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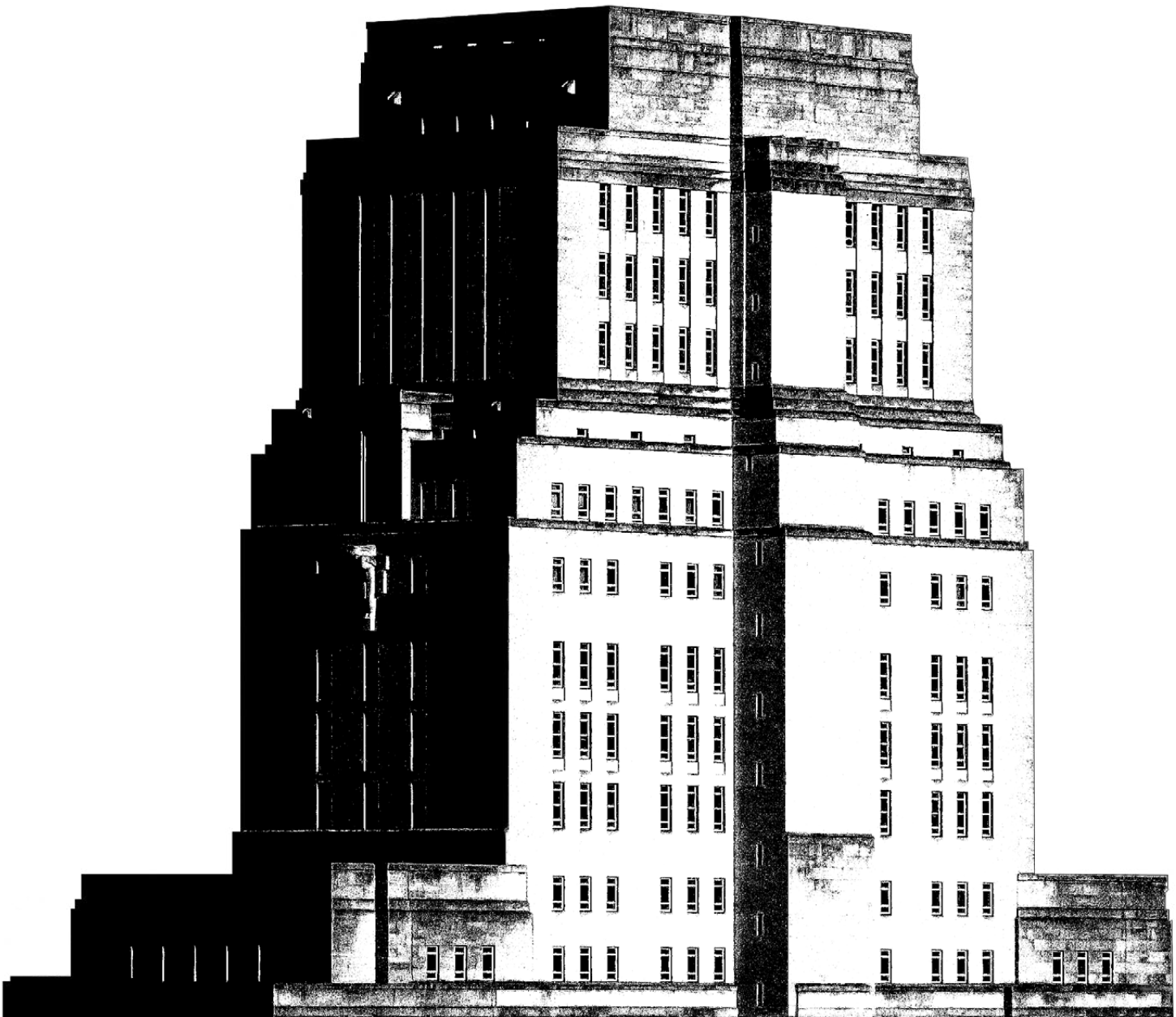
Rights Externalism and Racial Injustice

DERRICK DARBY



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Derrick Darby is Henry Rutgers Professor of Philosophy at Rutgers University, New Brunswick. He discovered his passion for philosophy growing up in New York City's Queensbridge public housing projects, as he reports in his TEDx talk Doing the Knowledge. After getting his undergraduate degree at Colgate University, he earned his Ph.D. in philosophy at the University of Pittsburgh. His work in social and political philosophy has focused on rights, inequality, and democracy, and generally examines how the lived experience and history of race and anti-black racism connects with theoretical and normative philosophical questions. He is the author of *Rights, Race, and Recognition* (Cambridge University Press, 2009). His most recent book, co-authored with historian John L. Rury, is *The Color of Mind: Why the Origins of the Achievement Gap Matter for Justice* (University of Chicago Press, 2018). His op-eds have appeared in *The New York Times*, *The Detroit Free Press*, *The Newark Star Ledger*, and elsewhere. He is the founding organizer of the Social Justice Solutions Research Collaboratory at Rutgers and directs its renowned Summer Institute for Diversity in Philosophy.

EDITORIAL NOTE

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RIGHTS EXTERNALISM AND RACIAL INJUSTICE

DERRICK DARBY

I.

HOW DO WE ACQUIRE RIGHTS? In *Rights, Race, and Recognition* (*RRR*) I contend that recognition is a necessary condition of having rights (Darby 2009). This recognition is provided by social practices that proscribe, promulgate, and enforce ways of acting and being treated. These practices might be rooted in law or custom. They might be tied to the operation of states or, more informally, to the activities of associations of persons. There may be inconsistencies between the formal and informal practices. And, as I suggest later, this can be useful for addressing a devil's advocate. The bold and unorthodox implication of this view, which I have elsewhere called 'rights externalism', is that there are no natural rights (Darby 2004). All rights even moral ones—at least in part—are conferred by the hands of a community.

