

A Review of J. Angelo Corlett's *Race, Rights, and Justice**

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In *Race, Rights, and Justice (RRJ)*, J. Angelo Corlett takes up several issues in mainstream philosophy of law. Part I consists of two chapters on constitutional interpretation. Corlett rejects Robert Bork's theory of original intent, and defends "constitutional coherentism," a view that develops out of his reading of Benjamin Cardozo's and Ronald Dworkin's theories of constitutional interpretation. Part II has chapters on international law and global justice. Corlett reviews Immanuel Kant's and H. L. A. Hart's theories of international law, trying to identify the basic requirements of a viable international legal system. He then defends John Rawls' *Law of Peoples*, and adds a principle of compensatory global justice. Corlett rejects cosmopolitan global justice, because it is culturally imperialistic and resistant to compensatory justice. Part III consists of three chapters on rights. Corlett defends a Marxian theory of individual rights, and a more mainstream theory of collective rights. In the final substantive chapter, he offers an account of humanitarian intervention, rooted in his approach to indigenous rights, and illustrated by the situation in Colombia and the U.S.'s "war on drugs."

Corlett intends this book to be a companion to another, *Responsibility and Punishment* (2006) (vii). However, the issues taken up in *RRJ* are distinct from those handled in the earlier book, so *RRJ* is accessible to readers unfamiliar with Corlett's other work. Readers familiar with Corlett's work, however, may recognize some parts of *RRJ*, since Chapters 2, 5, and 6 are revised versions of previously published work (x).

In *RRJ*, Corlett does not aim to provide a comprehensive treatment of the topics taken up (1). Instead, he brings together his views on several issues in mainstream philosophy of law, integrating them into a not inconsistent whole. As a result, each part of the book stands on its own. One benefit of this for readers is that each part can safely be read separate from the others. One drawback is that the book subsequently lacks the depth one might hope to find in a book-length treatment of race, rights, and justice. In fact, the chapters that comprise the different parts are sometimes only loosely connected. But Corlett does not intend to offer "grand and complete new theories of the topics under investigation" (2). His aim is more modest. He wants "to assist in the refinement" of "plausible existing theories" (2). He completes this task.

Part I

In Part I, Corlett aims to defend constitutional coherentism. He begins by describing and rejecting Robert Bork's original intent theory of constitutional interpretation (Chapter 1). According to Corlett, Bork proposes a moderate form of original intent (16-8). On this view, judges must interpret the Constitution in ways faithful to the intentions of its framers. What makes Bork moderate is his recognition that amendments to the Constitution are sometimes necessary. But in such cases, judges must avoid politics, and appeal only to constitutional principles.

Corlett discusses several objections to this view, many raised previously by others. For instance, Corlett argues that Bork offers no principled distinction boundary between constitutional and extra-constitutional principles (19). It seems easy enough to distinguish constitutional from religious, ethical, or political principles. But, Corlett says, both liberal and conservative judges can claim that their principles are rooted in some fashion in the Constitution. Nothing in Bork's view prevents this, or gives us any guidance in such situations. Thus, any claim that one or the other side appeals to extra-constitutional principles is an ad hoc pronouncement. Further, for many particular cases today, it seems likely that the framers had no intent at all, since they could not have anticipated many of these modern situations (20). Original intent can provide no guidance here.

One of Corlett's more interesting objections to originalism is rooted in his interest in critical race theory. In fact, this interest shows up in different ways throughout the book. To be clear, *RRJ* is not an example of critical race theory. However, Corlett is sympathetic to this movement, and several of its themes color his analysis of more mainstream issues in philosophy of law. For example, according to Corlett, we should not privilege the original intentions of the framers of the Constitution, because the Constitution "demonstrates an obvious 'intent' of the founders to subordinate various peoples by race and class" (25). The founders assumed the superiority of white men to women, blacks, and American Indians. Thus it is clear, Corlett says, that the intentions of the founders cannot stand as models of what we want judges today to think of the meaning of the Constitution. The founders were wealthy, white land-owners, none of whom came from oppressed groups. Given their privileged social positions, and evident aims and motives, Corlett feels it is absurd to claim that framers' intentions represent the interests of "We the People." That is, Corlett doubts that the founders sought to represent citizens generally in a way that would make their intentions when writing the Constitution normatively significant for citizens generally today. This leads Corlett to reject originalism, and, further, to call for a demythologization of the founders. On his view, we need a theory of constitutional interpretation that serves the interests of the People, and not just the interests of the group represented by the founders. And this leads to Corlett's constitutional coherentism (Chapter 2).

