

# Property, Community, and the Problem of Distributive Justice

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*While it is often taken for granted that the concepts of property and of distributive justice are capable of working together to generate norms which can enhance positive social and political relations, in particular the value of community, this Article argues otherwise. Relying on critical tools deriving from Hegel's Philosophy of Right and Marx's notion of fetishism, the author claims that the Rawlsian conception of distributive justice fetishizes the institution of property, and claims to "distribute" participation in society amongst its members as if this amounted to a distribution of so many objects. Taken in this way, the concept of distributive justice has no respectable content. 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, and the realization of this point undermines the cogency of most discussions of distributive justice.*

The topic of property and community normally invokes thoughts about the way in which the concept of property can be extended beyond private property, which in Western societies is paradigmatic, to normative formations in which the owner is a steward of what he owns for broader social purposes,

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or in which the community has a say in the use of property that diminishes the possibility that a self-interested owner will act to his own advantage, not only to the exclusion of any consideration of others, but to their disadvantage as well. Along these lines one might ask whether the owners of land should be regarded as having the duty of public stewardship so as to prevent environmental degradation. Or whether there are particular forms of ownership which reflect communal values, rather than individualistic ones, forms which might better animate and realize life in communal dwellings, for example.

While I do not doubt that much of interest can be said along those lines, here I will take a stab at explaining the relationship between property and community from a Hegelian perspective, arguing that property only makes sense as a private, individualistic "moment" or element of a broader system of public norms, and that those norms which genuinely amount to norms of political morality or which reflect the values of community, i.e., those norms which govern the relations of individuals to the state or of authorities to their subjects or of communal organizations to their members, are misconceived using property concepts. The result of the argument will be that, the more we genuinely realize any value of community, the more alien seems the legitimacy of distributive justice. I hope to show that distributive justice, rather than providing a standard under which a society can mitigate the most anti-social aspects of a private property system, is in fact the illegitimate offspring of a misconceived, fetishized concept of property.

## **I. PROPERTY FETISHISM**

The most important task for any theorist of anything is to distinguish the thing he is theorizing about from everything else. This does not require him to provide a definition or a conceptual analysis of the concept which represents his subject, but it does require him to give it a more or less reasonable, more or less workable content. So property theorists should at least try to maintain a more or less reasonable and workable distinction between property rights and every other kind of right a right-holder might have. This seems to be common sense, but it seems to me to be violated by property theorists all over the place, so much so that I would argue that the concept of property is regularly "fetishized." By "fetishized" I mean that our understanding of the concept is distorted in such a way that we think it applies where it does not, or perhaps we think it an illuminating model of a relation even where we recognize that the relation being modeled is not, strictly speaking, property, and then seem to forget that fact. As this error of over-application is repeated

again and again, what results is a distorted conception of property that has a kind of mesmerizing grip on us, making us feel that it is more powerful analytically than it really is. This hold of property on our imaginations regularly leads us to apply it far beyond the realm of genuine property rights to other very different sorts of social relations where rather than explaining anything, it obscures and distorts. Probably the most egregious example of property fetishism, which has, perhaps, fewer committed advocates these days than it once did, is the idea of self-ownership.<sup>1</sup> According to this idea, we make sense of our relations to others on the basis that we own ourselves, so that, for example, assaulting me is akin to vandalizing my car, kidnap and false imprisonment akin to a kind of theft, and so on. Lockeans extend this paradigm to the "sale" of one's labor, and much more might follow.<sup>2</sup> This unattractive and implausible use of the concept of property arises to a large extent because a fetishized conception of property under-appreciates and distorts the social aspects of property rights — a fetishized conception of property is not only a distortion in that it promiscuously entices us to apply it beyond any sensible boundary distinguishing property norms from others, but a distortion of the concept of property even in those cases where property norms are indisputably involved. The fetishized conception of property is an a- or anti-social conception of property; it is slanted towards individual ownership and away from co-ownership, towards transfers of property in the contractual realm and away from gifts and transfers by command, and towards the exclusion of non-owners as a guiding principle and away from the coordination amongst resource users which the exclusionary norms allow. 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. For this reason, in disputes over the justification of property it is not uncommon to find — not uncommon! it is rather emblematic of such disputes — that those on the left seek to undermine the justification of property rights and confine property rights with all sorts of limitations while those on the right seek to bolster them, treating any limitation on property rights as an attack on the very

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1 See HILLEL STEINER, AN ESSAY ON RIGHTS 237-49 (1994); see also Hillel Steiner, *Choice and Circumstance*, 10 *RATIO* 296 (1997). Contrast G.A. Cohen, *Self-Ownership, World Ownership, and Equality: Part II*, 3 *SOC. PHIL. & POL'Y* 77 (1986); Alan Ryan, *Self-Ownership, Autonomy, and Property Rights*, 11 *SOC. PHIL. & POL'Y* 242 (1994); J.W. HARRIS, *PROPERTY AND JUSTICE* (1996).

2 See, for example, the sources by Steiner cited *supra* note 1, on the ownership of one's children as the "products" of one's "labor."

soul of the owner. This whole orientation of the debate over the justification of property is, to my mind, a distortion worked by property fetishism. On this model, the paradigmatic citizen owner is Ebenezer Scrooge (before his ghost-prompted enlightenment).

A fetishized conception of property forms an intrinsic link with a correspondingly distorted notion of contract, in which all contracts are reduced to exchanges of property rights, and property is defined as that which can be exchanged.<sup>3</sup> On this view, the concept of a contract is reduced to purchaser choice, and any idea of contracts as relational, long-term, joint ventures under which people coordinate their behavior to mutual and joint advantage is obscured. Of course, just as the property theorist does not deny the possibility of co-ownership or gifts, the contract theorist does not deny the existence of relational contracts or joint ventures, but these are marginalized, as examples of contract with various complications but which, for analytic purposes, can be reduced to the central model without a remainder of any significance. Whatever its value in undermining the difference principle, only someone with a fetishized notion of property, sale, and contract could come up with Nozick's Wilt Chamberlain example.<sup>4</sup> It is this fetishized notion of property and contract which gives rise to the idea that one owns not just one's property, but the *value* of one's property, and to the "bundle of rights" theory of property, under which the reality of ownership is seen as always and already fragmented by the way in which one might possibly enter into contracts in respect of one's property. A property right is just a bundle of exchange values which are happily *already* there, *already* magically realized. As "sticks" in the bundle, it is *they* that we own, not the thing itself.