Rights externalism is an alternative to what I call an ontological conception, the view that individuals possess moral rights merely by virtue of their nature. It is also an alternative to a valid claims-based conception, which takes moral rights to be grounded in the possession of morally valid claims to act or be treated in certain ways. These are instances of *recognition-free* conceptions of moral rights. Critics of rights externalism wonder what we gain by embracing a recognition-based conception of moral rights and what we lose by rejecting a recognition-free one. Some have argued that we do not gain all that I claim and that we may suffer loses that I fail to appreciate. The most significant loss, some recent critics say, is ruling out the possibility of condemning racial injustice. If we lose more than we gain by rejecting a recognition-free conception in favor of a recognition-based one, and we undermine the critique of racial injustice in particular, then we should default to a recognition-free conception, or so goes the argument against rights externalism.

It has been a little more than a decade since the publication of *RRR*. It has been a little more than two decades since I first began working out my position in journal articles. And over the years many critics have spoken. This article vindicates rights externalism by answering two recent critics. (Mills 2015; Lyons 2013). My plan is to concede some ground, particularly with respect to their reservations about what we gain, but to argue that their claims about what we stand to lose are overblown. I conclude that rights externalism is not detrimental to the critique of racial injustice and that embracing it has noteworthy virtues. The most

significant is that it affords us theory of rights that takes the realities of lived experiences seriously.

II.

Raymond Geuss characterizes Robert Nozick's assertion, in the preface of *Anarchy, State, and Utopia*, that individuals have rights, and there are things that may not be done to them without violating their rights, as '*just* the announcement that one proposes to build a castle in the air' (2001, p. 146). Nozick's castle, constructed with the same natural rights bricks used by John Locke in the *Second Treatise*, was erected to serve a libertarian agenda: it called for a minimal state to provide persons with security against force, theft, fraud, and breaches of contract but not much more, and it supplied this protection by ascribing natural rights to persons, rights taken to exist prior to, and independent of, any recognition and enforcement by other persons, groups, or the state. This impulse to posit natural rights is ecumenical. It has equally served those with libertarian as well as radical egalitarian agendas.

Liberal egalitarian philosophers with more expansive views of state power that include the rectification of historical injustice and the mitigation of social, political, and economic inequality have also found it congenial to build castles in the air, constructed of recognition-free rights, to serve these progressive ends. For example, in making his case against American racism and for racial equality, Martin Luther King, Jr. ascribed natural rights to black Americans, saying 'every man [regardless of race] has rights that are neither conferred by nor derived from the state, they are God-given'. And, he adds, 'What a marvelous foundation for any home' (1968, p. 89)! We see, therefore, that white libertarians and black liberals have both used such rights to build castles in the air. While they may disagree on many matters, they agree that recognition-free rights have normative utility. The view that persons possess certain rights—call them 'natural', 'moral', or 'human'—that are not within the gift of state authority, or not conferred by social recognition more generally, is the conventional wisdom in philosophy.

Black radical liberals such as philosopher Charles Mills, one of my critics, who sometimes takes pride in departing from conventional wisdom to do the work of racial justice, e.g., rejecting the social contract for the racial contract, is not willing to give up all the master's tools. King offers but one example of how the idea of natural rights can be used to advance the moral cause of racial justice. So, to claim, as I do, that there are no recognition-free rights, not only bucks the 'majoritarian philosophical consensus of an overwhelmingly white profession', says Mills, it flies in the face of the 'longstanding moral convictions of the black civil rights

movement' (2015, p. 13). My rejection of the conventional wisdom regarding rights seems all the more surprising, according to Mills, given my allegiance to this movement and to the larger project of realizing racial justice and black freedom. On this point, says Mills, 'I believe [Darby] *is* wrong, and that this is a case where the conventional wisdom gets it right' (2015, p. 13). Mills's blunt question to me is: How can a true black radical champion this noble cause without the rights needed to secure the foundation of the castle in the air? Before turning to Mills directly, I shall elaborate on what is at stake in our debate using a distinction between 'objective' and 'subjective' right. After this I will motivate and summarize my recognition-based conception of rights drawing on a historical instance of the racial justice struggle—slavery abolition in antebellum America.

III.

Let me begin by stating the obvious: some things are right and some wrong. We can and will disagree about which things are right and which are wrong, but this is of no consequence for what I have to say. For instance, we can disagree about whether it was wrong for American financier Bernie Madoff to run a Ponzi scheme that swindled investors out of their money. One way to get at the morality of the matter—that is, at why Madoff acted wrongly assuming that he did—might be to start the argument with the following sort of rights claim: 'It is right that people not be treated as a mere means', or 'It is right that unsuspecting people not be swindled out of their hard earned cash'. Such appeals to the concept of a right are very familiar in our everyday normative practices. We say things like 'It is right that the punishment should fit the crime', 'It is right that every American citizen should have health care', 'It is right that every child including children of illegal immigrants be provided a K-12th grade public education', and 'It is right that citizens be allowed to bear arms'.

Following standard usage, we can describe the foregoing as appeals to *objective right*. I do not find these appeals particularly problematic, especially if, as some theorists have claimed, they are nothing more than alternative ways of making claims about what ought or ought not to be the case from the moral point of view. Accordingly, without loss of meaning, we might substitute for the claim that 'It is right that every American citizen should have health care', the claim that 'Every American citizen ought to have health care'. Or we might substitute for the claim that 'It is right that people not be treated as a mere means' the claim that 'People ought not be treated as a mere means', and similarly with other appeals to objective right. But when we attend to everyday rights discourse, we find that not all appeals to the concept of rights involve the idea of objective right.