Corlett's constitutional coherentism is a version of constructivism, a view that "sees the law as a dynamic set of justified legal rules ... which should be made and interpreted as

coherent with one another and with the most plausible set of moral and other extra-legal principles” (57). Corlett intends constructivism, so understood, to be a friendly amendment to Dworkin’s “law as integrity.” Constitutional coherentism builds on law as integrity and constructivism, by going on to insist that “any law, in principle, can justifiably be rejected if rejecting it preserves the overall integrity of law and the most reasonable moral principles” (57). Dworkin’s theory requires that laws be interpreted in ways that make them consistent and justified. But, Corlett says, Dworkin tells us nothing about the status of established law. What should we do when a new law appears to conflict with an established one? On many accounts, the established law takes precedence, and the new law should be reinterpreted, revised, or rejected. But Corlett thinks this is a mistake. Why not reinterpret, revise, or reject the established law, at least some of the time? To Corlett, this seems like an obvious solution to several problems that arise from the class, sexist, and racist intentions of the framers, and the (unintended?) intentions of contemporary legal theorists, who, in supporting originalism, seek to further the framers’ immoral aims.

Corlett distinguishes two sets of laws: long-established laws and recently established laws (58). Long-established laws are those enacted prior to the existence of the current generation of citizens; recently established laws are those enacted concurrent with (in some sense) the existence of the current generation. Though Corlett is not entirely clear here--he does not define “generations,” or discuss the way different generations overlap--his intent seems clear enough. Some laws were enacted before today’s citizens, understood as a set of actually existing autonomous moral agents, could have affirmed or rejected them. Since these laws pre-exist today’s citizens, they do not properly belong to today’s citizens (i.e., to the current generation). These are long-established laws. Other laws were enacted later, during the time period when today’s citizens could have affirmed or rejected them. These are recent laws. When a logical inconsistency appears between a long-established and recent law (other things being equal), the recent law ought to take precedence. Why? First, “... a community is more directly bound by the rules which it itself adopts freely than those which it inherits from a previous generation” (58-9). Second, recent laws represent a society’s considered legal views at some point in time (59).

For Corlett, no laws are foundational, in the sense that they should never be revised or rejected. This is part of his effort to demythologize the founders. The U.S. Constitution should not be viewed as some timeless, sacred text. What gives a constitution its normative force is its acceptance by citizens generally. Thus, the U.S. Constitution ought to be construed as speaking to citizens as autonomous, rational individuals. For such individuals, the main point of the Constitution is to end injustice (61). The text of the Constitution, as it was understood by the founders, was not meant to apply to non-whites. Thus, originalism is a non-starter, since the Constitution was itself unjust in inception. Judges today ought to take what they can from the Constitution, but must also change it, when justice requires it. Citizens should be open to radical judicial revisions to the Constitution.

Corlett's discussion of constitutional coherentism is brief, and several questions remain unanswered. For instance, Corlett's appeal to consent (as legitimating a constitution and other laws) raises several issues. It seems as if most Americans do accept the U.S. Constitution, and regard it as foundational. Why isn't this sufficient to legitimate the U.S. Constitution? There are a couple of possible answers. Corlett may demand universal consent. However, as a standard of legitimacy, universal consent is generally rejected as a non-starter, given its obvious impossibility. Alternatively, Corlett may reject the apparent consent of U.S. citizens to the Constitution, because of (what he sees as) the inherent injustice of the Constitution. That is, he may hold that consent to something immoral is not genuine consent, in the sense that it cannot actually bind someone to something. This seems like a promising idea. However, reasonable disagreements over the nature and demands of justice, and over appropriate (just or fair) methods of resolving such disagreements, are a permanent feature of liberal democratic society. Thus, it seems, every law/policy is likely to be reasonably regarded as unjust by someone. How do we resolve this sort of situation? As a third possibility, Corlett may have some sort of hypothetical consent in mind. On this sort of view, a law has genuine force if it is the kind of thing citizens could affirm, from some ideal and shared normative point of view (e.g., the shared perspective of "democratic citizen," understood as free equals sharing ultimate political authority). If this is what Corlett has in mind, though, we need some understanding of this ideal normative standpoint (e.g., John Rawls' "original position" in *A Theory of Justice*, 1999a). Also, this sort of view seems to put justice in tension with consent as a legitimating factor, insofar as it rejects much actual consent. People can and do consent to many things that promote their interests over the similar interests of others.

