

There is a Problem with Collective Moral Rights!

by Glenn R. Jackson

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In *The Problem of Collective Moral Rights*,¹ J. Angelo Corlett develops the notion of collective or group non-distributive moral rights.² It is the contention of this paper that in his development Corlett has created non-distributive collective moral rights from what are in reality distributive collective legal rights. And further, that his development of collective moral rights is in itself problematic, and raises more moral concerns than it answers.

For Corlett a moral right is a deontological right, conferred on the collective by principles of an "objectively true morality", or of an "enlightened conscience."³ It is "an absolute and nonconflictible moral right" which can never "be legitimately infringed or violated."⁴ A collective moral right to meet Corlett's requirements must have a collective - a group of individuals with a shared common interest - as its one true and non-distributive subject. This entails that Corlett must demonstrate the existence of at least one moral right that is irreducible to the moral rights of the individual members of the collective. By way of demonstration Corlett introduces the following example.

"Imagine the United States of America (USA) and the Congress of Native American Nations (CNAN) non-coercively entering (i.e., as secondary agents: those who act on behalf of others) into an agreement and signing a treaty whereby for one century a certain corporation is to be allowed to mine gold from the mountains of an already designated (by the USA government) tribal reservation."⁵

To complete this example, the individual participants, with the exception of the CNAN, after a century have no memory of the treaty. However, it is indisputable, a treaty exists and was signed knowingly and without coercion by all parties.⁶ It seems entirely reasonable that the CNAN have this treaty honored. Given the CNAN's interest in having agreements to which it is a party upheld. Given that a moral right is the implied protection of just such an interest, a moral right must exist with the CNAN as subject. Does this meet then the requirement that Corlett demonstrate a non-distributive collective moral right?

On the face of things this may appear to be the case, but Corlett's argument revolves around a legal right assigned by the treaty to the CNAN. Corlett wants to say, *a priori*, that the legal right leads to the moral right, but it is my contention that the moral right is antecedent. A change to Corlett's example will help demonstrate the antecedent relationship of moral rights to legal rights. At the end of the treaty's term (100 years) the corporation and U.S. government, as stipulated, return control of the land to the CNAN. However, in violation of that agreement, ten families remain behind. There is enough gold in the mine for them to scratch out a living. Needing supplies, they begin trading with the CNAN. Other families begin to drift in, and they too take over old corporate housing and mine for a living. Children are

born, people age, and life goes on. After 50 years one of the miners strikes what appears to be a second major gold vein. There is now a premium value on this property, and the CNAN steps forward to claim its rightful ownership as stipulated by the treaty.

Do we still feel that the clear moral right resides with the CNAN?

That the CNAN has a moral right to have the treaty honored has now become clearly problematic. Why? Because with Corlett's example we were faced with a legal right, held by the CNAN, and a legal responsibility, held by the USA and the corporation. This legal responsibility is what led Corlett to mistakenly argue for a moral right. By removing the legal responsibility from my example it is evident that true moral rights, i.e. the rights individuals have to the fruits of their labors, defeats the present legal right held by the CNAN.

Corlett acknowledges a distinction between legal and moral rights:

"A collective moral right is distinct from a collective legal right. A collective *legal* right is one conferred by legal rules on some collective as a legal guarantee against the infringement of that collective's interest/choice, as the case may be."⁷

Yet Corlett's confusion as to the relation between legal and moral rights appears when he states "it is worth noting that a collective right may be conferred by both moral and legal rules, such as when a corporation has a right to have its contractees honor that to which they agree."⁸ Corlett's underlying assumptions appear to be that legal rights have as their effect moral rights. And for Corlett, given the collective legal right imposed by the treaty, he can argue for the existence of a related collective moral right.

However, my contention is that Corlett is substituting a legal right as a collective moral right without recognizing that it - the legal right - is distributive to an underlying moral right. And that this underlying moral right is itself an individual right, not a collective right.