Some of these appeals invoke the idea of *subjective right*. So, for example, in everyday rights discourse we sometimes find claims of the following sort: 'I have a right to my property'; 'I have a right to bear arms'; 'I have a right to health care'; 'I have a right to equal concern and respect'. What makes these 'subjective' uses of right is that they focus our attention on a specific subject that is the bearer of a claim rather than on a more generally described state of affairs that may be characterized as right or wrong, as good or bad, or as satisfying some general normative description. To be sure, we may quibble about how best to characterize the difference between objective and subjective right. For example, according to one interpretation, 'the crucial difference is that the concept of objective right is a global moral evaluation of a state of affairs, while the concept of subjective right is a moral *relationship* between a person (typically) and a thing or action or state of affairs' (Edmundson 2004, p. 9). And according to another interpretation, 'an 'objective' right refers to a state of the world (which is good or bad, laudable or wrong); a 'subjective' right to an entitlement, that is, to an action (or omission) that I (or some other designated subject) can/should/ought to have the power or warrant to perform or suffer' (Guess 2001, p. 134).

We must note that with respect to the concept of a subjective right, on both of these interpretations the subject or bearer of the right takes center stage in the analysis. Indeed, it is precisely this interest in singling out a particular subject for special concern that makes the turn to subjective right necessary. So, from this perspective, then, it is some fact about the subject (namely that she possesses a right) that matters rather than about the moral quality of a general state of affairs. Thus, when we say that 'It is right that Emma have health care' that we are talking about Emma may not matter all that much. It could be that Emma ought to have health care because we have somehow discerned that this is God's will and that we are intent on doing God's will. But in contrast when we say that 'Emma has a *right* to health care' then Emma takes center stage; it is because of this fact about her that we are obliged to provide her with health care, which may or may not also conform to God's will or to producing the greatest happiness or to satisfying some other independent normative standard.

So, returning to the Madoff case, another way to get at the morality of the matter is by appealing to the idea of subjective right by starting the argument with claims of the following sort: 'Larry King has a right not to be treated as a mere means'; 'Kevin Bacon has right not to be swindled out of his money'; 'Baseball legend, Sandy Koufax, has right to be told the truth about his investments'. By beginning the analysis this way, that is, with subjective uses of 'right', we are putting the individual subjects front and center. From this vantage point, then, we have to consider certain facts about these victims of Madoff's Ponzi scheme to account for the moral

problem with his conduct. And if we embrace this way of accounting for the moral problem proponents of recognition-free conceptions of rights will suggest that there is an important relationship between objective and subjective right, namely, that the possession of a subjective right accounts for the moral basis of the objective right. So, for instance, it might be claimed: 'It is right that unsuspecting people (like King, Bacon, and Koufax) not be swindled out of their hard earned cash because each one of them has a right to equal concern and respect, a right to be told the truth, or a right to be treated as an end and not as a mere means'. Alternatively, we might say: 'Larry King ought not to be swindled out of his money because he has a right to equal concern and respect'. Hence it is his having the (subjective) right that justifies the ought-claim. One way to account for what's at stake between rights externalists and critics is that they offer different ways of understanding the source of subjective rights.

IV.

Developments in the philosophy of rights have often been driven in response to hard cases, ones that challenge (or support) our basic assumptions, pre-theoretical intuitions, or practical aims. Quite often these hard cases are generated by thought experiments which are the product of an active philosophical imagination. However they can also be the product of attentiveness to concrete historical facts or to the lived experiences of those whose rights have been denied. The case of black chattel slavery in antebellum America is an instance of a hard case that has informed philosophical thinking about the source and value of rights. For some philosophers, including King and Mills, this case motivates positing recognition-free subjective rights to defend the morality of abolition. For other philosophers it motivates positing recognition-based subjective rights to capture the lived experience of being a slave. What makes this a hard case, in my view, is that it serves both to illustrate the utility of asserting that individuals have recognition-free moral rights and to raise doubts about this assertion.

Slavery abolitionists in the United States often asserted that black chattel slaves had a right to freedom. If they were under the influence of Immanuel Kant's practical philosophy, they may have also believed that an innate right to a free life was the only original right belonging to every man by virtue of his humanity. Setting aside this latter point for the moment, a cursory study of American slavery may leave one perplexed by the abolitionist assertion because it is manifestly ambiguous. Whether or not slaves had a right to freedom, or any other rights for that matter, depends in part on what kind of rights were at issue. It is commonly assumed that slaves had no legal rights under slavery and we know that slaveholders had legal rights to black slaves. Human slaves were viewed

and treated as mere chattel that could be bought and sold like cattle, farm equipment, land, and real estate. And like all forms of chattel, black slaves were also passed on from one generation to the next, and could be used in all the ways proscribed by the laws of property. So given these facts, along with a more complete factual description of the status of blacks under the institution of American slavery, how might we philosophically unpack the abolitionist assertion that slaves had a right to freedom?

One way to proceed is by distinguishing having legal rights from having non-legal ones. The latter category might be further distinguished in terms of social and non-social rights, that is, rights whose possession stems from social norms and practices (e.g., formally or informally laying down rules regarding how someone can act or how they must be treated, promulgating these rules, and enforcing them) in contrast to rights whose possession is entirely independently of such norms and practices. Hence when someone says that they have a right merely in virtue of their humanity, or that they have a right merely in virtue of having a valid claim, they are invoking a non-social conception of the source of rights. For example, as one proponent of such rights puts it: 'Moral rights (in the relevant sense) are rights whose existence depends on principle and fact, not on social recognition or enforcement' (Lyons 1994, p. 3). The essential difference between this conception and the one that I vindicate in this essay is over whether or not some form of social recognition is a necessary condition of possessing a moral right to freedom.

