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# Race, Rights, and Justice



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is something wrong with even adequate and fair compensation for harmful wrongdoings. But this view can only make sense according to an ethic that in effect subsumes rights under social utility considerations. But to take rights seriously is to disallow social utility to trump them. Otherwise, there are no rights at all, but in effect privileges at the whims of social utility. What is so wrong with a world of adequately compensated harmful wrongdoings that cosmopolitan liberals seem to eschew them? The key to the presumption in question is found in the locution “There would be no guarantee that future economic relations. . . .” But why ought compensatory justice be sacrificed for the sake of “future economic relations”? Even if we want to admit the unproven anticompensatory rights stance concerning the importance of economic equality of opportunity, why should compensatory justice rights be jettisoned in favor of something that, contrary to the author’s point, can very well make the victims some of the wealthiest people? To take my previous example, if adequate reparations were paid to American Indians and blacks, there simply would not in the foreseeable future be any serious worry that they would even require distributive economic justice, thus making dubious the unsupported claim that democratic institutions would better ensure their long-term prospects.

Moreover, if someone becomes poor after becoming wealthy through reparations (not by direct cash disbursement, but indirectly by institutional compensatory measures), it would be folly to have any sympathy for them, and surely no moral duty to assist accrues to anyone on their behalf, that is, unless their poverty results from fraud or some other form of injustice beyond their control and for which they are not responsible. To not believe this would seem to imply that “There are very good reasons to believe that after a one-time compensatory payment, inequalities would continue to grow in the *lassiez faire* global market.”<sup>92</sup> But how is this an argument against the compensatory or remedial *right* to reparations? And how is reparations some kind of injustice? Reparations constitute a compensatory *right* that each wrongfully harmed person possesses and that correlates with a duty of compensatory justice of her harmful wrongdoer, alienable only by the person wrongfully harmed. Even if the person harmed wants to destroy all the monetary assets that compensation would grant her by law, it is her right and hers alone to do so. And it is a kind of morally presumptuous paternalism that would even imply something one way or another about what might happen as a result of *her* realizing *her* compensatory benefits. It is the kind of view that subsumes rights under utility and compensatory justice under distributive justice as it conflates justice with equality without rights to compensation

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<sup>92</sup> Moellendorf, *Cosmopolitan Justice*, p. 91.

(where compensation is justified). From the standpoint of American Indian and black experiences, furthermore, it is nothing short of morally insulting to desire a policy or system that would grant forced integration and equality of opportunity to become, in essence, culturally Westernized, and deny what justice truly requires in terms of compensatory justice.

If compensated according to just principles of proportionality, each American Indian and black would become economically wealthy several times over, and very rapidly. Why would there be a need for future distributive justice in their cases? And what about, say, survivors of the Nazi genocide in the mid-20th century? Would they have been happier under cosmopolitan “justice” to receive equality of opportunity instead of the millions of dollars in reparations that Israel (but not other survivors or families of other persecuted victims) has received over the years? Is the implication here that they would have been better off if those survivors simply accepted whatever “equality” they could receive back in Germany, their “homeland,” the very same society where they were oppressed? There is simply no need for distributive justice that effectively brings forced integration of peoples that compensatory justice does not. It is a kind of Western liberal paternalism that seeks to replace the generations (in many cases) of calls for reparative justice with a Westernized notion of making everyone as equal as possible to some middle-class notion of what cosmopolitan liberals desire for their seemingly unrealistic utopia. It is unrealistic in that cosmopolitan liberals do not seem to understand that the world is replete with injustices that not only require compensation, but often create enemies between the harmful wrongdoers and their victims.<sup>93</sup>

Again, a Westernized notion of equality of opportunity is highly dubious in the world of harmful wrongdoers who deserve to be punished and forced to adequately compensate their victims’ heirs as groups. Nor should any form of reconciliation be required in such cases. Many cosmopolitan liberals claim that they seek justice in the world. But as Martha Nussbaum argues: “. . . we must ask the questions, and we must know enough and imagine enough to give sensible answers.”<sup>94</sup> But how “just” and “sensible” is it to spin theories of utopias where victims of harmful wrongdoings are uncompensated and then expected to integrate (reconcile) with those who harmed them? Is that justice and sensibility, cosmopolitan style? If so, then cosmopolitanism must

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<sup>93</sup> This is ironically interesting in light of the fact that some cosmopolitan liberals fancy themselves as propounding theories of “real world justice” (Pogge, “Real World Justice”).