If one were to explain property fetishism in the same sort of way that a Marxist would explain commodity fetishism, one would say that it obscures the social division of labor, and that, to the extent the social division of labor is appreciated, it is distorted. Thus, the libertarian can believe that a modern capitalist economy is essentially nothing more than the aggregation of a multitude of independent economic actors, rather than a finely regulated social *organization* of persons in various ways, from employment relations to markets to transportation facilities to financial institutions. In the same way the nature of property ownership is conceived along the lines of each owner being independent from all others, instead of each being

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<sup>3</sup> See, e.g., RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 29-31 (3d ed. 1986).

<sup>4</sup> ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 160-64 (1974). A moment's thought will reveal that the contract or arrangement under which people pay their extra to see Mr. Chamberlain play doesn't work in any legally recognizable fashion.

dependent on norms socially contrived to secure not independence but social coordination. A non-fetishized view of property would not deny that one function of property is to provide a kind of independence from others, any more than a non-fetishized view of commodities denies that there is a *kind* of freedom and independence in consumer transactions, industrial production, and mass markets. But as one moves from a primitive sort of "family" or feudal production to industrial production, where the purpose of setting up a business is not merely to produce goods to trade for other of one's wants, but to mass-produce goods for general consumption, this entire enterprise depends upon there being a society economically organized to deal with mass production. It is only in the interstices of this system of physical structures and societal norms that the freedoms emblematic of modern conceptions of contract and property are real. How many of the myriad of contracts one enters are ones in which the parties genuinely negotiate the terms, with some reasonable understanding of the substance of goods or services provided? Does anyone these days think that ownership of land, at least if it has a house on it, makes one *independent* of others? All those raising their hands must be dually qualified plumber-electricians. To the extent that the freedom of contract and the independence of property exist, this is a significant and gratifying achievement of the economy we have. But they are neither its origin nor its main purpose.

While this Marxist angle is certainly part of the picture, it is by no means the whole, nor even the greatest, reason underlying property fetishism. The greater part of the problem is what I would regard as a philosophical betrayal of practical reason. We can call this the Hartian (or perhaps Razian) angle on property fetishism. The fundamental difference between Hart and his positivist predecessors, especially Austin and Kelsen, was Hart's appreciation of the law as an institution of collective or communal practical reason, in which the subjects of the law could be regarded as participants, regarding the law's norms as actually binding on them, rather than merely the recipients of threats. With great effort and acumen, and to my mind with resounding success, Hart overthrew the Austinian and Kelsenian obedient, a.k.a. Holmes's bad man, as the model of a citizen under the law. That he never went so far as Fuller and Dworkin and Finnis and, more recently, Waldron and MacCormick,<sup>5</sup> in the other direction, all of whom

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5 See Neil MacCormick, *Jurisprudence After Hart*, in *THE LEGACY OF HLA HART: LEGAL, POLITICAL AND MORAL PHILOSOPHY* ch. 3 (Matthew Kramer et al. eds., forthcoming); Jeremy Waldron, *Hart and the Rule of Law*, in *THE LEGACY OF HLA HART: LEGAL, POLITICAL AND MORAL PHILOSOPHY*, *supra*, ch. 5.

would confine the concept of law only to those institutions evincing a morally healthy relationship of sovereign to subject, in no way upsets this achievement. Property fetishism gains a foothold, and in my opinion will probably hold sway, whenever we conceive of private right-holders not as Hartian subjects of the state,<sup>6</sup> but rather as classical positivist obedient, individual actors whose outlook on the state and economy is that of what Hegel calls "the rabble," individuals who view the law as an alien body of norms which confine and restrain them by its threats of sanction. This will happen whenever people regard themselves not as *participants* in the organization of collective activity to provide for the needs and wants of themselves as participants, but as individual *recipients* of such shares as they can, by hook or by crook, extract from an alien and more or less imposed social and economic structure. This has nothing to do with the size of the share any individual manages to extract. An abused worker who takes what little his employer meanly insists is the most he can offer is no more a member of this rabble than a hedge fund manager who regards with malice any regulation of his market conduct. What binds them together is their treating the entirety of their relations with others as a series of transactions, at best transactions akin to contractual exchanges of property rights, at worst transactions akin to extortion or theft. As I hope, if not to show, then at least to begin to show in this Article, we are in the grip of property fetishism whenever we think the idea of "distributive justice" has respectable content, because the concept of distributive justice only makes sense if we adopt the outlook of the rabble.

## II. RAWLS, INDIVIDUALISM, AND DISTRIBUTIVE JUSTICE

We can begin our consideration of distributive justice by contrasting a passage from Hegel's *The Philosophy of Right*<sup>7</sup> with one from Rawls's *A Theory of Justice*.<sup>8</sup> Hegel's theory of social morality and Rawls's theory of justice are, of course, two very different creatures, but my purpose is not merely to set them against each other, but rather to point out a particular way in which they differ in their appreciation of the human condition. It is, after

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6 The state here is defined to include the norms and institutions of the state and the law which heavily shape a society's economic organization, e.g., institutions like the London Stock Exchange, labor unions, and the Bank of England as much as Parliament or the law courts.

