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Race, Rights, and Justice

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of rights in general, his attack on *all* the rights of man. . . .”⁷² Thus this latter claim of Buchanan’s too is inadequate as a support of his own argument in regards to Marx’s alleged internal critique of rights.

In short, Buchanan fails to provide adequate reasons in support of his claim that Marx’s internal critique says there is no place for rights in communism.

Difficulties with Attributing the “External Critique” to Marx

Now consider the putative Marxian external critique of rights as such. Does Buchanan’s threefold reply to the question, “Does Marx reject only certain bourgeois rights?” defeat the argument that Marx’s critique of rights concerns only certain “bourgeois” rights, rather than rights as such?

In reply to Buchanan’s first point, it does not follow from the fact that “Marx nowhere states that bourgeois rights will be replaced by other rights in communism” that either Marx criticizes rights *per se* or that Marx does not criticize certain “bourgeois” rights only. Buchanan’s first point amounts to an *ignoratio elenchi* and does nothing to defeat the more charitable interpretation that Marx criticizes only certain kinds of rights as those which protect the bourgeois class.

In reply to Buchanan’s second point, the fact that Marx scorns various rights (even “equal rights”) is not enough to show that he successfully criticizes rights as such or that he criticizes rights other than those which protect the bourgeois class. As I argue below, there are certain rights that seem to be affirmed by implication in Marx’s critique of capitalism (though Marx himself does not seem to acknowledge this fact). Furthermore, it must be pointed out that Marx, in the passages Buchanan cites from “Critique of the Gotha Program,” does *not* obviously scorn rights as such, not even “equal right” as such. Instead, it is arguable that Marx laments such “ideas which in a certain period had some meaning but have now become obsolete verbal rubbish, . . . ideological nonsense about right and other trash. . . .”⁷³ These are not necessarily the words of someone who criticizes the notion of rights as such, or even of equal right as such, but are compatible with recognizing that there is a proliferation of rights talk which threatens the very meaningfulness of rights attributions and claims themselves. Marx argues that only in communist society “can the narrow horizon of bourgeois right be crossed

⁷² Buchanan, *Marx and Justice*, p. 64.

⁷³ Karl Marx, “Critique of the Gotha Program,” in R. C. Tucker, Editor, *The Marx-Engels Reader*, Second Edition (New York: W. W. Norton & Company, 1978), p. 531.

in its entirety and society inscribe on its banner: From each according to his ability, to each according to his needs!"⁷⁴ Thus Buchanan's second argument, not unlike his first one, is problematic. Neither argument defeats the interpretation that Marx's critique of rights is limited in scope, rather than being general.

Furthermore, even if there is, as Buchanan argues, a total absence in Marx's writings of any indication that there will be a place for rights in communism, perhaps the reason for this is his general dissatisfaction with rights talk and rights theories that flourished during his time. That Marx does not specify the role of rights in communism (or even socialism)⁷⁵ does not prove that Marx criticizes other than bourgeois rights. Marx refers to the rights of man or bourgeois rights in such pejorative terms because such rights-claims separate people from one another and serve to divide members of society.

In reply to Buchanan's final point, it should be noted that Marx does *not*, in the passage from the "Critique of the Gotha Program" cited by Buchanan, criticize "the very concept of a right," as Buchanan avers. Instead, the passage explains how the alleged right to equality does not accord to humans' authentic equality, contrary to the claims often made in a capitalist regime. In the passage Marx is providing a criticism of rights *in capitalism*, of how the alleged right to equality is in certain crucial respects unequal in capitalism. This hardly amounts to a criticism of rights as such.