With these distinctions in hand, the foregoing facts pertaining to the status of blacks under chattel slavery suggest that insofar as abolitionists meant to claim that black chattel slaves had a legal right to freedom they were engaged in wishful thinking. Individuals that had a legal right to freedom could go and come as they pleased, could buy and sell property, could have children and raise a family without fear that their children would be taken and sold at auction to the highest bidder. But black slaves in antebellum America clearly could not do these or many of the other things that individuals with a legal right to freedom could do. For individuals that could do these things, their status as rightholders was not about what they hoped to be able to do, or ought to be able to do, but about what they could do. For these individuals, having a right to freedom, a right to go and come as they pleased was a part of their *lived experience*. So what else might abolitionists have been saying when they asserted that black chattel slaves had a right to freedom?

Perhaps abolitionists were really saying that slaves had a *moral* right to freedom—a right that was non-legal and, for that matter, non-social, that is, a right whose possession is not rooted in how one is treated. And here abolitionists might further add that slaves had this right to freedom

even though it was not being recognized by government, upheld by the rule of law, or otherwise established within informal social but non-legal practices. And to return to Kant, they might apply his general point to the case at hand by claiming that the slave's right to freedom was an innate right, which the slave possessed merely by virtue of being a human being. Obviously, if they did this, they would readily concede that this right to freedom was not part of the lived experience of slaves so to speak. Yet they would quickly add that is precisely the problem with black chattel slavery: it violated or disregarded the slave's moral right to freedom. I shall refer to the following as the abolitionist thesis: *black slaves had a moral right to freedom even though this right was not in any way socially recognized or part of their lived experience*. From this perspective, then, social recognition—whether formal legal recognition or informal non-legal recognition—is not a necessary condition of possessing a moral right to freedom. And taking it to be so would effectively undermine the main purpose of positing such a right in the first place, namely, to give us a vantage point for normatively criticizing the practice of black chattel slavery that is entirely independent of the contingent social realities established by existing legal or non-legal but social norms and practices.

While I concede that there is some utility in the abolitionist thesis, and that it represents the prevailing way of thinking about this matter, I believe that this is also an instance of wishful thinking. The problem is not with wanting to take normative issue with the slave's lack of freedom under slavery or, to put it another way, with wanting to condemn the legal institution of slavery as it was practiced in antebellum America. Rather it is with taking the slave to have a 'right' to freedom when doing all the things that free persons can do is not part of the slave's lived experience. Whatever possessing a moral right to freedom amounts to, if it is a 'right' that one truly possesses then freedom must be part of one's lived experience. In other words, possessing a right to freedom must make a concrete difference in the social world in terms of how one can act or how one is treated. And since this is a function of the presence of certain social norms and practices, these are necessary elements for possessing a moral right to freedom.

What is gained by embracing a general conception of moral rights that takes some form of social recognition to be a necessary condition of possessing a moral right? Apart from gaining a socially rooted understanding of the source of moral rights, namely, one that grounds the possession of moral rights in lived experiences, we also open up an avenue for appreciating a normative way of condemning the legal practice of black chattel slavery that does not require us to look outside of all existing social realities (Darby 2009, chap 5). And this will be especially appealing to theorists that wish to eschew looking entirely outside of

social practices (to castles in the sky) to capture why some practices are normatively objectionable.

v.

Critics of rights externalism will be reluctant to give up their recognition-free conception, even if they find the foregoing virtues appealing, if they think this will leave them in a normative abyss. Can we impose a recognition constraint on having rights and still take issue with slavery? I believe that we can. In *RRR*, I found inspiration for explaining the wrongness of slavery in the underappreciated moral and political philosophy of the late nineteenth-century British liberal philosopher Thomas Hill Green, who also embraced a recognition-based conception of rights.

Green's conception of rights appears in his posthumously published 'Lectures on the Principles of Political Obligation'. What distinguishes his conception of rights is the idea that 'rights have no being except in a society of men recognizing each other as *isoi kai homoioi* [equals]' (Green [1885] 1986, p. 139). According to Green, all rights including moral ones are constituted by such mutual recognition. In *The Right and the Good*, W. D. Ross describes T. H. Green's thesis that moral rights depend for their existence—and not just for their effectiveness—on social recognition as plainly wrong. He poses a purported *reductio ad absurdum*: '[it] would imply that slaves, for instance, acquired the moral right to be free only at the moment when a majority of mankind, or of some particular community, formed the opinion that they ought to be free' (1930, p. 51). Ross concludes that this is absurd and cannot be consistently maintained. Furthermore, he adds: 'Some may think that slavery is not wrong; but everyone will admit that there are certain forms of treatment of others which are wrong and which the sufferer has the right to have removed, whether this right is recognized by society or not' (1930, p. 139).

Obviously, if slaves have no natural rights prior to the state then the state cannot be said to violate natural rights. But if we follow Green in holding that slaves have natural rights in the sense of being independent of, and in conflict with, the laws of the state in which he lives, but not in the sense of being independent of *all* social relations, then not only can we see that the foregoing criticisms miss their mark but we can appreciate how Green makes a case for the immorality of slavery precisely by relying on the idea that rights are constituted by social relations more generally.

To understand why the slave case does not pose a problem for Green in particular, we must appreciate the obvious point that individuals participate in various forms of community with others. This is significant for at least two reasons. For one thing, all of these communities can be a source of rights to the extent that they can afford (or withhold) the

social recognition that is partly constitutive of having rights. What is more, the social practices in these various communities can be in conflict with one another so that an individual could be afforded the relevant social recognition that allows him to be able to reckon on the opportunity to act or be treated in certain ways in one community but not in others, with the most significant conflict arising between the state and all of the other communities. And this is precisely the predicament of slaves according to Green:

> The slave thus derives from his social relations a real right which the law of the state refuses to admit. The law cannot prevent him from acting and being treated, within certain limits, as a member of a society of persons freely seeking a common good…A man may thus have rights as a member of a family or of human society in any other form without being a member of a state at all—rights which remain rights though any particular state or all states refuse to recognize them; ([1885] 1986, p. 109)

So, for instance, while the state may not recognize the slave as having property rights or control over his family, it cannot stop him from living in some form of community with his family in which he acts and is treated as a father, husband, son, or brother and thus derives rights which are involved in his so acting and being so treated. The same can be said of the slave's social relations with friends and even with the family of his master if not also the master himself.