7 G.W.F. HEGEL, *PHILOSOPHY OF RIGHT* (T.M. Knox trans., Clarendon Press 1942) (1820).

8 JOHN RAWLS, *A THEORY OF JUSTICE* (rev. ed. 1999).

all, only in light of such an appreciation that any understanding of morality is achieved. To understand what is right conduct for *X*, we had better have a sense of what *X* is like and what his situation is.

Hegel insisted that the ultimate fulfillment of the unfolding of the "idea" of right, of morality or rightful behavior, lay in "ethical life," the state in which man's liberation from mastery by his desires or inclinations (from his "heteronomous self" as Kant put it) and his achievement of true freedom of action, freedom secured by a genuine understanding of what is valuable, is realized because all contradictions between the individual's subjective freedom and his sociality, his duty to and interests in others, are overcome. Here is a characteristic passage:

The right of individuals to be subjectively destined to freedom is fulfilled when they belong to an ethical order, because their conviction of their freedom finds its truth in such an objective order, and it is in an ethical order that they are actually in possession of their own essence or their own inner universality.<sup>9</sup>

Hegel continues with the remark:

When a father inquired about the best method of educating his son in ethical conduct, a Pythagorean replied: "Make him a citizen of a state with good laws."<sup>10</sup>

The intimate connection Hegel finds between the reality of true human freedom and the individual person's situation within an ethical social order is a long, long way away from Rawls's social contractual casting of the just society. Under the latter, basic liberties are essentially freedoms from the interference of others, in particular from the state or other authorities. Moreover, the difference principle, requiring that any inequalities in the distribution of social and economic values work for the benefit of the least well off and are attached to positions distributed under conditions of fair equality of opportunity,<sup>11</sup> seems equally to take a defensive stance against unjust appropriations from the pool of values available to all that would occur in the absence of its application. I would not be the first to remark on the surface oddity of a theory of political *morality* the ultimate source of which turns on the rational calculations of the self-interested, i.e., on the rational

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<sup>9</sup> HEGEL, *supra* note 7, para. 153.

<sup>10</sup> *Id.*

<sup>11</sup> See RAWLS, *supra* note 8, at 72, for the first formulation of the difference principle in its final form.

calculations of one for whom morality per se has no hold, but that is not my point here. My point here is that even if we were to neglect the particular structure of the argument, one which takes us from the self-interested perspective to the moral one in the hopes of illuminating and even justifying our intuitions about what morality requires, the morality outlined is what might be called a "zero-sum" morality, a morality of principles which draw barriers protecting us from certain sorts of depredations which might befall us if others act badly. It is our possible interactions with other people which pose the problem of "fairness," the essential "problem" of political morality as Rawls sees it. One of the most telling lines in the whole book is this:

Now obviously no one can obtain everything he wants; the mere existence of other persons prevents this.<sup>12</sup>

This is so spectacularly wrong-headed as the kernel of truth lying at the heart of our moral understanding that it takes one's breath away. So long as we assume that man is a social animal, which seems to be the case, no genuinely *human* being could obtain anything worth wanting in isolation from all others. The mere *absence* of other persons would *ensure* this.

Rawls carries on in this passage thus:

The absolutely best for any man is that everyone should join with him in furthering his conception of the good whatever it turns out to be. Or failing this, that all others are required to act justly but that he is authorized to exempt himself as he pleases. Since other persons will never agree to such terms of association these forms of egoism would be rejected. The two principles of justice, however, seem to be a reasonable proposal. In fact, I should like to show that these principles are everyone's best reply, so to speak, to the corresponding demands of the others.<sup>13</sup>

Notice how the presence of others creeps in, from their entirely negative role in the first line quoted above, where they merely work to prevent my getting what I want, to the role of objects whose actions may, if I arrange things aright, serve my interests.

I appreciate that Rawls's intention here is to begin drawing out the character of the self-interested individuals who choose in the original position, but I think it is important to point out that self-interested or not, these individuals appear to have no social sense whatsoever. Either others

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<sup>12</sup> *Id.* at 103.

<sup>13</sup> *Id.*



have a negative role, preventing me from getting what I want, or they have a positive role as my slaves. I deny that even the most selfish, yet still human, of us would think that their "absolutely best" is that all others join them in pursuing *their* projects conceived as such. This is the absolutely best of the psychopathic dictator of a hagiocratic ant-state, and I should deny that deep down we all envisage our absolutely best as the life of Kim Jong-il. It does no good to say that "my conception" of the absolutely best might be something different than Kim Jong-il's; of course it is. But there is no room for such a conception insofar as my *only conceivable* appreciation of others is as either impediments to or tools for the realization of my goals, because any conception of a genuine social good, one in which persons share in the realization of the interests of others, *ex hypothesi* requires conceiving of these others otherwise than as obstacles or instruments. In consequence and in stark contrast to the position of Hegel, so far as the conception of morality is concerned, the interaction between individual persons is not regarded as the essential source of value which gives worth to each individual's existence, the fostering of which would multiply the possibility of individuals having well-lived lives, but the problem of carving up some quantity of value which otherwise arises (from the fruits of the earth to people's individual capabilities and talents). It is a morality of "fair" exploitation, a zero-sum, distributional game, whereas for Hegel, man is not truly man at all outside such a social order — it is the order itself which allows for the possibility of value.

Now Rawls does not leave the matter there, and a Rawlsian might reply that Rawls himself did deal to a significant extent both with the way in which individuals cooperate to achieve projects, and also with the way in which an understanding of right, a "sense of justice," paves the way for "social union" and the moral impotence of envy. Although Rawls treads nothing like the same path as Hegel from the basic principles of right to some idea of ethical life within a social order, he is at pains to show how, starting as self-interested actors in the original position, we can proceed to reveal a genuine idea of social morality, the "well-ordered society." For example, Rawls contrasts a society whose economic situation is that of a zero-sum game with the social cooperation found in a society committed to the two principles of justice:

Suppose . . . that envy is held to be pervasive in poor peasant societies. The reason for this, it may be suggested, is the general belief that the aggregate of social wealth is more or less fixed, so that one person's gain is another's loss. The social system is interpreted, it might be said, as a naturally established and unchangeable zero-sum game. Now

actually, if this belief were widespread and the stock of goods were generally thought to be given, then a strict opposition of interests would be assumed to obtain. In this case, it would be correct to think that justice requires equal shares. Social wealth is not viewed as the outcome of mutually advantageous co-operation and so there is no fair basis for an unequal division of advantages.<sup>14</sup>

The zero-sum outlook is overcome once it is understood that mutually advantageous cooperation generates an expanding stock of goods, and this gives scope for the unequal division of advantages under the difference principle.

