misses the point and falls prey to Boxill's Objection to a World Government. What Pogge does in the above words is essentially to reassert the position of cosmopolitanism, rather than defending it from the stated objection. Where Pogge claims that what is needed is a "universal standard that all persons and peoples can accept," he seems to not understand that this is precisely the point of argument that is being challenged by the objection under consideration. And it will not do for him to state what he does if the charge is that the imperialism of cosmopolitan liberalism is precisely that which will hinder such agreement in the first place.

Cosmopolitanism and Human Rights

Perhaps a clue to the cosmopolitan confusion lies with its rather vague conception of human rights, which are conceived as rights that all persons possess and are morally binding on others who have duties of compliance with the terms of such rights. Pogge avers: "Once human rights are understood as moral claims on our global order, there simply is no attractive, tolerant, and pluralistic alternative to conceiving them as valid universally." And, "Our global order cannot be designed so as to give all human beings the assurance that they will be able to meet their most basic needs *and* so as to give all governments maximal control over the lives and values of the peoples they rule *and* so as to ensure the fullest flourishing. . . ." Finally, he states:

It is, for the future of humankind, the most important and most urgent task of our time to set the development of our global order upon an acceptable path. In order

⁸¹ Thomas Pogge, "Human Rights and Human Responsibilities," in Andrew Kuper, Editor, *Global Responsibilities* (London: Routledge, 2005), p. 24.

to do this together, peacefully, we need international agreement on a common moral standard for assessing the feasible alternatives. The best hope for such a common moral standard that is both plausible and capable of wide international acceptance today is a conception of human rights. At the very least, the burden now is on those who reject the very idea of human rights to formulate and justify their own alternative standard for achieving a global order acceptable to all.⁸²

Of course, “Human rights as moral rights entail obligations on others.”⁸³ In other words, there is in general a correlation of rights and duties such that if I have a right to something, then others have a duty to refrain from interfering in the exercise or enjoyment of my right if it is a negative duty, or to provide me with certain goods or services if it is a positive duty. In the former case, my right is said to be a positive one, and in the latter case it is said to be negative. The difficulty with Pogge’s statements is that he merely asserts that certain egalitarian human rights exist, and that certain corresponding duties of others exist. Instead of taking his statements as a *reductio ad absurdum* of his own theory of international justice, he reasserts his own theory as if it is the only viable one. But if what Pogge argues is correct, then a global order of justice cannot exist in the way he envisions it. So it is false to claim as he does that the argumentative burden is on those who would deny cosmopolitan egalitarian justice.

To understand this point more clearly, consider the nature of a right—in particular, a human right. If it is true, as Pogge claims, that all persons have a right “to be able to meet their most basic needs,” then there would correlate with that right a negative duty of others to not interfere with the exercise or enjoyment of that right. *That* is clearly what the human right in question, if it does exist, implies in the way of others’ duties to the right holder. But what Pogge and other cosmopolitan liberals need to demonstrate is their much stronger claim that the positive duty of assistance is required by the human right in question. But why would such a positive duty of assistance hold? Perhaps it might hold in cases of famine or other poverty caused by natural disasters. But what about famine or poverty caused by human greed, selfishness, or fraud? Pogge has a partially plausible answer to this question. He states that “the primary moral responsibility for the realization of human rights must rest with those who shape and impose” the existing political and economic institutions,

⁸² Pogge, “Human Rights and Human Responsibilities,” p. 26. Slightly less vague is the description of human rights found in Thomas Pogge, “The International Significance of Human Rights,” *The Journal of Ethics*, 4 (2000), p. 46.

⁸³ Larry Alexander, *Is There a Right of Freedom of Expression?* (Cambridge: Cambridge University Press, 2005), p. 4.

whether it be the International Monetary Fund, the World Bank, or other such global institutions.⁸⁴ This is an insightful claim. But it either draws its plausibility from some right of compensatory justice, as I have been advocating throughout this chapter, or it needs to explain why “the most powerful and affluent countries” are necessarily the ones who possess this positive duty. Again, if the relevant duty here is the negative one of non-interference, or of assisting an endangered stranger, few, if any, problems arise. But what if famine is eradicated, and a person is content to live the “simple life” and not one of equality of opportunity construed in terms of Western ideals? Again, we are faced with Boxill’s objection from cultural diversity that cosmopolitan liberals seem not to be able to escape or answer adequately.