<sup>94</sup> Martha Nussbaum, “Replies,” in Joshua Cohen, Editor, *For Love of Country* (Boston: Beacon Press, 1996), p. 137.

be exposed for the unjust utopia that it is, ignoring the wrongfully harmed underclasses who have sought compensation from those who have wrongfully harmed them, only to be given equality of opportunity to live in ways of which the more economically privileged approve. To say that cosmopolitan liberals are in favor of human rights is somewhat of a misnomer in that they tend to misunderstand the nature of rights to imply duties for which they have not proven exist for the wealthy. And one cannot really be in favor of that of which one lacks sufficient knowledge.

In the end, verbiage about building egalitarian justice faces the same fact that all other systems of international law confront: Boxill's objection from national autonomy. At bottom, such issues must come to terms with the fact that questions of global justice are related quite directly to questions of the meaning of life, a question that is unnoticeable in the philosophical literature on global justice. And if this question is not adequately addressed, then paternalism is the likely result in that a certain standard of living is imposed on peoples, which implies an acceptable meaning of life. For example, if the Diné nation found its cultural lifestyle quite fulfilling as it is, who is to say that it ought to partake of globally egalitarian lifestyles so its members can have an equal opportunity in life? The cosmopolitan liberal might argue that her theory does not force any nation to become equal to others and that it merely seeks a system of (distributive) justice that would provide individuals in the Diné nation an opportunity to have a certain kind of life. But precisely what is meant here by "kind of life"? In the many cases where compensatory justice retains that autonomy of ethnic groups and the individuals in them, cosmopolitan justice effectively coerces the Diné nation (or any member of it) to risk perverting its (or her) lifestyle that it (she) so cherishes. Thus the meaningfulness of life changes, and in many cases it is, on balance, for the worse.

In short, cosmopolitan liberals must explain how their imperialism provides a more meaningful life for those in non-Western nations and their respective cultures than they would have if they did not receive adequate compensation from those who wrongfully harmed them, or it must explain how cosmopolitan justice is, all things considered (including the depth of one's culture), better than the baseline quality of life that the targets of cosmopolitan justice seek to assist, quite apart from compensatory justice considerations. It is one thing to relieve global poverty. That can be justified by way of the duty of assistance not only in Rawls' principles of international justice, but in obedience to anti-bad Samaritan statutes. But it is quite another to deny the legitimacy and importance of compensatory justice, especially when in so many cases the global poor are also the victims of historic and contemporary oppression that many existing countries simply fail to take responsibility for and compensate. These are two quite distinct moral and

legal issues. I have argued for compensatory justice without denying the significance of the duty of assistance. But I have done so without embracing paternalism or in effect a crude kind of ethic that would deny the importance of rights, including the right to compensation.

In the end, cosmopolitan liberals, in their myopic concentration on global equality of opportunity, confuse poverty with need, and confuse justice with a rather narrow conception of equality and make no significant room for compensatory justice that would best ensure the freedom and autonomy, and in many cases sovereignty, of peoples. They do not comprehend, it seems, the profound truth of the saying: “justice cannot grow on injustice.” Distributive justice is no justice at all if it is meant to replace or ignore the importance of compensatory justice. Because cosmopolitan liberalism denigrates compensatory justice considerations, I believe that Rawls’ statist<sup>95</sup> theory of international justice is more plausible than cosmopolitan liberalism on matters of justice. As I have argued above, Rawls’ Law of Peoples can accommodate rights to compensation, while cosmopolitan liberalism is actually hostile toward anything that runs afoul of its Westernized version of equality of opportunity. These points are missed by Samuel Scheffler’s assessment of cosmopolitan liberalisms:

... moderate cosmopolitanism about justice will be a compelling position only if it proves possible to devise human institutions, practices, and ways of life that take seriously the equal worth of persons without undermining people’s capacity to sustain their special loyalties and attachments. And moderate cosmopolitanism about culture will be compelling only if two things turn out to be true. The first is that some people succeed in developing recognizably cosmopolitan ways of living that incorporate the sort of stable infrastructure of responsibility that more traditional ways of life have always made available to their adherents. The second is that other people succeed in preserving the integrity of their traditions without succumbing to the temptation to engage in the doomed and deadly pursuit of cultural purity.<sup>96</sup>

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<sup>95</sup> By “statist,” I mean no disrespect to Rawls’ theory. Rather, I mean to convey what many cosmopolitan liberal critics of Rawls refer to his theory as. Indeed, no theorist today would dare be a statist in some strong sense of thinking that the only legitimate subjects of international law and global justice are and ought to be states. For this would imply that it would be wrong for international law to place on trial individual war criminals or such, which would be absurd. So the old legal positivist doctrine that only states can be the legitimate subjects of international law must be discarded as a view no one holds. As one legal commentator puts it: “Like various other tenets of the positivist creed, the doctrine that only states are subjects of international law is unable to stand the test of actual practice” [H. Lauterpacht, *International Law and Human Rights* (Archon Books, 1968), p. 9].