But Rawls says more than this about the social character of the society governed by the two principles of justice. Forgive a rather long quotation:

Now the sociability of human beings must not be understood in a trivial fashion. It does not imply merely that society is necessary for human life, or that by living in a community men acquire needs and interests that prompt them to work together for mutual advantage in certain specific ways allowed for and encouraged by their institutions. Nor is it expressed by the truism that social life is a condition for our developing the ability to speak and think, and to take part in the common activities of society and culture. . . .

The social nature of mankind is best seen by contrast with the conception of private society. Thus human beings have in fact shared final ends and they value their common institutions and activities as good in themselves. We need one another as partners in ways of life that are engaged in for their own sake, and the successes and enjoyments of others are *necessary for and complementary to* our own good. These matters are evident enough, but they call for some elaboration. In the account of goodness as rationality we came to the familiar conclusion that rational plans of life normally provide for the development of at least some of a person's powers. . . . Yet one basic characteristic of human beings is that no one person can do everything that he might do; nor a fortiori can he do everything that any other person can do. The potentialities of each individual are greater than those he can hope to realize; and they fall far short of the powers among men generally. Thus everyone must select which of his abilities and possible interests he wishes to encourage; he must plan their training and exercise, and schedule their pursuit in an orderly way. Different

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14 *Id.* at 472.

persons with similar or complementary capacities may co-operate so to speak in realizing their common or matching nature. When men are secure in the enjoyment of the exercise of their own powers, they are disposed to appreciate the perfections of others, especially when their several excellences have an agreed place in a form of life the aims of which all accept.

Thus we may say following Humboldt that it is through social union founded upon the needs and potentialities of its members that each person can participate in the total sum of the realized natural assets of the others.<sup>15</sup>

The question this passage raises is whether, in elaborating a view of the sociability of humans, Rawls goes beyond what might be called his methodological individualism. It is clear that we desire ends that others also desire, and value common activities.<sup>16</sup> "Science and art provide ready-to-hand illustrations."<sup>17</sup> But the question is whether the fact that these shared ends and common activities are "necessary for" or "complementary to" our *own* good means that they are only of value as being of value to individuals *individually*, or whether they are for our own good *because* they are also good for others.

There are two ways of understanding the value of a common activity with a shared end, say a game. A game is good because only by that form of activity do both player *A* and player *B* realize a particular value. This is to understand the value of a game individualistically. But a game may be good in a further, social way, in that part (perhaps the greatest part) of the value of playing the game is that *A* realizes a value *because B* does as well, and vice versa. On this accounting, the value of a shared end which arises from a common activity is importantly grounded in the fact that the end is shared. This latter view has strong resonance with the general tenor of Hegel's philosophy of psychology and of right. According to Hegel, the central characteristic of the human is the need, as a rational will, for recognition by other rational wills. This comes about, in rough terms, when we overcome interactions orientated towards and understood in terms of conflict, in which one will seeks mastery over the other. Instead we form associations in which we act together, which actions reveal what Hegel rather obscurely refers to as the "universality" of human nature: by acting jointly in ways most true to our *common* nature the value of free action is realized.<sup>18</sup> Accordingly, games, art, science, and so forth, are not of value,

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<sup>15</sup> *Id.* at 458-59 (emphasis added).

<sup>16</sup> *Id.* at 460.

<sup>17</sup> *Id.*

<sup>18</sup> I believe this way of putting things has much in common with the perspective taken

or not primarily anyway, because of whatever value individuals find in them as expressions of our individual free and rational wills, but because they are expressions of our humanity, our common human nature, of the fact that being human is to participate in something much more than our individuality can encompass. To be human is necessarily to value, and care about, not just our own lives but the way the whole human project is going.<sup>19</sup> This, in Hegelian terms, is what it means to say, with Aristotle, that man is a political animal, or with Marx, that man is a species being.

As far as I can tell, despite whatever Rawls says about the idea of society as a collection of social unions, or of a just society as a union of social unions,<sup>20</sup> the project remains ultimately individualistic. Consider the following passages:

Human beings have a desire to express their nature as free and equal moral persons, and they do this most adequately by acting from the principles that they would acknowledge in the original position [the two principles of justice]. When all strive to comply with these principles and each succeeds, then individually and collectively their nature as moral persons is most fully realized, and with it their individual and collective good. . . .

In a well-ordered society [i.e., one which recognizes and complies with the two principles of justice] each person understands the first principles that govern the whole scheme as it is to be carried out over many generations; and all have a settled intention to adhere to these principles in their plan of life. Thus the plan of each person is given a more ample and rich structure than it would otherwise have; it is adjusted to the plans of others by mutually acceptable principles. Everyone's more private plan is so to speak a plan within a plan, this superordinate plan being recognized in the public institutions of society. But this larger plan does not establish a dominant end, such as that of religious unity or the greatest excellence of culture, much less national power and prestige, to which the aims of all individuals and associations are subordinate. *The regulative public intention is*

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by Raimond Gaita in RAIMOND GAITA, *A COMMON HUMANITY: THINKING ABOUT LOVE AND TRUTH AND JUSTICE* (1999). I have only recently become aware of this work, and I have much to think about because of it.

19 In respect of which concern tribalism, nationalism, racism, fascism, totalitarianism, and so forth, are the well known perversions.

