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# Distributive Justice and the Moral Division of Labor: A Comment on Penner

A Comment on: "Property, Community, and the Problem of Distributive Justice" by J. E. Penner.

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# Distributive Justice and the Moral Division of Labor: A Comment on Penner

#### Yitzhak Benbaji\*

James Penner's *Property, Community, and the Problem of Distributive Justice*<sup>1</sup> is a rich and insightful paper. In it Penner advances a Hegelian critique of Rawls's theory of justice as fairness. However, as I shall shortly demonstrate, Penner offers a more fundamental Hegelian challenge: in effect, he criticizes the social contract tradition as such, while faulting its well-established language of rights. Penner's critique may be summarized as follows:

- A. The contractarian conception of values is distorted: it misses the phenomenon of essentially communal values that resist distribution, and admits only (what I call) "distributable goods."
- B. The contractarian conception of human moral psychology is distorted: it portrays humans as a rabble busy maximizing their share of distributable goods, rather than as participants in the common human enterprise, who cooperatively produce essentially communal values.
- C. The very idea of distributive justice as fairness, as articulated in Rawls's theory of justice, reinforces the distorted contractarian conceptions of human values (A) and human moral psychology (B).<sup>2</sup>

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James Penner, *Property, Community, and the Problem of Distributive Justice*, 10 THEORETICAL INQUIRIES L. 193 (2009).

Penner's critique of John Rawls, A Theory of Justice (1971), is close to the communitarian critique developed in Michael Sandel, Liberalism and the Limits of Justice (1982) and by Charles Taylor, for example in Charles Taylor, Irreducibly Social Goods in Philosophical Arguments (1997). My response is

After providing an overview of Penner's concerns, I shall argue that his argument for the three theses listed above is invalid. Indeed, Penner correctly articulates some of the crucial metaphysical presumptions on which contractarian theories are based; he also provides a precise account of the concept of distributive justice that contractarian theories entail. Yet he offers only a partial account of the underlying infrastructure of these theories, missing the more complex and interesting full picture. By sketching out what I believe to be the full contractarian account of the "human condition," I will conclude that Penner's attack on it — as expressed in (A)-(C) — misfires.

#### I. PENNER'S HEGELIAN CHALLENGE

Social contract theorists view political societies as comprised of self-interested and mutually disinterested individuals, whose interaction with one another is guided by instrumental rationality. Even in the Lockean state of nature, where these individuals show respect for each other's natural rights to life, heath, liberty and property,<sup>3</sup> they cannot be assumed to have the desire to promote the overall good or maintain social justice. Therefore the notion of natural rights is misleading: respecting and protecting these rights is, in a clear sense, the correct (i.e., the moral) thing to do. Notwithstanding this, in the social contract tradition these rights boil down, in effect, to rights to be partial:

To put it bluntly and shortly, property is fetishized as a right whose most obvious role is to allow individuals the freedom to be selfish, and when being an owner is treated as the model of what it is to be a citizen or human, we extend this warped individualism to characterize our social interactions generally.<sup>4</sup>

Consider some of the inconveniencies of the Lockean state of nature. First, individuals are constantly tempted to violate the moral duties to which they

indebted to WILL KYMLICKA, LIBERALISM, COMMUNITY AND CULTURE ch. 7 (1989), and is based on Yitzhak Benbaji, *A Defense of the Traditional War Convention*, 118 ETHICS 464 (2008) and Yitzhak Benbaji, *The War Convention and the Moral Division of Labour*, PHIL. Q. (forthcoming).

<sup>3</sup> JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (second treatise § 19).