<sup>96</sup> Scheffler, *Boundaries and Allegiances*, pp. 129–130.

Unless by “responsibility” Scheffler means considerations of compensatory justice and the rights that must accrue therein, Scheffler’s assessment of cosmopolitan liberalisms, though insightful in its own right, makes no mention of rights to compensatory justice for, say, crimes against humanity. Thus his assessment of cosmopolitan liberalism, though nuanced, is insufficiently complex to account for the hostility cosmopolitan liberalism seems to display—at least according to some of its leading adherents—toward rights to compensatory justice, rights that are often, I might add, affixed to the rights of ethnic groups and cultures to preserve their own ways of life.<sup>97</sup>

Finally, Allen Buchanan provides a cosmopolitan critique of Rawls’ Law of Peoples in that it is overly minimalist in its list of human rights, and too tolerant of nonliberal societies that are not representative in their forms of government that, by Buchanan’s lights, result in “extreme inequalities:” “. . . regardless of what Rawls thinks it implies, his standard for what counts as a decent society allows extreme inequalities and indeed extreme inequalities that are morally arbitrary and indefensible.”<sup>98</sup> Now this is a serious charge, as it indicts Rawls on the charge of allowing what is morally indefensible and arbitrary, despite Rawls’ explicit attempts to avoid such problems. Buchanan continues,

The fundamental flaw in Rawls’ account of toleration can also be put this way: Rawls collapses respect for reason into an over-expansive conception of humility based on a subjectivistic view of what counts as a reasonable conception of public order, thereby sacrificing a commitment to equal consideration of persons to that flawed conception of reasonableness. . . .

Unless Rawls is willing to abandon the whole project of developing what he calls a political conception of justice—unless he is willing to rely on a comprehensive conception of the good that elevates respect for reason to the highest moral principle, higher even than respect for persons themselves or equal consideration for their well-being—he must recognize that respect for persons’ reasons is not the be all and end all of morality. He must recognize that respect for persons’ reasons may sometimes have to be subordinated to the demands of a more comprehensive principle of equal consideration of persons, whether this is spelled out as equal respect for persons or equal concern for their well-being.<sup>99</sup>

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<sup>97</sup> Furthermore, if one philosopher has it right, then cosmopolitan liberalism, in its focus on radical equality, seems also to ignore totally the rights that nonhumans might possess that would imply duties we have toward them. If sound, this criticism reveals the deeply speciesist nature of cosmopolitanism, and I would add, of Rawls’ theory of international justice as well [James P. Sterba, “Global Justice for Humans or for All Living Beings and What Difference it Makes,” *The Journal of Ethics*, 9 (2005), pp. 283–300].

<sup>98</sup> Buchanan, *Justice, Legitimacy, and Self-Determination*, 165f.

<sup>99</sup> Buchanan, *Justice, Legitimacy, and Self-Determination*, pp. 173–174.

There are several things that might be said in reply to this complex critique of Rawls. The first is that it is a bit like a straw person, as it is unclear that Rawls holds to a “subjectivistic view of what counts as a reasonable conception of public order.” And it is highly questionable whether Rawls thinks that respect for persons’ reasons is the “be all and end all of morality.” This is the case precisely because Rawls believes that “respect for persons’ reasons may sometimes have to be subordinated to the demands of a more comprehensive principle of equal consideration of persons.”

On a more generous reading of Rawls than Buchanan provides, Rawls is not subjectivistic along these lines, but rather remains consistent with the liberal pluralism articulated and defended in *Political Liberalism*.<sup>100</sup> In that book, Rawls is hardly guilty of a kind of subjectivism, but rather of a reasonable tolerance of those whose views and lifestyles fall under a broad conception of “comprehensive” doctrines, though whose views or lifestyles are not liberal in content. It is, Rawls insists, a liberally decent society that inculcates and nurtures this kind of toleration. And in *The Law of Peoples*, Rawls elevates liberal tolerance to the global level. There is no subjectivism here. Just as Rawls does not ground liberal tolerance in *Political Liberalism* in some subjectivistic idea of what counts as reasonable within a liberal state, nor does he adopt a subjectivist notion of what is reasonable and tolerable in the Society of Peoples. It is not subjectivism that Rawls is engaged in as Buchanan asserts, it is, on a more careful consideration of Rawls’ work, a deeper sense of liberal tolerance for legitimate differences between peoples and a genuine respect for differential decency between various peoples.