Of course, such a situation is far from ideal. Although the slave may gain rights from social relations within these more informal prepolitical communities, there is no substitute for having these rights recognized within social relations in the larger political society. But we need not assume a form of positivism as strong as Jeremy Bentham's by supposing that all of our rights are products of positive law and political authority. According to Green, the political state is the society of societies and its chief function is to sustain, secure, and harmonize the rights that arise not out of human nature as such, or merely out of individuals having morally valid claims, but out of their various prepolitical social relations. And these rights are neither natural in the sense supposed by the prevailing view nor are they merely derived from the state.

So to summarize: the normative argument against slavery is that slaves possession of moral powers (as recognized in their participation within nonpolitical forms of community) serves to validate morally their claim to be recognized within the larger political community, and such recognition is taken to be for the common good of all, and so to withhold it would be morally inconsistent, unfair, and would undermine the pursuit of a more completely free political society. But it is clear that this recognition

itself constitutes the status rather than the mere possession of the moral powers.

Defenders of the prevailing view would argue that the moral powers give rise to rights even when they are not recognized. But advocates of the rights recognition thesis contend that if the slave's moral powers are not acknowledged and they are otherwise without recognition and cannot reckon on action then they are without rights. Fortunately, given our social nature, it is impossible without considerable dexterity to imagine a plausible situation in which even the slave does not participate in some form of community that acknowledges his moral powers.

Grounding rights in the activities of communities of individuals acting in concert by mutually affording one another the opportunity to reckon on certain ways of acting and being treated—as I proposed in *RRR*—seems to be as solid a foundation as any, and perhaps even more solid in the case of slaves. Although they may have their humanity called into question or rendered less relevant within an insufficiently progressive political society on account of racial thinking, they will nevertheless participate in other nonpolitical forms of community in which their humanity, or moral powers, are thoroughly acknowledged by at least some people. And given the practical impossibility of removing any person—enslaved or not—from all forms of community with others, I see no reason at all to assume that persons are rendered any less secure by grounding their rights in social recognition by those within given communities rather than in humanity as such.

VI.

The struggle against black slavery in the United States was difficult not only because it was profitable but also because slaveholders turned to the nation's founding ideals to defend it. As distinguished slave historian Ira Berlin reports: 'The doctrine of natural rights, which gave impetus to the first emancipation movement, also sanctified property rights, so that both abolitionists and slaveholders found comfort in the words of the Declaration of Independence' (**REF**). Pernicious appropriations of rights and the status of being a rightholder have long been sources of skepticism about these categories; they have been rejected for representing social subordination and social inequality as both right and natural. For slaveholders, their supporters, and advocates of states' rights appealing to property rights to defend slavery was hardly enough. They also contested the cogency of ascribing rights to slaves both from the standpoint of law and morals. Steeped in racist thinking, and aided by the 'science of race', defenders of slavery claimed that slaves—being of an inferior nature—had no rights at all. They represented black subordination and white supremacy

as natural and beyond man's power to change. The most infamous and well-known example of this can be found in the 1857 U.S. Supreme Court *Dred Scott* decision.

The main issue before the Court in this case was whether Dred Scott, a slave held as property in Missouri but who had temporarily resided in the free territories of Illinois and Wisconsin with his master, could sue for his freedom under a Missouri law holding 'once free, always free'. In a crafty decision, delivered by slaveholding Chief Justice Roger Taney, the Court did not question whether Dred could become free by living in a free territory. Instead, the Court denied that Dred was ever free at all by holding that the Northwest Ordinance of 1787 and the 1820 Missouri Compromise were unconstitutional, and thus that Congress never had legitimate authority to outlaw slavery in western territories. And as if this were not enough to block Dred's quest for freedom, in a further dramatic step the Chief Justice rejected the very idea of applying the status of rightholder to slaves with these ignominious remarks:

> [Negroes] had…been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect…This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing…[1]

Henceforth I shall refer to this as *the Dred puzzle*.

When I first encountered this puzzle many years ago, I was struck by the presumption that having rights was linked to race. I wondered: 'What was the underlying account of how a subject came to be a bearer of rights'? On my reading, which was partly informed by a study I had been doing of 19th century proslavery ideology, the general conception of the source of rights underwriting this puzzle was that having rights was taken to be a matter of a subject having a certain nature or being constituted in a certain way. It was obvious how this ontological conception was particularly accommodating within a society where differences in the legal status of free persons and enslaved ones were rooted in race and purported intellectual, affective, and moral differences between races.

The great philosopher and abolitionist Frederick Douglass also noticed this connection between rights and nature. He once observed that when the Negro is denied something that is rightfully his, such as his freedom, he is alleged to be an inferior man. Yet an important difference between Douglass and myself is that he did not question the underlying ontological

1 *Dred Scott v. Sandford*, 60 U.S. 393, 408 (1857).

conception of the source of rights invoked by the Court. Instead, he accepted it and directly argued against the Negro inferiority thesis to use the discourse of rights to argue for black emancipation and civic equality. This is certainly one way to proceed in response to the Dred puzzle. Another way to proceed is to reject the underlying ontological conception altogether, which is the strategy pursued in *RRR*.