<sup>4</sup> Penner, *supra* note 1, at 195.

are subject, in order to unjustly maximize their share of worldly resources. Second, conflicts also arise from reasonable disagreements; contradicting narratives may generate disputes over historical rights and corrective justice. Third, the goods produced by mutually beneficial cooperation is another issue people are bound to disagree about; each party would like to maximize its share of the cooperative surplus. Conflicts of interests and conflicts of rights should motivate inhabitants of the state of nature to found a political society. Yet entering into a political society does not change human nature: individuals experience a constant temptation to violate the contractual duties to which they are subject, in order to minimize the costs of their membership in the commonwealth. They view the law as an alien body of norms, which confine and restrain them with threats and sanctions. As Penner nicely puts it, "while society and social unions which consist in mutually beneficial activities are necessary . . . individuals are conceived as . . . recipients of social value," rather than as participants in its creation.

Rawls's theory of justice as fairness is another version of the social contract justification of political society. Cooperative arrangements produce cooperative surplus. Given the nature of individuals as construed by Rawls's contractarian theory, cooperation will inevitably generate conflicts between rational individuals who — by virtue of their rationality — would like to maximize their share of the cooperative surplus. Consequently, the regulations by which the parties overcome these conflicts will be experienced as an alien body of norms. Indeed, the outlook of the rabble is immanent to the idea of distributive justice: individuals are conceived as recipients of social values that the cooperative arrangement produces, rather than as participants in its creation.

Penner's inspiring Hegelian outlook is based on a radically different vision of human values, human nature and human society: participants in the human enterprise would form a conception of value that does not tolerate the idea of *individual shares*. Conversely, "man is not truly man at all outside . . . a social order [because] it is the order itself which allows for the possibility of value." Penner offers an example of values, which, according to him, the contractarian vision of humanity cannot accommodate:

games, art, science, and so forth, are not of value . . . because of whatever value individuals find in them . . . but because they are

<sup>5</sup> LOCKE, *supra* note 3, §§ 125-26.

<sup>6</sup> Penner, *supra* note 1, at 206.

<sup>7</sup> *Id.* at 201.

expressions of our humanity, . . . being human is to participate in something much more than our individuality can encompass.<sup>8</sup>

For Penner, the value of a shared end arises from the fact that the end is shared. Or, more generally, "the corporation is a form of association in which members are somewhat like citizens of a polity . . . [therefore m]embers of a corporation assist their fellows, providing a quasi-familial idea of responsibility for the welfare of each, thus avoiding the possibility of pauperization and the emergence of a rabble." Justice is, therefore, not about distribution. Rather, "What social justice requires is a means to ensure that people are not 'socially excluded,' which requires each individual's participation in the social and cultural enterprise. This sort of participation can no more be 'distributed' than can life itself . . . . "10

#### II. THE SOCIAL CONTRACT TRADITION REVISITED

Penner's version of the contractarian story about the human condition is seriously incomplete; the metaphysical and normative presumptions that underlie this tradition are more complex and more interesting than Penner would have us believe. As I see it, the true story is built on the following propositions:

- 1. The morality underlying the social contract tradition is moderate; it does not condemn one's natural tendency to promote one's self-interest, to pursue one's personal projects, or to give priority to the interests of the near and dear. In other words, morality does not require sainthood. Its role is, rather, to restrict our partiality.
- 2. Their partiality notwithstanding, humans can transcend their individuality. Under the appropriate conditions, humans can be responsive to essentially communal values. Furthermore, human life gains ethical significance that is, it is human, in the ethical sense only if it is responsive to such values.

Let me illustrate what moderate morality is by the notion of rightful

<sup>8</sup> *Id.* at 203-04.

<sup>9</sup> Id. at 209-10.

<sup>10</sup> *Id.* at 193. Compare Penner's conception of justice to the ideal of democratic equality developed in Elizabeth Anderson, *What Is the Point of Equality?*, 109 ETHICS 287 (1999) and to Elizabeth Anderson, *How Should Egalitarians Cope with Market Risks?*, 9 THEORETICAL INQUIRIES L. 239 (2008).

self-defense. Consider the morality of self-defense against a psychotic, non-responsible aggressor, and the philosophical view asserting that a psychotic aggressor is immune from defensive killing by virtue of his moral innocence. This view, Thomson says, employs an "excessively high minded conception of morality." Thomson's alternative vision treats the moral right to self-defense not as a right to enforce justice in the distribution of harm, but as a right to be partial. When a person is about to kill you, you have a right to defend yourself; the aggressor's degree of culpability — and consequently the considerations of justice in the distribution of harm — are irrelevant to this right. The right to kill an innocent aggressor in self-defense is merely a right to protect one's legitimate interests, and, as such, it is an element of a morality that affirms self-interest.