That Marx heaps scorn on certain rights, especially those respected under capitalism, that he has nothing positive to say about rights (in a direct fashion), and that he says nothing about the possible role of rights in communism, seem to be the features of Marx's writings that drive Buchanan's interpretation. But these are insufficient reasons to conclude that Marx thereby criticizes *all* rights. That Marx does not tell us the role of rights in communism does not entail that there can be no such role for rights in communism, according to Marx, nor that there can be no role, in fact, for rights in communism. Furthermore, Marx's slogan "from each according to his ability, to each according to his needs" appears to imply a positive (welfare) right of each individual *in a communist regime* to the provision of certain basic needs.⁷⁶ And there seems to be no reason why such needs could not include

⁷⁴ Marx, "Critique of the Gotha Program," p. 531.

⁷⁵ "Conceptions of rights will not play a major motivational role in the revolutionary transition from capitalism to communism" (Buchanan, *Marx and Justice*, p. 162).

⁷⁶ However, not every right is respected by Marx. Implied in Marx's condemnation of the private ownership of the means of production is that such a right is condemned by Marx. Further consideration might reveal other rights, which are implicitly condemned by Marx.

some property. Surely Marx would hold that persons in either capitalism or communism have a legitimate moral interest in securing the satisfaction of their basic needs. It is precisely this interest, Marx might argue, which grounds the moral (and perhaps legal) right to such needs.

Foundations of a Marxian Theory of Rights

Buchanan's arguments aside, my own interpretation of Marx on rights is that Marx does not criticize rights *per se*. Instead, Marx holds a position on rights one of whose unacknowledged (and possibly unrecognized) implications is that persons do and should have some rights. Recall that Marx singles out only certain specified rights ("the rights of man" and, perhaps, the "rights of the citizen") as targets for criticism: the rights to liberty, property, equality, security, and certain other political rights. *These* are the sorts of rights Marx criticizes as promoting egoism among persons in capitalist societies. But Marx does *not* criticize the right to resist oppression in Article 2 of the Declaration of the Rights of Man and of the Citizen (1789). That Marx does not criticize the right to resist oppression does not logically imply that he accepts it. However, it does mean that Marx does not criticize one of the rights of the Declaration, a right with which Marx is surely familiar. This fact alone casts some doubt on the view that Marx rejects rights *per se*.

What *does* Marx mean when he criticizes certain rights as being "egoistic"? Perhaps, like Bentham, Marx believes that the idea that the rights of man could be a starting point for political morality is "pernicious nonsense." Perhaps Marx holds that certain rights are a celebration of the primacy of individualism, and he opposes individualism (over, say, the recognition and pursuit of collective goods) because it asserts an individual's own interests against those of the collective good, which nurtures him or her and makes individual autonomy possible and worthwhile.⁷⁷ Rights separate individuals from the communities their very membership in which is vital for human growth. Since the rights of man are essentially social, this criticism goes on to say, there cannot be moral rights of this type independent of any or all social institutions, as the political atomist or individualist would have it.⁷⁸

⁷⁷ Jeremy Waldron, "Introduction," in Jeremy Waldron, Editor, *Theories of Rights* (Oxford: Oxford University Press, 1984), pp. 1–2.

⁷⁸ "Political atomism" is defined as the view that society is "in some sense constituted by individuals for the fulfillment of ends which were primarily individual," and includes the notion that rights play a central part in the justification of political structures and action [See Charles Taylor, *Philosophical Papers*, Volume 2 (Cambridge: Cambridge University Press, 1985), p. 187].

Similarly, Marx seems to be criticizing the rights of man because he sees them as serving a foundational function in the justification of other moral, social, and political principles (in certain, if not all, capitalist regimes), while such rights themselves are alleged to be self-justified or not justified on the basis of any such principle(s). Why should *rights* be *basic* to any social or political morality?

Jeremy Waldron recognizes this as a plausible interpretation of the “socialist” critique of rights when he writes, “if rights had any relevance at all in society, it was not on account of their being the terms of its foundation.”⁷⁹ Perhaps Marx is also arguing that a rights-based society is problematic in that it does not recognize any intrinsic value in any collective good. If collective goods such as membership in society are intrinsically valuable, then it is to be expected that they provide the source both of personal goals and of obligations to others.⁸⁰ Perhaps Marx is criticizing the rights of man as being an underdeveloped notion of rights that fails to correlate individual rights with collective goods and obligations to society.