Repeatedly accusing Rawls’ list of human rights as being “truncated,”<sup>101</sup> Buchanan charges Rawls with excessive minimalism along these lines. At issue here is which societies count as decent and which do not, the latter being the ones where, under certain conditions, humanitarian intervention is permitted, if not required. But here we would do well to study the important sources in contemporary rights theory. On Joel Feinberg’s account,<sup>102</sup> a right is something that is a valid claim or interest, and there is a difference between one’s having a right, one’s claiming that right, and one’s exercising it.<sup>103</sup> This distinction is important for Buchanan’s criticism of Rawls’ view of liberal tolerance and the possible duty of humanitarian intervention because

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<sup>100</sup> John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993).

<sup>101</sup> Buchanan, *Justice, Legitimacy, and Self-Determination*, 164f.

<sup>102</sup> Joel Feinberg, *Rights, Justice, and the Bounds of Liberty* (Princeton: Princeton University Press, 1980); *Freedom and Fulfillment* (Princeton: Princeton University Press, 1992), Chapters 8–10.

<sup>103</sup> See Chapters 5–6 of this book for discussions of rights.

Buchanan seems to distort what counts as a society that is not decent and in need of external reform.

Suppose that there is a people in “Traditionsville” that imbeds in its democratic constitution all of the same rights that would make it a liberal democracy, but wherein women of that society by and large do not choose to live what Westerners would deem a “liberated” life. Instead, citing the comforts of tradition, religious or otherwise, the women of this society by and large choose to bear children, raise their children, and not engage themselves in professional affairs outside their homes. They also choose to not bother themselves with the administration of their society, as they genuinely do not want to “waste” their lives with such “troublesome nonsense.” These women, by and large, seek their own happiness and meaning in life in the nuclear family, rather than in politics and a career of hustle and bustle. They care about who represents them, demonstrated by the fact that they study candidates and vote conscientiously for who they want to represent them in governmental affairs of their state.

The point of the example of Traditionsville is that Rawls’ Law of Peoples can accommodate it as a decent society in that the women of Traditionsville have rights and can exercise them at will should they want to, but Buchanan seems not to be able, or willing, to. Yet precisely what is it about Traditionsville that places it outside the realm of decency? For Buchanan, it might be that it fails to *conduct* itself as a liberal society. But is this true? Each woman in Traditionsville has every right that each man has, and each can claim that right at any time, without fear of reprisals of any kind. In fact, anybody—man or woman—in Traditionsville can even freely exercise his or her rights to this or that and the social structure is set up to accommodate this possibility. But Traditionsville is where women choose traditional women’s roles over those of Westernized “liberated” ones. They simply choose to not exercise their rights to be the equals of men outside of the home. Buchanan might complain that the “folkways” of Traditionsville brainwash women to accept rather than freely select their roles, and that no self-respecting woman would ever freely choose what subordinates them to men as Traditionsville does. But this seems to be an answer based on Western bias as to what constitutes the “rightful” place of a man or a woman in a decent society. It appears to assume that the ways of Traditionsville are flawed at the outset, with no consideration of the possibility that someone might really want to live in this or that role within it.

Consider what Buchanan writes in criticism of Rawls’ notion of a “consultation hierarchy” in certain hierarchical societies that are to be tolerated as being reasonably just: “. . . rights to basic education, to freedom of association and expression, and rights regarding employment and property ownership that provide opportunities for women to have some degree of economic



independence if they do not conform to traditional roles—all of these rights may be necessary if women's basic interests are to be effectively represented in the consultation hierarchy."<sup>104</sup> But one question for Buchanan is what constitutes a context in which these necessary conditions for societal justice accrue? Is it that women *possess* these as constitutional rights? If so, then the women of Traditionsville have such rights and thereby live in a decent society. They can even *claim* their rights openly and with confidence! But the fact that the women of Traditionsville by and large do not *exercise* their rights to equal participation with men poses a particular epistemic challenge to a position such as Buchanan's. How is it to be understood exactly what separates Traditionsville from a society that is truly unjust toward women? Rawls' minimalist list of human rights in principle provides an easier way to answer the question, as there are fewer standards of justice to satisfy. But does this not pose a particular problem for Buchanan's less minimalist view insofar as it contains a more robust list of human rights? Is it the freedom to choose to exercise one's human rights that serves as the means by which to discern decent societies from those that are not decent? Yet how is this standard of assessment to be known within the confines of a nonideal world in which Buchanan insists that we operate? It would appear that Buchanan owes us a theory of how the influences of traditions can be separated from citizens' free choices to live their lives in one way or another. Otherwise, Buchanan's version of cosmopolitanism seems to verge on, if not exemplify, a rather blatant form of strong paternalism, a view that he seems to not address or refute in his criticism of Rawls' theory of international justice.