Supposedly, Penner would prefer a Hegelian conception of rights that follows from what Malcolm Thorburn calls the engaged state model: "Claims of justification . . . are not made in one's private capacity but are instead raised in the actor's capacity as a state agent." Exercising violence is right because it is "legitimate state conduct" — so individuals are in the right, *qua* members of a community that authorizes them to do justice in particular circumstances. The contractarian conception of rights rejects this view.

Here is another illustration of the relation between rights and self-interest, and the way moderate morality accommodates human partiality. Consider the egalitarian aspect of the Lockean morality of the state of nature according to which earth belongs to men in common. This principle might be institutionalized by the common property model requiring that resources be governed "by rules whose point is to make them available for use by all or any members of the society." Yet, "the tragedy of the commons" undermines this model. "If everyone is entitled to use a given piece of land, then no one has an incentive to see that crops are planted or that the land is not over-used." It is important to note, however, that factually, if we were moral saints we would care about others' interests to the same degree that we care about ours. Common property would have created an incentive for all of us to make sure that the crops are planted and that the land is not overused. And normatively, were we *required* to be moral saints (i.e., to love our neighbor

<sup>11</sup> Judith J. Thomson, Self-Defense, 20 PHIL. & PUB. AFF. 283, 285 (1991).

<sup>12</sup> See Malcolm Thorburn, Justifications, Powers, and Authority, 117 YALE L.J. 1070 (2008); and Malcolm Thorburn, The Constitution of Criminal Law (Sept. 15, 2008) (unpublished manuscript), available at http://law.huji.ac.il/upload/thorburn\_the\_constitution\_of\_criminal\_law.pdf.

<sup>13</sup> The quotations are from Jeremy Waldron, *Property*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY, http://plato.stanford.edu/entries/property (last visited Sept. 15, 2008).

as we love ourselves), the institution of private property designed to resolve the tragedy of the commons would be morally unjustified. By allowing private property, Lockean morality affirms human partiality.

Fetishized values like private property are, therefore, an essential element of morality and of human moral psychology as the contractarian tradition conceptualizes them. Yet, despite Penner's argument to the contrary, characterizing individuals as subjects of rights, and using methodological individualism as the basis of political legitimization, is consistent with (2). And (2) conveys a morality that praises altruistic behavior (i.e., it praises voluntarily waiving one's rights for the sake of others), and an ethics that characterizes life as human by its sensitivity to essentially communal values, common culture, and a shared conception of the human enterprise.

To see this, observe that self-transcendence is a recognized phenomenon in the social-contract tradition: the economic picture of politics is not only framed by Adam Smith's observation regarding competition over distributable goods (see below), but also based on David Hume's<sup>14</sup> observation regarding cooperation. Hume asks what accounts for humankind's brilliant success, and answers that "humans, unlike lions are wonderfully capable of cooperating in many varied and flexible ways: leonine cooperation, unlike human cooperation, is rigidly confined to a few tasks. Human cooperation is, in the language of Hume, artificial. It is based on dispositions that are sensitive to social conventions, and not on fixed innate dispositions that Hume calls natural." Cooperation produces essentially communal values, which form and develop the human enterprise. And, as Hobbes observes, with no such common values, life would be brutish (i.e., inhuman): it would contain "no knowledge of the face of the earth; no account of time; no arts; no letters; no society..."