Marx could argue that in communism, the working class would possess a (collective) right to ownership of the means of production, a notion that would certainly ring consistent with Marx’s general critique of capitalism. Moreover, he could argue that the working class both as a collective and as individuals possess rights against their exploitation and alienation.

Furthermore, that Marx calls capitalist exploitation “robbery”⁸¹ and an injustice⁸² seems to *imply* that Marx does not condemn rights *per se*, but rather affirms the moral right (based on the valid moral claim) of each person to be free from exploitation. More specifically, Marx’s concept of capitalist exploitation implies the right of individuals not to be exploited, a right which is correlated with the duty of others not to exploit the right

⁷⁹ Waldron, “Introduction,” p. 152.

⁸⁰ Joseph Raz, “Right-Based Moralities,” in R. G. Frey, Ed., *Utility and Rights* (Minneapolis: University of Minnesota Press, 1984), pp. 46, 59.

⁸¹ Karl Marx, *Grundrisse: Foundations of the Critique of Political Economy* (Rough Draft), Martin Nicolas, Translator (London: Allen Lane with New Left Review, 1973), p. 705.

⁸² Ziyad I. Husami, “Marx on Distributive Justice,” *Philosophy and Public Affairs*, 8 (1978), pp. 27–64. Husami argues that two principles of justice may plausibly be extracted from Marx’s writings. The first is a principle of equal treatment. The second is one of rewards according to labor. Since capitalism violates the labor exchange between capitalists and workers, it thereby violates the principle of rewards according to labor. Since capitalism violates a principle of justice, it is unjust. For a critique of Husami’s argument, see Allen W. Wood, “Marx on Right and Justice: A Reply to Husami,” *Philosophy and Public Affairs*, 8 (1979), pp. 267–295.

holder, not to use the right holder as a mere means to individual or collective socioeconomic or political advantage.⁸³ Even if Marx's moral condemnation of capitalist exploitation is itself an insufficient ground to derive the conclusion that workers' rights are violated, it is an important evidence for such a conclusion. Also implied in Marx's critique of capitalism seems to be an individual's right not to be alienated from creative, self-conscious, and productive activity by robbing one of control over his or her actions.⁸⁴ This right implies a duty of others not to cause one to be alienated in such a way. This implied right, in turn, seems to further imply that individuals should have a choice to do certain things in a socialist regime. Thus there is reason to think Marx implies that some individual rights ought to be respected in a socialist regime. That is, Marx appears to provide a critique of capitalism one of whose unacknowledged (and possibly unrecognized) implications is that persons have moral rights at least some of which ought to be protected by institutional structures of law. Or, at least, it is not inconsistent with anything Marx argues about rights to attribute to him such a position on rights.

Marx's critique of capitalism also seems to imply that there are some individual and some collective (group) rights that are basic to a communist society. One such right is the collective and individual right to self-determination. This right is implied in Buchanan's own characterization of Marx's view 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."⁸⁵ This, it might be plausibly argued, implies that Marx thinks that both collectives and individuals have what might be called a "right of self-determination," based on a group's legitimate interest (moral or legal) in collective freedom. Furthermore, Marx's critique of capitalism also seems to imply an individual's right to free productive activity in a communist regime. For in communism, Buchanan himself writes, "productive activity will be free, rather than compulsory, and mutually beneficial, rather than harmful, when and only when individuals choose to engage in particular activities on the basis of undistorted preferences and when the collective result of these choices is a social order in which all persons' undistorted preferences can be fully satisfied."⁸⁶

Thus, even though Marx writes critically about certain rights in capitalism, his critique of capitalism seems to imply that some rights should not

⁸³ This Marxian notion of exploitation is borrowed from Buchanan, *Marx and Justice*, p. 39.

⁸⁴ I borrow this Marxian notion of alienation from Buchanan, *Marx and Justice*, p. 43.

⁸⁵ Buchanan, *Marx and Justice*, p. 48.