"Legal relations are merely existing facts of life viewed in the light of a past uniformity of societal action, that enable us to predict similar action in the future with respect to two or more persons."⁹

Under Corlett's original formulation of the CNAN example we are moved to side with the CNAN for two reasons: a recognition, as individuals, that adherence to the law is necessary for society to function for all; and a recognition of a clear legal responsibility. But these reasons are not enough to demonstrate the existence of a collective moral right.

The formulation of the CNAN example offered by this paper creates a different outcome from Corlett's. By removing the contractual legal responsibility imposed by the treaty, it is possible to see an individual's moral right at work. The CNAN still holds a treaty right to the land that is being mined, and in fact the miners as a group are in violation of that treaty. However, once gold is found through the labor

of the individual miner we have an intuitive sense that it would be wrong for the collective (CNAN) to enrich itself at the expense of that individual. The legal right may be enforced against the other miners, but it is intuitively wrong to enforce that legal right against the individual miner whose labor produced the gold strike.

Adding support to my contention that moral rights are antecedent to legal rights, the law does recognize 'squatter's rights' over the rights of the legal property owner in situations like this. Essentially when a party, who is not the property's owner, makes significant improvements over a period of time to that property, the law has an option to recognize this as de facto ownership. If enough time has elapsed it becomes an immoral act to deny this de facto ownership since the de facto owner has begun to rely on the benefits of the property. The law recognizes the moral right to the property by assigning it a legal status.

Beyond the above example, an argument offered by Corlett to support the attribution of collective moral rights is based on secession as a non-distributive collective moral right.¹⁰ Again, a moral right is valid when an objective moral rule confers a valid moral interest/choice on the subject.¹¹ Is secession an irreducible collective moral right? Corlett says yes, "it is difficult to make sense of the right to secede on distributivist grounds."¹² But there appear to be two objections that cast doubt on the plausibility of Corlett's claim for secession.

The first objection springs from the claim that secession, "is not an individual right...but a collective moral right which certain individuals claim in order to protect the interests of the collective."¹³ Corlett goes on to explain that "one difference between a right the subject of which is an individual and one the subject of which is a collective is that a collective moral right, unlike an individual one, gives some member of the collective the power to claim that right for the collective."¹⁴

Now this is a curious thing. Why would there be a collective moral right that required individuals to exercise the right for the collective? It seems more likely that these are really individual's exercising a predefined legal right. To explain his view Corlett offers a Kantian concept of "role responsibility", whereby these individuals share with the collective the claiming/exercising of their moral rights. ¹⁵ The example used is that of a corporate CEO who is responsible for ensuring promises are kept, ensuring due process, etc.. These individuals, therefore, are group moral right holders and individual right claimers.

That individuals can exercise for a collective a moral right is problematic for several reasons. As related to the above example, corporations are artificial legal entities whose status is intended for the protection from personal liability of those within the corporation. But more importantly, corporate legal entities are designed for regulation and protection of those individuals external to the group. A CEO does not claim due process for the corporation, that is already guaranteed by society, but the CEO is one of the figures designated by law to be legally accountable for the corporation's actions toward society.

A second problem for this notion of individual exercisers/claimers of collective moral rights is the troubling idea of a few individuals claiming rights for the collective. What is to ensure that the few might not be committing the group to a path which itself may be immoral and deny rights to others? An obvious example of this is the leaders of Hitler's Germany. Who used a claim for the right of self-determination for the German people to plunge the world into war and worse. The concept of the few exercising for the many is a problem much like that of the corporate CEO. Society has always found it necessary to use legal means to ensure it's own protection, and to enforce accountability on those who make these group decisions. Without individual involvement in the claiming/exercising of a moral right there is no clear accountability for immoral actions.