Furthermore, the social contract theory is committed to a third proposition which integrates (1) and (2): essentially communal values are inseparably intermingled with scarce goods such as money, honor, and prestige that scientific/artistic success (for example) generates; after all, participation in scientific achievements has its self-interested, voluntary aspect. Enter, therefore, Adam Smith's observation: competition and conflicts over

<sup>14</sup> Avishai Margalit, *Indecent Compromise*, in 26 The Tanner Lectures on Human Values 189, 196 (2006) (citing David Hume, Enquiry Concerning the Principles of Morals bk. 3, § 2 (L.A. Selby-Bigge ed., P.H. Nidditch rev., Clarendon Press 3d ed. 1975) (1751)).

<sup>15</sup> Id. at 197.

<sup>16</sup> THOMAS HOBBES, LEVIATHAN ch. 13 (Richard Tuck ed., Cambridge Univ. Press rev. ed. 1996) (1651).

distributable goods are unavoidable. True, any material gain or prestige that attaches to individual scientists is secondary; it depends upon science's primary value (viz., the value of the shared social activity of scientific progress). Still, at least some individuals will compete over these scarce goods, derivative or not, and care less about the value of science for its own sake.

I therefore suggest that instead of undermining the production of shared communal values, distributive justice sustains an institutional framework which, given human partiality, is necessary for producing them. The outlook of the rabble is, indeed, part of this picture. Even if the rules that govern cooperation are fair, following them is a compromise: agents who strive to gain scarce goods cannot obtain them to their full satisfaction. Compromise "etymologically means co-promises or mutual promises, [that is] cooperation based on mutual promises." Furthermore, the contractarian picture allows for virtuous individuals who are devoted *exclusively* to the common end of scientific progress. Still, fair rules of distribution of the distributable byproducts of scientific progress are necessary to allow these individuals to participate in the human enterprise. They may have no interest in prestige and money, but they do have a *moral* reason not to be exploited by a rabble that would use their talent in order to gain more prestige and more money for itself.

I conclude that the contractarian picture of the human condition is immune to Penner's critique. First, the social contract tradition does accommodate essentially communal values — hence Penner's (A) is false. Second, this tradition does not construe humans *merely* as a rabble; under a fair institutional scheme, humans can participate in the human enterprise — hence (B) is false as well. Finally, (C) is false because distributive justice does not reinforce the outlook of the rabble, but rather sustains the institutional framework that *enables* a social union that produces essentially communal values.

Penner's critique fails to show any sensitivity to another crucial factor on which the contractarian picture is based, namely the phenomenon of the invisible hand. An appropriate institutional framework may cause individuals who have *no* interest in the human enterprise, and are therefore unable to overcome their partiality, to produce essentially communal values. In the same way that the behavior of purely self-interested individuals maximizes social welfare under free market conditions, it is certainly possible that in these conditions sports, art, science and culture will flourish. As Nozick

<sup>17</sup> Margalit, supra note 9, at 8.

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insists, under a private property regime, "experimentation is encouraged . . . because with separate persons controlling resources, there is no one person . . . whom someone with a new idea must convince to try it out." <sup>18</sup>

### III. RAWLS'S THEORY OF JUSTICE AND THE MORAL DIVISION OF LABOR

Rawls's theory of justice deepens the contractarian conception of political society discussed above. Justice as fairness regulates the behavior of individuals for whom the norms legislated by the just state are an alien body of rules of conduct. In particular, the second principle of justice treats "the talented" as a rabble. According to this principle, society's basic structure should be designed so that social and economic inequalities will benefit those who are least well-off. Rawls famously infers that if an unequal distribution (e.g., according to one's contribution to the social product) increases the lowest income, a just society ought to allow this inequality. Now, Rawls predicts that "the talented" will not work as hard nor contribute as much to the social product if taxation were to reduce their income to that of the poor. Hence, a tax regime ought to allow inequality in net incomes insofar as the resulting incentives tend to raise the lowest income.