I want to mention one other issue with Part I. Corlett claims that the U.S. Constitution, as it is written, is morally flawed by the classist, racist, and sexist intentions of the founders. For this reason, he says, we should expect judges who seek justice to make big changes to it. Once judges begin to eliminate injustice, "we must accept whatever truths of the Constitution are able to survive" and open ourselves to a "future of mutable constitutional content" (61). Corlett seems to think that it would not be sufficient to simply ensure that the rights and protections specified in the U.S. Constitution are available to all. For instance, I suspect that he thinks the classist intentions of the founders have somehow morally skewed the content of the Constitution (not just its range of application) in unjustifiable ways, such that even if (say) equal rights for women were secured, according to the terms of the Constitution, there would still be something wrong with the arrangement. This is an interesting claim, and it is one that would sharpen his critique of originalism significantly. However, it is never really fleshed out. If the intentions of the founders were immoral, merely because they excluded some individuals from participating in an otherwise just scheme, the fix seems relatively simple and straightforward. If there is more to it than this, it is not obvious from Corlett's discussion just what the problem is. This does not mean that he does not have an answer, or that there is nothing he might say here. I mean only to point out that, whatever he might say, he does not say it here.

Part II

The chapters in Part II aim to refine our understanding of global justice. First, Corlett identifies the basic requirements of a viable system of international law (Chapter 3). These requirements respond to concerns that emerge in his discussions of Immanuel Kant and H. L. A. Hart. The first requirement of a system of international law is a genuine global community which provides a basis for shared values (78). This is necessary for the development of laws with universal appeal. But the West should not impose its values on the rest of the world. Instead, laws ought to be supported by reasons independent of Western ideals, which are accessible to non-Western cultures too. The second requirement is a set of legal institutions and bodies sufficient for the rapid development of clear laws capable of addressing new and changing circumstances (79). Third, world states must form a federation and support an international legislative body with the authority to demand obedience its laws, and the power to enforce them. Finally, within this system of law, there ought to be a distinction made between public and private international law (80). Public law deals with relations between states, while private law deals with relations between individuals, groups and corporations interacting across state lines. To these, Corlett adds the eight principles of Lon Fuller's familiar "inner morality" of law. Corlett argues that the principles of international law he has identified ought to have supremacy over the constitutions of member nations, just as the U.S. Constitution has authority over states' laws.

Second, Corlett evaluates two theories of international justice, John Rawls' approach in *The Law of Peoples* (1999b) and a generic liberal cosmopolitanism (Chapter 4). One of Corlett's main concerns is compensatory justice, since injustice between societies in the world is common still. Unfortunately, as he rightly complains, compensatory justice has received little sustained attention in the literature on global justice. In response to this, Corlett develops a principle of compensatory justice (88-90) and uses it to evaluate Rawls' view and liberal cosmopolitanism. Corlett determines that Rawls' view, though silent on compensatory justice, does not rule it out. Thus, Corlett concludes, his principle of compensatory justice can easily fit into Rawls' principles of global justice (91). Liberal cosmopolitanism, however, has deep conflicts with it. This, combined with other problems, renders it inadequate as a theory of global justice.

Liberal cosmopolitanism focuses on individual persons, and is primarily concerned with correcting injustice globally and within states (92). Corlett develops the position this way: various global structures create and sustain injustice, including inequalities of opportunity to realize basic needs; the global structures in question are those of the world's wealthiest countries; those who cause the injustice have a duty to address them, because all individuals have a right to an equal opportunity to have basic needs met (94). These problems are primarily addressed through humanitarian intervention, e.g., poverty relief programs (94).

Corlett has two main objections to liberal cosmopolitanism. First, it is paternalistic and culturally imperialistic (93). The Western world's understanding of equality is realized through humanitarian aid, with little attention paid to non-Western values. For example,

poverty eradication programs typically require implementation of Western ideals. This means that the liberal cosmopolitan approach to combating inequality puts pressure on non-Western nations to accept Western values (99). But the preservation of cultural diversity is important. Liberal cosmopolitanism does a poor job of promoting this value.