20 RAWLS, *supra* note 8, at 462.

*rather than the constitutional order should realize the principles of justice. . . .*

*It follows that the collective activity of justice is the pre-eminent form of human flourishing. For given favorable conditions, it is by maintaining these public arrangements that persons best express their nature and achieve the widest regulative excellences of which each is capable. At the same time just institutions allow for and encourage the diverse internal life of associations in which individuals realize their more particular aims. Thus the public realization of justice is the value of community.<sup>21</sup>*

When we bear in mind Rawls's idea of justice as expressed in his two principles, the first requiring an equal *distribution* of basic liberties (and a better example of property fetishism than this would be hard to find),<sup>22</sup>

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<sup>21</sup> *Id.* at 462-63 (emphases added).

<sup>22</sup> Rawls's model for determining how much liberty citizens should have is one of distribution — roughly, as much liberty for you as is compatible with an identical share for me, which seems to draw on the homespun "your right to swing your fist ends where my nose begins" idea of liberty. Leaving aside the issue whether the largest share possible is really something we should be aiming for (on which point see H.L.A. HART, *Rawls on Liberty and its Priority*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 223, 223-47 (1983), and for Rawls's textual alteration of his theory in response, see JOHN RAWLS, *POLITICAL LIBERALISM* 289-368 (1993)), basic liberties, such as rights to life and bodily integrity, freedom of speech and of assembly and so on, cannot be distributed in any coherent sense. We do and can distribute things, and we do that for completely different reasons than we acknowledge that it is wrong to kill, maim, or break up your meetings. In the former case, it is clear that we can talk about a fair distribution. In the latter case, a "fair distribution" of the right to assemble is simply the property fetish getting in our way. And if its hold over us were complete, think of how our intuitions would change for the worse. To my mind, the very least you could say about the Holocaust was that it was unfair to the Jews. But, if I understand Rawls correctly, that is the most you could say, in the sense that that would be the most fundamental criticism there could be. That somehow the Jews were short-changed, albeit to a very great extent. But this is an atrocious way of thinking about the Holocaust, and could only be conceived when we have misconstrued liberty as some item of value or property which is to be dished out. (To cast the evil in terms proposed by GAITA, *supra* note 18, ch. 131, one might say that these genocidal acts depended upon the Nazis' disregard of the humanity of the Jews; in my terms, *see supra* text accompanying note 18, which may be essentially identical, the evil was not an offence against equality but an offence against universality; the Nazis' treatment of the Jews depended upon treating them as if our common nature, our humanity, was not itself a source of rights and duties; on either way of putting the matter, this was evil irrespective of the comparative treatment by the Nazis of others.) I hasten to distinguish this argument

and the second requiring a *distribution* of economic goods so as to benefit the least well off, it is difficult to escape the conclusion that ultimately, human flourishing is a matter of individual "voluntarism," if I can put it that way. While society and social unions which consist in *mutually beneficial* activities are necessary, there is no sense in which we escape the outlook, which of course is immanent in the idea of distributive shares, that however non-static the stock of goods happens to be, individuals are conceived as rightly orientated in relations to others, as a matter of political morality, as (just or unjust) recipients of social value, rather than as participants in an enterprise where the idea of "individual shares" makes no real sense.

It seems to me that Rawls makes a serious error here. To take one of Rawls's own examples and use it against conceiving of the "value of community" in terms of justice in distribution: science is meant to be illustrative of a social union under which a common activity is carried out to the mutual advantage of the participants. But what scientist, qua scientist, conceives of his relation to science as one in which, by collaboration with others, he acquires a *share* of some value that is realized by the activity of science? Is it really plausible to model science, or art, or any other activity to which we attribute cultural significance, along the lines of an activity in which we think of the benefits that participants get in terms of shares?<sup>23</sup>

Against this individualistic, voluntaristic backdrop, however, the difference principle makes complete sense. Rawls takes great pains to identify self-respect or self-esteem as one of the most, or the most, important

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from the Marxian idea that, under capitalism, everything is commodified, and from the similar economic idea that from the perspective of the rational self-interested actor, any possible "good" of whatever kind is commensurable with all the rest, and the same cost/benefit reasoning applies to the exercise of choice. My argument, if I am correct, is that Rawls has mistakenly transposed the idea of distribution, and fairness in distribution, which only really applies to the case of things which we might hold as property, to the issue of what basic liberties we ought to recognize. I am not claiming that Rawls thinks of the basic liberties as on a par with property or other economic rights.

- 23 Yitzhak Benbaji has pointed out that participation in scientific achievements has its self-interested, voluntaristic aspect — scientific success brings money, honor, and prestige — and these can be distributed fairly or unfairly. While that is true, this self-interested, voluntary characterization is true only of this secondary aspect of the value of science, which is dependent upon science's primary value, the value of science per se, about which it is not true. It is this primary value as a shared social or cultural activity of discovery which makes sense of any material gains or prestige that attach to individual scientists. After all, if science itself had no value, who would pay scientists anything or accord them any honor for their scientific work?

of the primary goods.<sup>24</sup> A person's self-respect is threatened when others show no respect for one's plan of life as worth carrying out.<sup>25</sup> The principles of justice, in particular the difference principle, provide for this self-respect because under their operation, society is arranged to the reciprocal advantage of its members:

[B]y arranging inequalities for reciprocal advantage and by abstaining from the exploitation of the contingencies of nature and social circumstance within a framework of equal liberties, persons express their respect for one another in the very constitution of their society. In this way they insure their self-respect as it is rational for them to do.<sup>26</sup>

But in view of what I have said above, this self-respect is that of a child who receives a slice of cake equal to the other children,<sup>27</sup> the self-respect of the "equal recipient." It assures the self-respect of a person who takes the outlook of the rabble, i.e., one whose self-respect is attached to his not being exploited, given an unfair share. It does nothing to assure the self-respect of one who regards his relationship to others as more than one of reciprocal advantage, i.e., one who regards it as something of the essence of being fully human to participate with others in moving the human project along. In conclusion, the idea of community underwriting the difference principle and individual self-respect is very, very thin, and it is worthwhile asking whether it is so thin as to be essentially vacuous.