Perhaps this problem can be at least partially averted if the cosmopolitan liberal states that the positive duty of assistance is an imperfect one, only holding in cases where those in poverty communicate their desire to claim their right to or interest in equality of opportunity. But then how does this differ from arguing that the human right in question imposes only a negative duty of noninterference, in conjunction with the duty to assist endangered strangers so long as the fulfillment of that duty does not endanger oneself? As Miller writes, “The issue is how to identify one particular agent, or a group of agents, as having a particular responsibility to remedy the situation.”⁸⁵ Unless and until cosmopolitan liberals can accomplish this, then in light of the general correlation of rights and duties, it would appear that they, in their incessant insistence on human rights, might well be indulgent in what Onora O’Neill refers to as the “free-floating rhetoric of rights,”⁸⁶ or what has been referred to as the “proliferation of rights” talk.⁸⁷

Indeed, some egalitarians who are not cosmopolitan liberals have argued that a plausible notion of equality need not, or ought not, to invoke the notion of rights at all. Temkin reasons accordingly:

Telic egalitarians believe that equality, or inequality, is a feature that is relevant to the *goodness* of outcomes, such that, *ceteris paribus*, the worse a situation is regarding equality the worse the situation is. But it does not follow from this that “all persons have a general right, as against all other persons, *to be supplied with . . . some . . . good*, at the expense of all who have more of this good.” Indeed, *rights* do not have to enter into the egalitarian’s picture at all, and my understanding and characterization of equality does not invoke, or in any way rely on, the notion that

⁸⁴ Pogge, “Human Rights and Human Responsibilities,” p. 31.

⁸⁵ David Miller, “Distributing Responsibilities,” in Andrew Kuper, Editor, *Global Responsibilities* (London: Routledge, 2005), p. 95.

⁸⁶ Onora O’Neill, “Agents of Justice,” in Andrew Kuper, Editor, *Global Responsibilities* (London: Routledge, 2005), p. 42.

⁸⁷ Carl Wellman, *The Proliferation of Rights* (Boulder: Westview Press, 1999).

the worse off have a *right* to equality, or a *right* against the better off to be made as well off as they.

... The worse off may be improved through sheer good fortune, or the better off may be worsened—or leveled down”—through sheer bad luck. *Either* event may bring about a *perfect* situation regarding equality. But, then, it obviously is not central to the egalitarian’s view that the worse off should be made better off *at the expense* of those who are initially better off. ... But then, *a fortiori*, it is not part of the egalitarian’s view that the worse off must “be supplied with ... some variable and some commensurable good,” much less that the worse off have a *right* to be supplied with such a good.

... Basically, egalitarians favor promoting equality between equally deserving people *whoever those people are*, regardless of race, gender, religion, nationality, sexual orientation, or any other characteristics or relationships of the people in question.⁸⁸

Thus it is highly questionable whether cosmopolitan liberals are working with a conception of global equality that is not in need of independent argumentative support in light of the fact that what they regard as equality is quite stronger than what others who consider themselves egalitarians think it ought to be.

Furthermore, this problem of cosmopolitan liberals not being seriously interested in compensatory justice is found in other cosmopolitan liberal writers. In fact, cosmopolitan liberals seem to have conflated compensatory justice with distributive justice. To see this, consider the following:

If the remedy for imperialism were reparations for past injustices, the duty to correct the injustice would be fulfilled once the compensation for past injustices had been paid. There would be no guarantee that future economic relations would be to the maximum benefit of the least advantaged. Hence, on this account of remedying the injustice of imperialism may provide one-time relief for millions of disadvantaged people, but it would not secure long-term prospects for them in the way that institutions governed by democratic equality would.⁸⁹

But these claims contain numerous problems. First, there seems to be an assumption and implication that reparative justice would take the form of cash payments to beneficiaries. Yet it is clear that reparations can and would⁹⁰ be institutionalized for efficiency and long-term value for the beneficiaries. And let us not forget that reparations, properly construed and institutionalized, exert expressive functions⁹¹ that are vital to the kind of ethnic integration that cosmopolitan liberals desire. Moreover, the conflation of compensatory justice with distributive justice is found in the further presumption that there

⁸⁸ Temkin, “Thinking About the Needy: A Reprise,” pp. 431–433.

⁸⁹ Moellendorf, *Cosmopolitan Justice*, p. 91.

⁹⁰ In the U.S., there seems to be insufficient toleration for cash payouts for those who, by their lights, should not even be accorded affirmative action of any kind.

⁹¹ Corlett, *Race, Racism, and Reparations*, Chapters 8–9.