⁸⁶ Buchanan, *Marx and Justice*, p. 49.

be condemned either in a capitalist society or in a communist one. Even if it is true that Marx both fails to provide conceptual resources to serve as weapons against combating rights violations during and after a communist revolution, and actively discourages his readers from trying to revise old ways of thinking about rights along communist modes of thinking, it does not follow that Marx criticizes rights *per se*, as Buchanan's alleged Marxian external critique of rights suggests.

But perhaps most telling of all is a fact that is not even alluded to by implication in Buchanan's, nor any other philosopher's treatment of Marx. The right to freedom of expression, thought by most in the Western world to gain its initial expression in the writings of John Stuart Mill, was in fact articulated in rather clear terms by none other than Marx himself. Historically and philosophically speaking, many philosophers and legal scholars believe that Mill, in *On Liberty* (1859), articulated an account of freedom of speech and expression that has served as the foundation of the predominant U.S. attitude toward the First Amendment and the right to freedom of expression.⁸⁷ But in 1842, Karl Marx argued that "[a]s soon as one facet of freedom is repudiated, freedom itself is repudiated, and it can lead only a mere semblance of life, since afterwards it is pure chance which object unfreedom takes over as the dominant power. Unfreedom is the rule and freedom the exception of chance and caprice."⁸⁸ Of freedom of the press in particular, Marx writes, "The essence of a free press is the characterful, reasonable, ethical essence of freedom. The character of a censored press is the characterless ogre of unfreedom; it is a civilized monster, a perfumed abortion."⁸⁹ Not only, then, does Marx express his unambiguous support of freedom of expression in publication, he condemns any attempt of a government to suppress it or limit it in any way. And Marx's words are not the rantings of an opinionist with merely emotive content. For as a philosopher, he wants to consider rationally the putative justifications for censorship: "we must above all examine whether censorship is in its essence a *good* means."⁹⁰ His conclusion is that censorship of the press is but a police measure that

⁸⁷ For example, in articulating some of the "arch-defenders of free speech," one author makes no mention at all of Karl Marx [See Daniel Jacobson, "Freedom of Speech Acts? A Response to Langton," *Philosophy & Public Affairs*, 24 (1995), pp. 67–68. Moreover, in his discussion of freedom of expression, Frederick Schauer makes reference to Mill, but never to Marx: Frederick Schauer, "The First Amendment as Ideology," *William and Mary Law Review*, 33 (1992), 853f.].

⁸⁸ Karl Marx, *On Freedom of the Press and Censorship*, Saul K. Padover, Editor and Translator (New York: McGraw-Hill, 1974), p. 46.

⁸⁹ Marx, *On Freedom of the Press and Censorship*, p. 26.

⁹⁰ Marx, *On Freedom of the Press and Censorship*, p. 28.

does not even achieve what it wants to achieve: “The censorship is thus no law but a police measure, but it is itself a *bad police measure*, because it does not achieve what it wants and it does not want what it achieves.”⁹¹ This is because “censorship is a constant attack on the rights of private persons and even more so on ideas.”⁹² Marx derives this inference from the premise that freedom in general is a good thing, and a good thing to protect: “If freedom in general is justified, it goes without saying that a facet of freedom is the more justified the greater the splendor and the development of essence that freedom has won in it.”⁹³ Although Mill’s defense of freedom of expression differs from Marx’s in certain respects, it would be incorrect to suppose that it is Mill who first argued in favor of the right to freedom of expression. And most important of all, for our purposes, is Marx’s own use of “rights of private persons” in the content of his support of freedom of expression, perhaps a most neglected facet of his attack on capitalism.