### III. HEGEL AND THE RABBLE OF PAUPERS

The question for Hegel is not, as it is for Rawls, one of distributing something fairly to win acceptance of a particular social order and inhibit the loss of self-respect in individuals, but rather one of elaborating how society is the

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24 RAWLS, *supra* note 8, at 386.

25 *Id.* at 155.

26 *Id.* at 156.

27 The wisdom of teaching the idea of fairness or any other moral principle with rules like "one slices and the other chooses" has always escaped me. Surely one wants to instill in the child that cuts the cake the appreciation that having the power to slice the cake is not a license to act selfishly. Presumably, one would like a child to overcome any inclination to selfishness in the first place rather than regard as a manifestation of morality a procedure which only undermines the effectiveness of selfish action, and which leaves the selfish motivation otherwise untouched.

precondition for the realization of any genuinely human values, through the exercise of freedom (which thereby also expresses itself). Far from being a zero-sum game of distributive justice, political morality is the condition of our realizing any truly human values at all.

To put words in Hegel's mouth, I think his criticism of Rawls's theory would go something like this. The distribution of the world's pre-existing resources, land and objects is indeed a matter of justice. To properly understand property rights, one must appreciate that humans live in the world and may interfere with each other in the way they make use of those resources. In order to conceive of property rights at all, one needs to appreciate the difference between those things that have personality, roughly rational will, and those things that don't, i.e., those things which can be the objects of property rights. Having thus grasped the existence of personality, we can devise rules which reflect this understanding, principally rules against trespass, rules of alienation, and so on. We *might* even try to construct rules for the distribution of property, but we shouldn't. For any such rules could only reflect an understanding of our nature and our relation to others as separate personalities which, however vital, is an extremely thin and partial element of the true picture both of ourselves as individuals and of our relations to others. While the distinction between personality (things with humanity) and non-personality (things without) is, pretty certainly, the most basic and essential foundation for morality one can imagine, it is also the most primitive, and a woeful stopping point for any genuine moral understanding.<sup>28</sup> The most significant result of the Hegelian analysis of property is that, while any society requires rules of property and contract, and rules pretty much along the lines one finds in developed Western societies, we must transcend the outlook of the individual owner of property vis-à-vis others if we are to understand with any sophistication the ethical community in which humans live, or rather must live to be fully human.

One might hope, therefore, that Hegel himself would avoid any fetishizing of property, but unfortunately he does not. However, his fetishism of property is the common one of not only treating property rights as the model of all subjective or private rights, but treating all subjective or private rights *as* property rights of different kinds.<sup>29</sup>

Arguably, this leads to his inability to deal properly with the emergence

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28 For a full elaboration of Hegel's theory of property and its situation within the total ethical framework set out in *The Philosophy of Right*, see J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* ch. 8 (1997).

29 *See id.*



of a penurious or pauperized rabble under the economic conditions which Hegel calls the "system of needs" under civil society. The "system of needs" comprises the socio-economic relations of interdependence, including the division of labor, organized markets and so on, which link all people together in terms of the fulfillment of needs and wants, and which constitute the subject matter for that area of study known as political economy.

Hegel describes the emergence of the rabble as follows:

When the standard of living of a large mass of people falls below a certain subsistence level — a level regulated automatically as the one necessary for a member of society — and when there is a consequent loss of the sense of right and wrong, of honesty and the self-respect which makes a man insist on maintaining himself by his own work and effort, the result is the creation of a rabble. *At the same time this brings with it, at the other end of the social scale, conditions which greatly facilitate the concentration of disproportionate wealth in a few hands.*<sup>30</sup>

One notes in passing the significance of "self-respect" in this characterization of the rabble. The problem of the rabble seems to arise inevitably as a consequence of the operation of the "system of needs." Unfortunately, Hegel sees no clear solution to the problem posed by the rabble of paupers; he rather feebly mentions external trade and colonization or emigration,<sup>31</sup> which history shows provide a temporary respite at best (though not which failed to attract, in particular in the English phenomenon of transportation and, until recently, the Irish "export" of its unemployed to the United States and UK). However, he seems to peg his hope on what he calls the "corporation," an element of civil society which also serves as the pivot upon which we transcend the partial ethical framework of civil society and attain the full-blown ethical existence of life in a state. We can regard civil society on Rawlsian terms as the union of social unions, the myriad interlocking systems of mutual interdependence; the "state," the final stage in the unfolding of the realization of ethical life, is not to be conceived principally as the institutions of the state, but as the political constitution under which men realize their true selves (where the history of man, rather than his "pre-history," to use Marx's terminology, begins). Very roughly, the corporation is a form of association in which members are somewhat like citizens of a polity, and therefore the corporation can serve as a kind of conceptual bridge from the more or less

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<sup>30</sup> HEGEL, *supra* note 7, para. 244 (emphasis added).

<sup>31</sup> *Id.* para. 248.

atomized but interdependent social relations under the economic system, to the genuinely communal or social life of the citizen of a state. Rather mysteriously, Hegel asserts that the corporation provides "against contingencies still lurking in" both civil society's economic organization (its system of needs) and the exercise of freedom under the administration of justice (which Hegel, true to form, fetishizes as the "protection of property").<sup>32</sup> The idea seems to be that the corporation provides for those involved in industrial production what the family assures for those in the agricultural class. Members 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.