Thus, as Penner observes, justice as fairness utilizes (what I have called) moderate morality: the talented — like other agents operating in the free market — are not required to pursue social justice in their private lives. And this means that *qua* agents in the free market, they will experience the tax regime as an external constraint. Yet, Penner overlooks the other crucial aspect of the Rawlsian vision of the just society: citizens in a just society invest time and effort in designing a just tax regime. Qua citizens, the talented are *participants* in an organization that fulfills justice. As such, they are required to take social justice to be their sole concern. In the public sphere, self-transcendence is obligatory: what we owe to each other as fellow citizens through our common institutions is very different from what we owe to each other as private individuals. Furthermore, Rawls's theory offers an attractive explanation as to why self-transcendence is required in the public sphere and nowhere else. People may overcome their partiality more easily through their institutional duties as citizens, officers, judges, statesmen etc.

<sup>18</sup> ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 177 (1974).

The basic idea of "public goods" justifications of the state is found in the following famous passage from Hume's Treatise. Hume says: "bridges are built; . . . and armies disciplin'd; every where, by the care of government, which, tho' compos'd of men subject to all human infirmities, becomes, by one of the finest and most subtle inventions imaginable, a composition, that is, in some measure, exempted from all these infirmities."

It seems, then, that in Rawls' theory, morality is moderated by a social cooperative arrangement that divides the moral labor. Individuals operating in the market are free to maximize their profit (despite the fact that their acquisitive behavior generates inequality), *because* society as a whole, and the citizens that make up this society, are under a duty to legislate and enforce the redistribution that social justice demands.

In sum, as agents in the free market, we *are* recipients in relation to the just law; we are self-interested maximizers, constrained by taxation. We are not required to overcome our self-interest, only to restrain it in conventionally specified ways. On the other hand, as citizens we design the law and are responsible for its fairness. As members of the civic society, we are required to implement justice; the society which we constitute is under a duty to implement justice. This dualistic structure of Rawlsian morality is an important advantage; it leaves room for self-realization, freedom and autonomy, which, from the standpoint of egalitarian social justice, would be described as egocentric.

Jerry Cohen and, following him, Liam Murphy, find the moral division of labor incoherent:<sup>20</sup> if people have a duty to promote just institutions, why is there no duty incumbent upon them to promote whatever it is that just institutions are for? It makes no sense to require citizens to pursue egalitarian justice in one way — through efforts at basic structure design — but not to require them to pursue it in their personal lives. But, like Penner, Cohen and Murphy disregard the dualism that inspires moderate morality. Worse, like Penner, Cohen and Murphy disregard the possible effects of the invisible hand: justice might be better served if less widely pursued; absolving people

<sup>19</sup> David Copp, *The Idea of a Legitimate State*, 28 PHIL. & PUB. AFF. 3, 33 (1999) (quoting DAVID HUME, A TREATISE OF HUMAN NATURE 539 (L. Selby-Bigge ed., Clarendon Press 1978) (1739)).

<sup>20</sup> See G.A. Cohen, Where the Action Is: On the Site of Distributive Justice, 26 PHIL. & PUB. AFF. 3 (1997); and Liam Murphy, Institutions and the Demands of Justice, 27 PHIL. & PUB. AFF. 251 (1999).

of the duty to promote distributive justice in their personal lives may well be a better way to promote justice.<sup>21</sup>

The Rawlsian conception of political society can thus employ the resolution of the Hegelian challenge as developed in the previous Part. The currency of social justice is fetishized, property-like values. Yet, since the moral division of labor legitimizes partiality, the question of fair distribution of these goods is a *moral* problem. There are values that resist fetishization and hence resist distribution too; notwithstanding, justice in the distribution of property-like values is a necessary condition for a social union that produces those values.

<sup>21</sup> See Thomas Pogge, On the Site of Distributive Justice: Reflections on Cohen and Murphy, 29 PHIL. & PUB. AFF. 137, 159 (2000). Compare to the usual "invisible hand explanation": within the appropriate institutional background, absolving people of the duty to maximize general welfare is the best way to achieve that goal.