Second, “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” (103). For example, Corlett says, Thomas Pogge, a prominent liberal cosmopolitan, sees the solution to the problem of past global injustice not as one of reparative justice, but instead as one of providing equal opportunities for all, especially those least advantaged by past injustice. Corlett objects to this, because it “subsumes any putative right to compensatory justice under the presumed right of equality” (103). There are many problems with this, says Corlett, not least of which is the fact that the right to compensation has nothing to do with inequality (103-8).

Corlett’s first objection to liberal cosmopolitanism is compelling. He has identified a genuine worry about the position. However, his second objection is much less compelling. Corlett does not identify anything in liberal cosmopolitanism that rules out, in principle, any genuine concern for compensatory justice. In the end, he is left saying that liberal cosmopolitan thinkers are inadequately concerned with it. But this does not show that the theory is incapable of handling it. Thus, while Corlett’s most interesting objection to liberal cosmopolitanism does highlight something important that has been overlooked, it does not show that the liberal cosmopolitan view is inferior to Rawls’.

Part III

Chapter 5 deals with individual rights. Corlett spends the first half of Chapter 5 refining Joel Feinberg’s theory of rights (125-36). This chapter will be instructive for readers unfamiliar with Feinberg’s work, and does make some progress refining the view. But the second half of the chapter, in which Corlett defends a Marxian theory of rights, is much more interesting.

In the second half of Chapter 5, Corlett responds to Allen Buchanan’s reading of Marx on rights. Buchanan finds both an internal and an external critique of rights in Marx’s “On the Jewish Question” and “Critique of the Gotha Program”. The internal critique rejects rights, on the grounds that they will not be necessary in communist society (137-9). Marx holds that communism will do away with the sources of conflict that make rights valuable, because no one will feel a need to secure his share of the social product or means of production with rights. This is an example of how communism will do away with the “rights of man,” rights associated with individuals as human beings. According to Buchanan, this Marxian critique of the rights of man shades over into a critique of the “rights of the citizen,” rights associated with individuals living under states. Marx holds that the rights of the citizen depend on and foster the illusion that the state is above and does not contribute to clashes between classes. According to Buchanan, this implies that in communism the rights of the citizens will no longer be needed either.

Buchanan's external critique deals with rights as such (139-40). First, he points out, Marx never says bourgeois rights will be replaced by communist rights. Second, Marx is generally scornful of rights. Third, the idea of rights implies equality, but, for Marx, the application of equal standards to different people treats them unsatisfactorily. Thus, on the external critique, Marx is against the very idea of rights.

In contrast, Corlett holds that Marx rejects only *some* rights, and only *in capitalism* (140). Further, according to Corlett, Marx holds a position that implies that persons do have some rights (140).

Corlett finds several difficulties with Buchanan's internal and external critiques. For instance, the fact that Marx believes that communism will reduce one source of egoism, and hence one significant source of conflict, does not mean that it will end egoism or conflict (141-2). Illegitimate pursuit of individual interests, perhaps rooted in weakness of will, might give rise to egoism. One might wonder if this worry is unfounded. Would communism not produce a harmony of interests? Corlett rejects this (142). It assumes that communism will undermine the separateness of persons and self-respect, and makes Marx's communist society almost too utopian. Finally, even if rights are not needed to secure individuals against egoism and class conflicts, still there might be a need for rights. Having one's rights respected is a source of enjoyment and self-respect, and there can be value in voluntarily not asserting rights-claims.

After responding to Buchanan's critiques, Corlett lays out the foundations of a Marxian theory of rights (146-150). Corlett argues that Marx criticizes only certain rights, such as the rights to liberty, property, equality, security, and other political rights. These are rights that promote egoism and conflict, by opposing the individual to society (146). But other rights do not do this, for instance, the right to resist oppression (146), to not be exploited (147), to freedom of expression (149), and to individual self-determination (148). Some collective rights are also consistent with Marx's view, including a collective right to the means of production (147) and communal self-determination (148). Corlett argues that these values ought to be protected institutionally through law, even in communist society.