I have argued that, for all its attention to details of distributive justice, cosmopolitan liberalism lacks an essential ingredient in the construction of a globally just legal order. It neglects substantially rights to compensatory justice, an oversight that, unless repaired, renders it impotent to qualify both as a realistic utopia and as one that can handle not only rights violations of the past, but those of the present and future. Some cosmopolitan liberals, however, have failed to make an adequate case for the global duty of providing equality of opportunity for all individual persons. Insofar as global poverty caused by human affairs and various other forms of injustice are duties to be fulfilled, it remains to be seen as to precisely whom has such duties.

Collective responsibility is far too complex to simply assign the duties generally to all citizens of wealthy countries. For in most countries the power to effect change is had only by a relative few. And so long as the citizens of some country did not approve of the actions of a few of their governmental

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<sup>104</sup> Buchanan, *Justice, Legitimacy, and Self-Determination*, p. 170.

leaders who enacted policies that eventuated in the injustices in question, why ought the citizens of that country to bear the brunt of what a few were causally responsible for, say, in another country? This is not to argue that a country's citizens bear no collective responsibility for what their elected leaders do in their name. Rather, it is to argue that the arguments in favor of such collective responsibility or duties of assistance must be made much stronger than cosmopolitan liberals have provided thus far. For this is an argument that cosmopolitan liberals have not bridged. Until they do, their theory of global justice remains as an instance of holding responsible for many forms of injustice many of those whose responsibility for it is unclear.

Cosmopolitan liberalism, then, faces several problems leveled against it from Boxill,<sup>105</sup> and myself. Until a version of it can plausibly answer these difficulties, it will continue to suffer from impoverished conceptions of rights and justice. And this holds true despite the fact, as Rousseau notes, those “few great cosmopolitan souls . . . overcome the imaginary barriers that separate peoples . . . and embrace the entire human race in their benevolence” seek to unite peoples of the world “in order to protect the weak from oppression, restrain the ambitious . . . ” and “gather them into one supreme power that governs us according to wise laws . . . and maintains us in an eternal concord.”<sup>106</sup> For no matter how much cosmopolitan liberals aspire to, among other things, base putatively effective responses to terrorism on their aspirations for a just and democratic global order,<sup>107</sup> such a scheme often only exacerbates such problems when it defiantly disrespects the unrectified injustices that surely form the bases of so much of terrorism in the first place. Furthermore, rights-disrespecting claims like “The world will not be able to move toward fair, inclusive, and effective global governance without major reallocation of economic, technological, and organizational capacities to reduce existing global disparities in the quality of life and institutional

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<sup>105</sup> One embarrassing fact about cosmopolitan theories is that many, if not all, of them continue to propagate and commit many of the same errors articulated by Boxill in 1987, as this section indicates.

<sup>106</sup> J. -J. Rousseau, *Discourse on the Origin of Inequality*, David A. Cress (Trans.) (Indianapolis: Hackett Publishing Company, 1992), pp. 56–57.

<sup>107</sup> Daniele Archibugi and Iris Marion Young, “Envisioning a Global Rule of Law,” in James Sterba, Editor, *Terrorism and International Justice* (Oxford: Oxford University Press, 2003), p. 158. However, for analyses of the causes of terrorism that construe terrorism as a possible means to justice for the oppressed, see J. Angelo Corlett, *Terrorism: A Philosophical Analysis* (Dordrecht: Kluwer Academic Publishers, 2003); Ted Honderich, *After the Terror* (Edinburgh: Edinburgh University Press, 2004); and Burleigh Wilkins, *Terrorism and Collective Responsibility* (London: Routledge, 1991).

order”<sup>108</sup> are indeed naïve, if not also part and parcel what sustains such injustices, as they continue to deny the compensatory rights for those suffering from historical injustices.

Where both Rawlsian and cosmopolitan liberal theories are weakest, it seems, is in their providing theories of international distributive justice as if they were full-fledged theories of international justice. But just as domestic law concerns itself with compensatory justice as well as distributive justice, so too must any plausible theory of international justice concern itself with duties of and rights to compensatory justice. Assuming, then, that rectificatory justice can be written into an otherwise plausible (Rawlsian) theory of international justice, I shall now turn attention to considerations of the nature and value of rights—both individual and collective—and then to an assessment of a particular global problem that integrates the ideas of international law, justice, and rights.

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<sup>108</sup> Archibugi and Young, “Envisioning a Global Rule of Law,” p. 168.