Buchanan, then, has not given us sufficiently good reason to conclude that either the internal or external criticism of rights, which Buchanan identifies, is properly ascribable to Marx. Marx criticizes certain rights because they tend to separate individuals from each other and minimize the pursuit of collective goods. There is room for some rights in Marx’s position, ones that he discusses by implication in his overall critique of capitalism. The rights-respecting Marxist need not be embarrassed by Marx’s scathing indictment of certain rights. Instead, the Marxist should understand that some of the richest human rights appear to be respected or affirmed (by implication) in Marx’s writings.⁹⁴

It is no longer obvious that a distinguishing mark between liberalism and Marxism is that liberalism makes room for rights, while Marxism does not. A deeper taxonomy of political theories is needed in order to differentiate more plausibly the genuine differences between these two important kinds

⁹¹ Marx, *On Freedom of the Press and Censorship*, p. 31.

⁹² Marx, *On Freedom of the Press and Censorship*, p. 34.

⁹³ Marx, *On Freedom of the Press and Censorship*, p. 39.

⁹⁴ There is room for a fuller treatment as to how certain rights have a place in Marxism. One might strive toward creating and developing a Marxian theory of rights, one that is not logically excluded from the core of Marx’s philosophy. A Marxian theory of rights would need to do at least the following: (i) explicate the nature and value of rights in communism (and explain how rights might differ in scope, content, etc. in a capitalist regime); (ii) provide a moral, social, and political grounding for rights of various sorts; (iii) set forth the conditions under which a right holder has a right in communism; (iv) give an account of the conditions under which rights “trump” others when rights conflict in communism.

of societies. In better understanding the differences between such political perspectives, those engaged in attempting to shape a system of international law might better appreciate what truly unifies and what genuinely distinguishes them in order to try to reach sufficient consensus on what each such political viewpoint can accept as binding on it in the Society of Peoples.

Chapter 6

Collective Rights

This country, with its institutions, belongs to the people who inhabit it. Whenever they shall grow weary of the existing government, they can exercise their constitutional right of amending it, or their revolutionary right to dismember or overthrow it—Abraham Lincoln.¹

Despite the neglect by political liberals in the distant and recent past to take collective rights seriously, the problem of collective rights is beginning to capture the attention of an increasing number of philosophers.² This new

¹ Quoted in William O. Douglas, *An Almanac of Liberty* (Garden City: Doubleday and Company, Inc., 1954), p. 107.

² See Peter Benson, "The Priority of Abstract Right, Constructivism, and the Possibility of Collective Rights in Hegel's Legal Philosophy," *Canadian Journal of Law & Jurisprudence*, 4 (1991), pp. 257–291; Moshe Berent, "Collective Rights and the Ancient Community," *Canadian Journal of Law & Jurisprudence*, 4 (1991), pp. 387–399; Nathan Brett, "Language Laws and Collective Rights," *Canadian Journal of Law & Jurisprudence*, 4 (1991), pp. 347–360; Allen E. Buchanan, *Secession* (Boulder: Westview Press, 1991); A. Carter, "On Individualism, Collectivism, and Interrelationism," *Heythrop Journal*, 31 (1990), pp. 23–38; David Copp, "International Law and Morality in the Theory of Secession," *The Journal of Ethics*, 2 (1998), pp. 219–245; J. Angelo Corlett, "The Problem of Collective Moral Rights," *Canadian Journal of Law & Jurisprudence*, (1994), pp. 237–259; "The Right to Civil Disobedience and the Right to Secede," *The Southern Journal of Philosophy*, 30 (1992), pp. 19–28; *Terrorism: A Philosophical Analysis* (Corcrecht: Kluwer Academic Publishers, 2003), Chapter 4; R. P. George, "Individual Rights, Collective Interests, Public Law, and American Politics," *Law and Philosophy*, 8 (1989), pp. 245–261; Mary Gibson, *Workers' Rights* (Totowa: Rowman and Allanheld, 1983); Leslie Green, "Two Views of Collective Rights," *Canadian Journal of Law & Jurisprudence*, 4 (1991), pp. 315–327; Michael Hartney, "Some Confusions Concerning Collective Rights," *Canadian Journal of Law & Jurisprudence*, 4 (1991), pp. 293–314; Lesley A. Jacobs, "Bridging the Gap Between Individual and Collective Rights With the Idea of Integrity," *Canadian Journal of Law & Jurisprudence*, 4 (1991), pp. 375–386; A. Kernohan, "Rawls and the Collective Ownership of Natural Abilities," *The Canadian Journal of Law & Jurisprudence*, 20 (1990), pp. 19–28; Will Kymlicka, *Liberalism, Community, and Culture* (Oxford: Oxford University Press,