This is far from satisfactory, and for the same reason that embracing the difference principle is ultimately insufficient to overcome the outlook of the person who has lost self-respect. While there is certainly a *causal* connection between penury, loss of self-esteem, and the outlook of the rabble, the emergence of a rabble or the rabble outlook is a failure of understanding, not of material circumstances. The reason why the realization of the idea of the state is the ultimate fulfillment of human morality or ethical life, the consciousness of which completes our moral understanding, is that ethical life transcends the partiality or incompleteness of the rabble outlook, the outlook of the atomized individual, whose idea of the highest possible state of ethical engagement with others is that of a fair game. As Hegel seems to want to indicate in the final sentence in the preceding quotation, which I have italicized, in the same way that the pauper is diminished materially, so as to engender within him the outlook of the rabble, presumably a similar outlook must take hold at the other end of the social scale if such a person is to justify to himself the "disproportionate" wealth that has come his way. How else can the plutocrat rationalize his success other than by portraying himself as the lucky or skillful winner of a game which is fair?

The solution to the problem of the rabble, or so I shall conclude by suggesting, is not one of better distributing some sort of good, but one of overcoming the property-fetishized, distributive outlook.

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32 *Id.* para. 188.

#### IV. PROPERTY, COMMUNITY, AND THE PROBLEM OF PROPERTY FETISHISM

You can distribute things. You can distribute objects or patches of ground, which can be the subject of property rights. But you cannot distribute *life*. What the idea of the "outlook of the rabble" captures is the outlook of a person who has not merely reified human life or human experience, treating it as something which *essentially* consists of a series of *things* which an individual receives, but has *propertized* it as well, regarding the reified blocks of experience as objects in respect of which there might be an unequal and therefore unfair distribution. It is the outlook of the property fetishist.

To reach any genuine concept of community, property rights must be kept in their place. The institution of property must be understood as an instrument, akin to markets, the division of labor, and so on, institutions which are the achievement of collective or communal practical reason, but over which we must remain the masters. Property fetishism arises when we allow one way in which we organize our affairs (very effectively, it need be said) to become our master, we its captives.

This is not at all to say that community and property are opposing concepts. Quite, quite the reverse. Property is one of the normative achievements which allows us to have a functioning economy. Think of a division of normative labor. Property is one of the sites in which individuals are able to act communally. It is, however, only one of the sites, and much broader institutions, for example, the institutions of art and science to take two of Rawls's examples, are equally if not more vital to the flourishing of community. On this way of viewing things, the institution of property serves as an extremely important indicator of the inadequacies of community. When there is penury, want, a rabble of paupers, the institution of property is serving one of its most vital functions as a kind of social barometer, revealing to us what in the UK now typically goes under the heading of "social exclusion."<sup>33</sup> It is not that there is something wrong with the institution of property; rather, there is something wrong when significant numbers of people are insufficiently capable of, in a sense, making property rights (and, typically, many other sorts of rights) "their own."

Let me conclude briefly with what, I think, is a good illustration of how

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<sup>33</sup> Though God help us if we think the present government's thoughts about remedying it will do any good.

the idea of a community is distorted when our outlook is shaped by the property fetish. Recently the World Bank published *Where is the Wealth of Nations? Measuring Capital for the 21st Century*.<sup>34</sup> The report claims that the preponderant form of wealth worldwide lies in intangible assets — formal and informal institutions and human capital (skills and education) — and that even in less-developed countries, the majority of wealth lies in these intangible assets, though the share of intangible to tangible assets (e.g., natural resources) is lower there. To put this conclusion another way, economic wherewithal largely lies in the social means of exploiting creative potential, not in things. Unfortunately, the report frames this conclusion in terms of assets per capita, which introduces the notion of inequality of distribution in violation of the very point that is sought to be made, which is that wealth does not lie in the distribution of those things that can be distributed, natural resources and so on, but rather in the effective operation of communal practical reason.

### V. THREE OBJECTIONS

When I first gave this paper, Jeremy Waldron suggested to me that all of this may be quite unfair on Rawls, in that it was not a central ambition of *A Theory of Justice* to write a theory of distributive justice, in the sense of proposing a theory about the justice of the distribution of resources or wealth. Rather, his social contractarianism pays the particular attention it does to the distribution of resources so as to emphasize that, to be just, any political institutions must be rationally acceptable even to the worst off under them, and worst off here is framed as worst off in terms of resources, opportunities, life prospects. This is not to draw morality from the perspective of one concerned only with his own self-interest, but to understand the moral constraints placed on the person who would seek to impose a political structure on others; he is constrained by a morality of fairness, which disentitles him from prosecuting any political program to which any other member of society, considering its effects on his own situation relative to others, could rationally oppose as either imposing an unfair burden or unfairly denying a benefit.

Two replies could be made. First, whether or not as a matter of exegesis it is right to say that *A Theory of Justice* is properly understood to be a theory of political morality which adopts, as I have said, a "distributive"

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34 THE INT'L BANK FOR RECONSTRUCTION & DEV./THE WORLD BANK, *WHERE IS THE WEALTH OF NATIONS? MEASURING CAPITAL FOR THE 21ST CENTURY* (2006).

model of legitimacy (i.e., that with respect both to basic human rights as well as to what we might more conventionally regard as society's resources, the idea of a fair distribution is the key justifying notion) is not ultimately important to my purposes. Whether or not one can pin this perspective on Rawls, it is, I would argue, an outlook which is popular enough to warrant a serious interrogation of the kind I have given it here. In the second place, *as a matter of exegesis*, I think it is somewhat telling that from the outset Rawls's primary opponent is the utilitarian,<sup>35</sup> whose chief failing is that of being insensitive to the *distribution* of a society's goods.<sup>36</sup> "Utilitarianism," Rawls famously says, "does not take seriously the distinction between persons,"<sup>37</sup> and the distinction he is referring to here is the distinction between persons as individuals whose wants may or may not be fulfilled by a utilitarian's distribution of a society's resources. So whatever else *A Theory of Justice* may be about, it is at least plausible to think of it as a theory of political justice whose central feature is a recasting of the question of political morality as a question of justice in distribution, and therefore a plausible candidate for the sorts of arguments I have set out.