A last problem for this notion of the few for the many addresses the question of who is to claim rights for the collective. It is inevitable, with the exception of legally defined collectives, that more than one individual will wish to speak, claim, or exercise some specific right for a larger collective. Practically speaking it appears impossible to find a group/collective that can bring forward a single voice, or individual, or sub-group to claim/exercise the groups collective moral rights without a method of polling the individuals in the collective. This looks suspiciously like collectives devolving into a constituency of individual members, each voicing their own individual interest/choice.

The second objection to Corlett's view of secession as a non-distributive moral right relates to my earlier contention that moral rights are antecedent to legal rights. That secession is a right seems to gain the most strength from an explicit statement of its conditions in a legal document. For example, as argued by Allen Buchanan, the right to secede could be included among other constitutionally guaranteed rights.¹⁶ I would argue that this approach gives us a ready clue as to the true nature of secession. Secession is best viewed as the repudiation of the social contract whereby one sub-group has reason to assert a claim against the majority group. This puts secession in a position very much akin to an area of contract law concerned with repudiation, i.e. breach of contract.

If we take a social contract view of governance or group/collective involvement, then we can talk of duties. In particular we can talk about duties that accrue to governments to protect and serve the individual moral and legal rights of their citizens. Once we talk of rights and duties then we can address those instances where we witness a non-performance of duty - "a breach of contract is always a non-performance of duty; but it is not every non-performance of duty that is a breach of contract."¹⁷ A full exploration of this idea is beyond the scope of this paper. However, it may be sufficient to cast doubt upon Corlett's characterization of collective moral rights to offer a few applications of the breach of contract nature of secession.

Under the American system of contract law it is generally held that "whenever there is a *legal justification* for the non-performance of a promise (duty) there is no breach of contractual duty."¹⁸ An example of a legally justified non-performance of a duty would be any of the 'seceding' former Soviet states. It is a clearly recognized legal

principle that contracts are not binding when they are coerced. For example, when they are made at the point of a gun. So the argument would go in this case that there were never binding social contract between these states and the USSR. Therefore the states have no need to secede, they can simply walk away from a non-binding union.

It is further held under contract law that "a breach of contract may be committed by prevention, hindrance or repudiation."¹⁹ A ready example of this case of breach of contract would be the American colonies. The colonist believed that they were prevented from attaining their individual moral rights of life, liberty and the pursuit of happiness. The social contract had been breached by the British Crown and the

Colonists were justified in seceding. While these examples are rather brief, the point is that secession can be addressed as a legal principle reducible or distributable to underlying individual moral rights.

I have argued that legal rights are derived from antecedent individual moral rights. And I have presented an example to demonstrate that where Corlett has argued for a collective moral right, a legal right was his more likely formulation. Furthermore, where Corlett argued for secession as a non-distributive collective moral right, I have made the case for the problematic nature of his contention and have given an argument for secession as a legal right derived from antecedent moral rights. While collectives undoubtedly hold certain legal rights, they are rights derivable from the historic patterns of individual moral rights.

¹ J. Angelo Corlett, "The Problem of Collective Moral Rights" (1994) 2 *Canadian Journal of Law and Jurisprudence* 237-259

² *Ibid.* at 238

³ *Ibid.* at 238

⁴ *Ibid.* at 238

⁵ *Ibid.* at 240

⁶ *Ibid.* at 240

⁷ *Ibid.* at 239

⁸ *Ibid.* at 239, note 8.

⁹ Arthur Linton Corbin, *Corbin on Contracts* (St. Paul: West Publishing Co., 1952) 3-4.

¹⁰ Corlett, *The Problem of Moral Rights*, 243

¹¹ *Ibid.* at 243

¹² *Ibid.* at 243

¹³ **Ibid. at 245**

¹⁴ **Ibid. at 245**

¹⁵ **Ibid. at 245, note 25.**

¹⁶ **Allen E. Buchanan, *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (Boulder: Westview Press, 1991), "A Constitutional Right to Secede."**

¹⁷ **Corbin, *Corbin on Contracts*, 923**

¹⁸ **Ibid. at 924**

¹⁹ **Ibid. at 924**