concern for collective rights seems to be “the result of a recent interest in the value of communities.”³ Having in the previous chapter discussed some political dimensions of rights in general, I shall now clarify and assess some of the chief categories of *collective moral* rights talk and proffer some criteria of adequacy for a philosophical analysis of collective moral rights. Is it reasonable to ascribe to collectives moral rights, rights at least some of which ought to be protected by law? If so, then precisely which collectives ought to be attributed such rights, and under what conditions?

At the outset it is important to clarify, however tentatively, a working definition of “collective.” On my view, a *collective* is a collection of individuals who are members of the same collective type.⁴ A collective type is a category

1989); “Liberalism and the Politicization of Ethnicity,” *Canadian Journal of Law & Jurisprudence*, 4 (1991), pp. 239–256; *Multicultural Citizenship* (Oxford: Oxford University Press, 1995); Will Kymlicka, Editor, *The Rights of Minority Cultures* (Oxford: Oxford University Press, 1995); I. Macdonald, “Group Rights,” *Philosophical Papers*, 18 (1989), pp. 117–136; Michael McDonald, “Should Communities Have Rights? Reflections on Liberal Individualism,” *Canadian Journal of Law & Jurisprudence*, 4 (1991), pp. 217–237; Avishai Margalit and Joseph Raz, “National Self-Determination,” *The Journal of Philosophy*, 87 (1990), pp. 439–461; L. May, “Corporate Property Rights,” *Journal of Business Ethics*, 5 (1986), pp. 225–232; Jan Narveson, “Collective Rights,” *Canadian Journal of Law & Jurisprudence*, 4 (1991), pp. 329–345; Joseph Pestieau, “Minority Rights: Caught Between Individual Rights and People’s Rights,” *Canadian Journal of Law & Jurisprudence*, 4 (1991), pp. 361–373; Robert J. Rafalko, “Corporate Punishment: A Proposal,” *Journal of Business Ethics*, 8 (1989), pp. 917–928; Leslie R. Shapard, “Group Rights,” *Public Affairs Quarterly*, 4 (1990), pp. 299–308; R. L. Simon, “Rights, Groups and Discrimination: A Reply to Ketchum,” *Analysis*, 40 (1980), pp. 109–112.

³ Hartney, “Some Confusions Concerning Collective Rights,” p. 294.

⁴ This definition of “collective” is not inconsistent with David Copp’s definition of “collective.” David Copp, “What Collectives Are: Agency, Individualism and Legal Theory,” *Dialogue*, 23 (1984), p. 249. In contrast, Peter A. French construes collectives as being of two general sorts: aggregates and conglomerates. Borrowing his use of these terms from geology, French defines an “aggregate” (or an “aggregate collectivity”) as a collection of people whose membership is fixed, not subject to change over time. Peter A. French, *Collective and Corporate Responsibility* (New York: Columbia University Press, 1984), p. 5. A conglomerate (or a “conglomerate collectivity”), on the other hand, is “an organization of individuals such that its identity is not exhausted by the conjunction of the identities of the persons in the organization. The existence of a conglomerate is compatible with a varying membership” (French, *Collective and Corporate Responsibility*, p. 13). What is predictable of an aggregate according to French is predictable of each member of the aggregate, while what is predictable of a conglomerate is not necessarily predictable of all or any of its members. What separates aggregates from conglomerates are three features: (a) conglomerates have internal decision and/or organizational procedures by which courses of action can be chosen, whereas aggregates do not; (b) generally, the enforced standards of conduct for individuals of a conglomerate are more stringent than