A different objection is made by Yitzhak Benbaji, who defends Rawls by distinguishing between our private and public roles or personae:

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 duty to implement justice.<sup>38</sup>

The genius, then, of Rawls's position is that we can, in a sense, take the outlook of the rabble as *private* actors, but, as *public* actors, must design political structures which serve as constraints on our partiality; we therefore do not demand the wholesale altruism of a saint; we recognize the legitimacy of partiality to ourselves and our loved ones, but constrain its effects insofar as it would, at a communal or social level, actually work injustice (conceived as unfairness).

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35 RAWLS, *supra* note 8, at xvii.

36 *Id.* at 23-24.

37 *Id.* at 24.

38 Yitzhak Benbaji, Comment on James Penner (Jan. 2-3, 2008) (unpublished comment, presented at the Cegla Center conference on Community and Property, on file with author).

I think this is an attractive, perhaps the most attractive, casting of Rawls's theory. Nevertheless, I think the preceding arguments show that it remains less attractive than the Hegelian alternative; indeed it helps to reveal one aspect of the outlook of the rabble, for it massively enlarges the territory where partiality and fairness are thought to have cogency. To my mind, in a reasonably prosperous society with decent institutions very few of the decisions individuals regularly take are morally significant. They are morally appraisable in the minimal sense that they are required not to be actually immoral, actually selfish or vicious or intemperate, but they are not "moral" in the sense that they are made in response to moral considerations. Choices are made and decisions are taken because they seem like a good idea at the time. Grandly put, they contribute in smaller or greater ways to our flourishing. There may of course be, and certainly have been, social circumstances in which much of day-to-day life involves a series of tragic choices, but one cannot frame a political morality of a more or less flourishing community, which is what Rawls and Hegel aim to do, against that sort of fraught background. In a more or less flourishing community, the fact that most of my choices and decisions typically implicate my wellbeing and the wellbeing of those I like and love and regularly deal with more than they implicate the wellbeing of others has nothing to do with selfishness or partiality; it just has to do with the way in which my actions will typically have scope and meaning for others. If, to use an example Benbaji borrows from Thomson,<sup>39</sup> we explain our right to kill in self-defense as an example, not of our right to do justice, but of the right to be partial, then the day-to-day sorts of choices I make have nothing to do with partiality. One cannot extend, except illegitimately, this genuine idea of a right to partiality to encompass or specify the freedoms that go with having a right to property or the right to enter contracts. The freedom to use one's property as one chooses and freedom of contract are not rights to act partially, but specify in the authoritative norms (reflecting the exercise of our communal practical reason) a "moral division of labor," norms which reflect our appreciation that individuals must to some extent shape their own lives in order to flourish. In the same way that at a social level, in order to flourish, we must participate in "the life of species" or "the course of human history," so at the individual level we must participate in our own lives, lives which are our own in part because we participate in them by making autonomous choices and thus are actively engaged in our own destinies. This has nothing to do with selfishness or partiality.

We can similarly undermine the sense of the public or societal aspect

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39 Judith Jarvis Thomson, *Self-Defense*, 20 PHIL. & PUB. AFF. 283 (1991).

of this picture, where we are required to think impartially. This *impartial* outlook makes no sense either. As a social, cultural, and political actor, by which I mean someone working as a philosopher, or a lawyer, or exercising my rights as a voter, or more generally as a reader and writer and someone who has conversations with others about anything pretty much which goes beyond gossip, I am of course bound to think about the world beyond my own limited circle. But that does not make others the objects of any altruistic impulse. I should, of course, refrain from acting immorally in this realm just as much as I should in the "private" realm — and acting immorally here, whether selfishly or viciously or intemperately, will involve acting differently than acting selfishly in the "private" realm — but the "public" realm is no more a realm where altruism and selflessness hold sway than the private realm is one where they do not. If this is right, then the public/private dichotomy relied upon fails to get a real grip on the reality in question. Attractive though this characterization of Rawls's theory is, ultimately it is just the outlook of the rabble on its best behavior, and not worthy of our acceptance.

Finally, if "being human is to participate in something much more than our individuality can encompass, [and] is necessarily to value, and care about, not just our own lives but the way the whole human project is going,"<sup>40</sup> and if "the essence of being fully human is to participate with others in moving the human project along,"<sup>41</sup> Martin Krygier queries whether this is not a rather "big ask" of our fellow creatures. Are all individuals to conceive their very humanity in terms of such daunting projects? The objection mistakes (no doubt owing to an ambiguity in the way I presented it) a normative desideratum for a conceptual claim. If I am right, it is not that we must consciously act to value and care about people, all humans, as a requirement of morality, or that we have a duty to contribute to the human project. Rather, the essence of being human is to have these cares and interests, to see our lives in terms of a larger project.

It is often said of the young that while they know in their heads that they are mortal, they don't believe it in their hearts. Similarly, it is a common experience of the university lecturer that our undergraduate students often seem not to really believe that anything of consequence happened before they were born, and that everything begins anew with each generation. Anyone who has ever had a youth finds these beliefs understandable despite the fact that they are obviously false. In a similar way, it is an understandable

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40 See *supra* text accompanying note 19.

41 See *supra* text accompanying note 26.

youthful and romantic mistake to think that to be a moral actor is to adopt an altruistic if not saintly concern for the human race, for humanity and its history as a whole. This confuses a fact about our nature — that we are social beings who are inevitably found within a history of the achievements and failings, joys and sorrows of our species, a fact which rightly frames our moral understanding — for a moralistic urge to self-denial. My claim is that it is a matter of fact that our understanding of what it is to flourish and what it is for our lives to have meaning is ineluctably a matter of situating ourselves within the history of the human species — how could any grasp of a well- or poorly-lived life not take such a resource into account? In short, the "social imperative" is not a moral command but a matter of fact about our nature, which, because it is, significantly shapes what is morally required of us.