Whether or not Marx would approve of Corlett's approach to rights in communist society is an open question. Buchanan's critiques are compelling, and Corlett's responses, while not wrong, are not particularly strong. He does show that there is room in Marx for some rights, though this is far from convincing evidence that Marx would accept Corlett's view. Nevertheless, Corlett may be right to say that Buchanan's reading of Marx is uncharitable. Buchanan's reading of Marx is an interpretation, after all. In any case, Corlett's claim that Buchanan's vision of communist society is too utopian is instructive. It is, perhaps, the most interesting part of Corlett's response. Rawls claims that one of the primary purposes of political philosophy is the production of "realistic" utopias (Rawls, 2001: 4-5 and 2007: 10-1). These visions provide hope, and give us some sense of how to evaluate contemporary social and political institutions with an eye toward a better future, but they do this within the confines of what is practically possible,

that is, what it is reasonable for us to assume about human beings, human nature, and social life. It does no good to produce unrealistic utopian visions. These provide no guidance, and can leave people hopeless. Whatever Marx might have thought of communist society, and it is not clear that he had any strong ideas about what it might finally look like, we will be better placed to understand and evaluate it if we think about it in more realistic terms. Corlett's complaint against Buchanan is justified in these terms.

In Chapter 6, Corlett defends a notion of collective rights. On his view, certain collectives can have moral rights. That is, some rights belong properly to collectives, and cannot be reduced to the rights of the individuals who comprise the collectives. For example, Corlett argues, the right to secession is a genuine right that cannot be reduced to the rights of individuals (162). Not all collectives can have rights. In order to have rights, a collective must be a conglomerate: "its members see themselves as normatively bound to each other such that each does not act simply for herself, and ... there is a shared understanding among members of the collective regarding its membership" (161). On Corlett's account, the Congress of American Indian Nations (CAIN) is such a conglomerate (158). The first part of this chapter develops the ideas central to this account of collective rights, including the idea of common interests, conglomerates, and so on, and then refines the view by placing the idea of collective rights ascriptions more generally in political philosophy.

In Chapter 7, the last substantive chapter, Corlett discusses humanitarian intervention. Proponents of humanitarian intervention argue that one country can have moral justification for intervening in the affairs of another. Corlett seeks to identify the conditions of such justification. What is interesting and novel about his approach is the attention he gives to indigenous rights. He illustrates his discussion with examples drawn from Colombia and the U.S.'s "war on drugs."

Corlett's account of humanitarian intervention draws on John Stuart Mill and Michael Walzer (188). Corlett holds that humanitarian intervention is justified when it is necessary to help another country exercise its moral right to national self-determination. Sometimes this means helping other countries settle internal disputes. Sometimes this means protecting vulnerable members of another society, since not everything is permitted under the right of self-determination (e.g., acts that shock the conscience). In every case, though, humanitarian intervention must respect national self-determination.

Colombia is currently going through a civil war (187). According to Corlett, U.S. intervention, through its "drug war," amounts to taking sides in Colombia's civil war, in this case, against the rebel forces. Corlett argues that, though there may be reason for some country to engage in humanitarian intervention in Colombia, the current U.S. intervention is not justified as humanitarian intervention, for several reasons. First, the U.S. is not helping Colombian's to settle an internal dispute, but seems set on helping one side win (188-9). This is not consistent with Colombia's right to self-determination. Second, only legitimate states can justifiably engage in humanitarian intervention (191). Since the U.S. is not a legitimate state (at least to many people in other parts of the world), its intervention in Colombia is not justified (191-3). Third, in order to be justified,

humanitarian intervention has to be invited or wanted by the subject nation 195-8). This is necessary to make intervention consistent with national self-determination. Following this basic principle, countries in need of help have the right to determine what kind of help they should get, and who might provide it. According to Corlett, the U.S. government has not been asked to intervene by the majority of Colombians.

Corlett's second point is not convincing, for two reasons. Corlett says that the U.S. is not a legitimate state, because the U.S. fails basic standards of justice, and has perpetrated evil acts that it has yet to rectify (192). Why and how the U.S. fails basic standards of justice (all of them?) is not obvious, and Corlett does not make this claim clear. The second point, regarding evil acts, is clearer, and easier to accept, but it is not obvious why this renders the U.S. government illegitimate. Persons do not lose their status as moral agents when they commit evil acts, even if they fail to rectify them. They still have moral obligations, and undoubtedly still have many moral rights. So it is not clear at all that this part of Corlett's discussion is helpful.

Corlett's first and third points are more helpful. There is reason for the U.S. to be concerned about drug use, and Colombia's role in our national drug problem, but this concern does not justify humanitarian intervention. This intervention is justified by the help it gives to others, and not in terms of self-interest. Corlett's discussion of self-determination and indigenous rights is timely and instructive.

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