Douglass's response to the Dred puzzle, which accepts the recognition-free conception of the source of rights, is straightforward and clear about what we gain by embracing it. If the prevailing conception of what having rights amounts to holds that prospective rightholders must have a certain nature, then one way to expand the realm of rightholders to include subjects that have been excluded is to argue that they have the relevant nature. Within a society, such as the one Douglass lived in, where beliefs about racial differences and about black inferiority and white supremacy run deep, arguing for black humanity to extend the realm of rightholders is no easy task. This strategy also carries the risk of vindicating scientific or pseudo-scientific accounts of race and racial differences as rooted in real biological differences. Furthermore it is difficult to see how pursuing this strategy does not simply end up in arguments about who has the correct take on the science of race. I am not saying that this isn't an argument worth having, but I rather not have my conception of what having rights amounts to turn on the outcome of such an argument, especially in a society where one of the Founding Fathers made the following observation about blacks: 'Comparing them by their faculties of memory, reason, and imagination, it appears to me, that in memory they are equal to the whites; in reason much inferior, as I think one could scarcely be found capable of tracing and comprehending the investigations of Euclid; and that in imagination they are dull, tasteless, and anomalous' (Jefferson 1787, p. 149).

In a deeply racist polity, where racial thinking of this sort runs deep, I do not think that there is much to gain by arguing against allegations of black inferiority to demonstrate that blacks do indeed have rights. I must concede, however, that we may still run into some trouble here with any kind of normative argument for extending the realm of rightholders where moral principles have to be joined with matters of fact about the nature of subjects to make the moral case. And if this is so, the shortcomings of making such arguments within a racial polity may seem inescapable. Partly with this problem in mind, in the last chapter of *RRR*, I offered the argument inspired by Green to take a different approach.

Still, we are left wondering what more, in addition to having an account that rings truer to the lived experience of slavery and eschews building castles in the air, do we gain by embracing a conception of having rights that makes social recognition a necessary component of having them? Does

this give us a *better* way to make the case for including previously excluded subjects into the realm of rightholders? Does this enable us to entirely avoid getting entangled in philosophical arguments about the nature of prospective rightholders in making a case for including or excluding them from the realm of rightholders? Does it afford us a more attractive way of responding to the Dred puzzle? These are the right questions to ask.

VII.

How should we respond to the Dred puzzle? Was the Supreme Court wrong? Was it careless? Was it morally confused? However we respond to this puzzle, a philosophical engagement with it demands that we probe the meaning, the source, and the value of rights. Furthermore, a philosophical response that considers the Dred puzzle and these foundational matters in the general theory of rights, with attentiveness to the legacy of race, racism, and black subordination and white supremacy, requires us to consider some of the defining features of what Mills calls a *racial polity*.

Combining a philosophical study of rights and race with attention to how the United States polity was once divided by persons and sub-persons yields a counterintuitive and provocative response to the Dred puzzle, namely that the Court was neither wrong nor careless but rather was offering an accurate assessment of *social reality* or *lived experiences* of blacks in a racial polity *at some level of description*. I find this response compelling when thinking about what having rights amounts to. And, ironically, it bears some similarity to Mills's response to the puzzle, which is why I find his disagreement with me so surprising. In his essay, 'Whose Fourth of July'? Mills concludes: 'Taney was wrong on the details but right on the principle. His central underlying rationale is basically entirely correct: blacks were seen as an inferior race who could—normatively, legitimately, morally—be subordinated by the white majority. Taney is the indiscreet speaker who blurts out in public what is supposed to be mentioned only in private: that the polity is a racial one' (1998, p. 185).

Shortly, I will present and rebut Mills's interpretation of my response to the Dred puzzle, which will suffice to show that his criticisms of me miss their target. But let us first consider three positions that one might take in response to the Dred puzzle on the question of whether slaves had rights:

a. Slaves did have rights (so the Court was wrong)
b. Slaves did not have *legal* rights but they had *moral* rights (so the Court was careless)
c. Slaves had a moral right to be free (so the Court was morally confused)

One could read Mills's response to the Dred puzzle as rejecting (c). But to appreciate the significance of this rejection one needs to be clear about

the meaning of this claim. When read simply as a claim about what ought to be the case morally speaking, the point is that within a racial polity, where beliefs about black inferiority are sincerely held, and blacks were taken to be excluded from the realm of possible rightholders, the Court was rejecting the claim that slaves ought to be free. And if one associates claims about what ought to be the case with claims about what one has a moral right to, then the Court was indeed denying that slaves had a moral right to be free. Thus from this perspective the Court was not at all morally confused. It was merely working out the implications of life and beliefs within a racial polity. But of course, neither Mills nor I would agree with the conclusion that slaves ought not be free, though he would be more inclined than I to rely on the premise that slaves had unrecognized moral rights to defend this conclusion. In other words, he would rely on (a) and (b).

If one reads attributions of rights simply as claims about what ought to be the case from the standpoint of morality, then one will owe some kind of argument fleshing out why this or that ought to be the case. So abolitionists would need an argument for why slaves ought to be free, and pro-slavery defenders would need one for why they ought not be free. In the absence of such arguments appealing to a right seems to be nothing more than a placeholder or promissory note.

One way for an abolitionist to fill in the argument for why slaves ought to be free would be to claim that they possess a right to be free, and not just any kind of right but one that slaves have independently of whether or not they can or cannot act in the ways prescribed by the right. So, if the right in question is a right to freedom, the point is that slaves have such a right whether or not there are social practices in place where they can freely go and come as they please and do all the things that free persons typically do. Indeed, some philosophers have held that the postulation of such rights was precisely meant to give us a way of explaining why slaves ought to be free even if the laws and practices of every existing society condemned them to be slaves. Setting aside the obvious problem with taking rights to be claims about what ought to be the case and then explaining why such and such ought to be the case by making recourse to rights, this postulation of recognition-free rights raises the important question of how one comes to have such rights.

One way to proceed here is to ground rights in the nature of our being, as more than a few philosophers have done. For instance, one philosopher maintains: 'If I have rights, it is because of something about *me*, not something that resides in the messy outside world' (Lomasky 1987, p. 153). And he adds: 'basic moral rights are possessed by their possessors independently of other beings. My moral right to autonomy

and integrity springs from my nature and being; it depends on no one else, and is conferred by no one else…' (Lomasky 1987, p. 153) This contrast between rights residing in facts about the 'messy outside world' and 'springing from our nature' represents two sharply opposed positions on the source of rights.

By making social recognition a necessary condition of having rights, I incorporate facts about the messy outside world into my analysis of rights possession. And I claim that, as a virtue of this, it allows us to view the status of being a rightholder as somewhat within our control, within our power to change, and as a status that can be fought for and can be won or lost. I contrast this with taking rightholder status to spring from our nature, which suggest that the status is held entirely independent of our actions. I think that the former is a more empowering perspective in a racial polity where what seems to be most needed is bringing it about that slaves are treated in a certain way rather than viewed as having a certain nature.

It may well be that seeing them as having a certain nature helps bring it about that they are treated in a certain way, but from my point of view, however it is brought about, it is the treatment that matters first and foremost in the final analysis. From the point of view of the slave, it does not matter whether a master frees the slave because it comes to view the slave as a moral equal or because the master becomes convinced that enslavement is no longer economically profitable, or because the master becomes convinced that slavery is contrary to the will of God. What matters from the slave's point of view is that the slave is treated as a free person. I think that this is part of what Benjamin Miller, an ex-slave, was getting at when he remarked: 'I was in bondage in Missouri, too. I can't say that my treatment was bad. In one respect I say it was not bad, but in another I consider it was as bad as could be. I was a slave. That covers it all. I had not the rights of a man' (Blassingame 1977, p. 439).

VIII.

Another way to proceed in accounting for how a subject comes to have moral rights in the absence of recognition is to follow the lead of John Stuart Mill. In thinking about the relationship between rights and utility, he maintained that having a right is having a valid claim that society was obligated to protect. If he were asked for the source of the claim's validity, Mill would appeal to the principle of utility. One need not follow him this far, however. Instead, one can simply accept the point that having morally rights is a matter of having a morally valid claim of some sort, and leave the matter of how one normatively works out the moral validity of this claim as a further question. This view holds that our rights do not

spring from the messy outside world, or from nature, but are rooted in the justification of claimed ways of acting and being treated.

I classify the ontological approach and the valid claims approach as instances of recognition-free conceptions of the source of rights, and I advance my recognition-based view as an alternative to both. However, it is essential to understand that I represent all three views as theses about the conditions that must be met for a subject to be deemed a bearer of rights, where I treat being a rightholder as a social status much like some have treated the concept of a person. I do not treat these views as perspectives on what Mills calls *the metaphysics of value* or as theses about the basis of moral entitlements (though I suppose that one may certainly do this). In particular, I do not claim that social recognition is the basis of a moral entitlement, and so I am not open to the charge of making moral entitlements subject to social whim as some of my critics seem to think. They may have a target for these criticisms, but I am not the target.

I take the valid claims view to be essentially making a point about justification, and the thought is that the source of rights can be entirely rooted in the justification of valid claims, a view familiar to readers of Joel Feinberg. I incorporate the idea of justification into my account of the necessary conditions for being a bearer of rights, but take care to distinguish my view from one that reduces rights possession to satisfying this constraint. As I claim in *RRR*: '…a significance difference between the valid claims theorists and rights externalists, however, is that while the former take such justification to be sufficient for possessing moral rights, externalists maintain that this is necessary but not sufficient' (2009, p. 88). On my view, the recognition of ways of acting and being treated, and their being justified play independent roles in accounting for what possessing rights amounts to. Had I applied the recognition constrain to justification then my critics would have a legitimate complaint, and I would be vulnerable to the charge of taking an unpopular stance on a version of Euthyphro's dilemma. But alas I was careful not to do this. Indeed, I explicitly set aside both normative theory and this particular metaethical matter as ones that I did not have to take a position on for my particular purposes.

I should say, however, that my critics have more work to do to make the case for their preferred resolution of Euthyphro's dilemma. Clearly it will take much more than scaring up fears about making values dependent upon social whim or on community, or fears about getting entangled in pernicious forms of relativism that have been philosophically discredited. Mills declines to rehearse arguments against relativism. However, another way to think about what motivates my position on rights, is taking

seriously the concerns of those who wish to take the concept of being a rightholder seriously but who are unwilling to do so if this commits them to a mysterious, metaphysically untenable, or theological views about what possessing rights amounts to. Jeremy Bentham certainly had this worry, but so do some contemporary philosophers, critical legal theorists, and critical race theorists. The most powerful arguments against relativism often seem to require such contentious commitments. Imposing a recognition constraint on having rights is a small gesture toward those who have these worries but do not wish to expunge the idea of a rightholders from their conceptual landscape.

David Lyons takes a somewhat different strategy, though he also mistakenly assumes that I apply the recognition constraint to the justification side of things. He does not simply reject relativism out of hand, but rather takes the recognition-based conception (which he presumes applies to values or justification) to endorse the contradiction that a person can be a member of different communities with some recognizing a right based on their values and others not doing so in which case we must say that a person both has and does not have a particular right. Interestingly, I am not as troubled by this contradiction because it can play a useful role in generating an internal criticism of existing practices and can support efforts to reconcile radical differences in these practices, a thought I develop in chapter five of *RRR*. Furthermore, a straightforward way to reconcile the appearance of incoherence that Lyons is worried about would be to suppose that recognized rights might have different weight, strength, and authority depending upon facts about the communities they issue from. So, for example, there are clearly important differences along these lines between my rights as a citizen of the United States and my rights as a citizen of the state of Michigan.

The crucial point, then, is that contra Mills and Lyons my thesis about recognition is not a thesis about values. It is true that communities are diverse and that this can manifest itself in a diversity of values. But within this diversity of values we can attend to concrete practices of laying down, promulgating, and sanctioning, or threating sanctions, for noncompliance with prescribed ways of acting and being treated. And on my account, these are the essential ingredients on the recognition side of the equation for converting ways of acting and being treated into rights.

IX.

According to Mills, I accept a rather unpalatable conclusion regarding the Dred puzzle:

a. Slaves did not have rights (so the Court was right)

But Mills puts the emphasis in the wrong place in getting me to face this implication. The interesting demarcation is not between having rights and not having them, but between rights tied to forms of legal recognition and non-legal forms of recognition. Furthermore he misses the fact that a recognition-free conception may face this unpalatable implication as well. For example, if one asserts that only persons with the capacity to comprehend the investigations of Euclid possess rights, and one believes that blacks cannot do this, then the unpalatable conclusion follows. Indeed this seems to be precisely the logic involved in the Dred decision, which Mills argues is not confused at all. Had Mills put the emphasis in the right place when characterizing my view, he would see that there is something to be gained by embracing the recognition-based view in a racial polity, where slaveholders cannot entirely avoid interacting with slaves in ways that acknowledge their humanity.

While it is certainly a consequence of my view that if the recognition constraint is not satisfied, then slaves have no moral rights. Nowhere in *RRR* do I claim that the recognition constraint is not satisfied. To the contrary, on account of claiming that recognition need not only come formally via the legal practices, but that it can come informally, and on account of claiming that it is difficult to imagine slaves being excluded from all forms of community with their slaveholders, where we find evidence of acknowledgement of their humanity, it is practically impossible for slaves to be without any rights whatsoever. Mills will have to find another way to argue that my view sticks us with the unpalatable consequence and that my view is 'profoundly antithetical to the entire spirit of the diasporic black struggle for equal rights in modernity…' (2015, p. 19). And if he succeeds at this, which is no small feat, he has yet to show that recognition-free conceptions do not also stick us with this conclusion.

One of the more troubling concerns about my argument raised by critics is that my claims about the relative advantages, politically or critically, gained by embracing it over the prevailing view are insufficiently developed at best, and false, at worst. I set out to show that the prevailing view has certain drawbacks, one of which is being used as an instrument of black subordination. But I give the impression that my view leaves us better off on this score. Giving up some ground to my critics on this point, I admit that any conception of rights can be put to dual uses so this is not a special problem for the prevailing view. But my point still suffices to shake our confidence in the indispensability of the abolitionist thesis, even if I concede, which I do, that the recognition-based view can be used as an instrument of racial subordination. If this is the case, then as Lyons's observes: '…for all practical purposes, effective use of the two conceptions would seem to be identical…If we compare the two conceptions fairly and even-handedly, we have no reason to suppose that one conception is likely

to be morally more useful than the other' (2013, p. 50). If this is true, then I have made a significant contribution in unseating the prevailing view as the only game in town.

Indeed, in *RRR*, I aspire to do no more than this. As I say, 'My main concern is simply to show that rights externalists can also give a political justification for their position. It would clearly take much more work to show that one side has a clear-cut political advantage over the other' (2009, p. 79). Facing a draw on this point, some may choose to hold on to the prevailing view. However, if one finds the idea of connecting rights with lived experiences attractive then the prevailing view will still be unsatisfying. And, at a minimum, my argument will have shown we can rest assured that the alternative recognition-based view leaves us no worst off when it comes to combating racial injustice or arguing for reform. This is a modest conclusion but one I am happy to accept and take credit for.

Lyons objects that I do not produce sufficient data to evaluate the differential consequences of recognition-free and recognition-based conceptions of rights. While I certainly do not produce any hard data on this, defenders of the recognition-free conception have never offered any data of their own. Perhaps this suggests a certain futility in adopting a social criticism criterion of adequacy to choose between competing theories of rights. But if this is the case, I believe that the absence of comparative data is more devastating for the prevailing view, since the purported advantage of this view over recognition-based views in facilitating the critique of racial injustice has been the main point made in favorite of it.

x.

In *The Racial Contract*, Charles Mills quotes James Baldwin: 'Negroes want to be treated like men…a perfectly straightforward statement, containing only seven words. People who have mastered Kant, Hegel, Shakespeare, Marx, Freud, and the Bible find this statement utterly impenetrable' (1997, p. 119). Whatever else we wish to say about what having rights amounts to, particularly with respect to distinguishing moral from non-moral rights, I think that a certain kind of treatment is absolutely essential to having them and so I propose that some form of social recognition is a necessary condition of being a bearer of subjective rights.

When we look back to how Dred Scott actually became a rightholder from the standpoint of law—some three months after the Supreme Court ruled that he had no rights that the white man was bound to respect—we find that this was because Dred's owner freed him and in freeing him he could have certain lived experiences that were previously unavailable given the prevailing practices of one kind of community—one governed by the highest law of the land. Just like my critics, I believe that Dred ought to

have been free to go and come as he pleased with impunity, free to sell his labor for a wage, free to read and write, free to sue in Court and to do all the things rightholders in the broad political community could do, though making a case for this conclusion was not the main task of my book.

My primary purpose in *Rights, Race, and Recognition* was to defend imposing a social constraint of having rights. I admit that the argument for this view may not be as strong as one would like to have, particularly on its comparative political advantages, but it does have one clear advantage over all versions of recognition-free views. It offers a viable conception of the source of rights to philosophers who prefer a conception more deeply rooted in concrete lived experiences. And rights externalism will be much more appealing to those of us utterly uninterested in critiquing racial injustice with castles in the air.

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