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Book Review: Justice and Equality: Here and Now. Edited by Frank S. Lucash.

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IV

In 1974, Charles H. Sheldon summed up a debate within the political science fraternity between "traditionalists" and "behavioralists." The debate appears to have peaked during the 1960s. He wrote:

This debate has been leveled at the question of the use of values in research and at the methodologies common to the behavioralists. The dialogue takes a scientific versus non- or antiscientific perspective, with the behavioralist claiming that the traditionalist fails to be scientific enough, and the traditionalist arguing that the behavioralist confuses science with methodology. . . . Robert McCloskey has observed ". . . that the fraternity in general is now receptive to the methods and insights of behavioralism in so far as it finds them *helpful*; . . . and that the discipline is about ready for a new movement. . . ."

The new movement is upon us. . . . The post-behavioral revolution in political science demands that we be concerned for the contemporary world and its problems even if we must sacrifice some of our scientific rigor. In Easton's words, ". . . it is better to be vague than non-relevantly precise." . . . In describing, explaining, and predicting what *is* and eschewing the *ought*, [the behavioralist] tends to support the existing conditions in the world. The realities of the political world tend to be lost in the abstract context of models and data collection.¹⁷

It is not evident from *Judicial Conflict and Consensus* that its editors and contributors were daunted by Sheldon's last sentence. Because I was perplexed by my own inability to discern the purpose or utility of much of the research reported in the collection, I paid attention to the suggested agendas, in almost every chapter and in an epilogue, for "further research." Suspecting that the studies reported were intended to be incremental, I hoped that the research agendas would help me to see the larger canvas on which they were to be increments. Unfortunately, however, most of the agendas called for more of the same.

JUSTICE AND EQUALITY: HERE AND NOW. Edited by Frank S. Lucash.¹ Cornell University Press. 1986. Pp. 170. Cloth, \$22.50, paper, \$7.95.

*David P. Bryden*²

Nearly thirty years ago, a biologist of my acquaintance, on learning that I planned to study philosophy, said something that

text. B. SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY* 198 (1983).

17. C. SHELDON, *supra* note 4, at 228-29 (emphasis in original).

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stuck in my mind. "I usually don't understand philosophers," he confessed, "and when I do understand what they've written I usually don't understand why they bothered to write it." His skepticism, though expressed with unprofessorial directness, was not heretical. Similar doubts could be found in the latest writings of philosophers themselves, some of whom devoted their careers to demonstrating that metaphysics is invariably trivial, false, or obscure.

In those days, political philosophy was commonly regarded as a current in intellectual history, not a serious method for analyzing politics. That, I suspect, is still the average layman's view, but in the academy political philosophy is enjoying something of a vogue. This comeback, commonly attributed to the influence of John Rawls, is evident in the work of several constitutional theorists.

Of course, there's philosophy and philosophy. Political philosophy includes much more than the fantasies of Plato and company. Although lacking scientific rigor, men like Burke, Marx, and Brandeis were talking about how the world works. They may have been wrong; but they were neither trite nor theological. Despite patches of metaphysics, their emphasis was descriptive and utilitarian. Burke's *Reflections* may not persuade you, but he will at least open your eyes to some reasons for opposing "just" revolutions. Marx had great faults, but he will make you sensitive to the relationship between ideology and class interest. Brandeis may have exaggerated "the curse of bigness," but he was not just playing with words.

As everyone knows, empiricism—whether petty or grand—cannot answer all questions. In social research, the methodological problems are commonly so difficult that scholars disagree about how to interpret the results, as has happened, for example, with studies of the deterrent effect of capital punishment. Fearful of methodological criticisms, social scientists often confine themselves to measuring gnats' eyebrows, achieving precision at the cost of utility. The more fundamental problem is that most political quarrels are not amenable to empirical resolution. Even if capital punishment does deter, many will still attack it as inhumane; and even if it doesn't, many will still applaud it as just.

The inconclusive quality of empirical research does not necessarily make it worthless. Given my prejudices, I may be swayed by a solitary fact. Still, we all yearn for something more, a system that will answer ultimate, normative questions.

The attraction of thinkers like Rawls is that they hold out the promise—or seem to hold out the promise—of filling this epistemological void. But do they deliver the goods? Or was Bentham cor-

rect when he described the metaphysics of rights as “nonsense on stilts”?

Justice and Equality is a venture in Rawlsian thought. It contains seven essays about distributive justice. The contributors are unusually distinguished: Judith Shklar, Charles Taylor, Allan Bloom, William Galston, G.A. Cohen, Michael Walzer, and Walter Berns. With such talented and politically varied authors, this book looks to be a fair test of the Rawlsian enterprise.

Judith Shklar's introductory essay celebrates Rawls's achievement. He showed, she says, that “questions of great ethical urgency, such as the proper balance between liberty and equality, could be discussed without the slightest loss of rational rigor or philosophical rectitude.” Notice the ambiguities in her formulation. Do “rational rigor” and “philosophical rectitude” imply utility? If political theory is to be a kind of verbal chess, it will be rigorous but useless—similar, in that respect, to an overly refined empirical study. I don't mean to imply that political philosophy should be able to answer *every* practical question, or even that it should give a conclusive answer to *any* practical question. All I ask is that it tell me something I don't already know about a problem that interests me. Not necessarily something highly practical, but something interesting. Surely a collection of essays on equality should help me to decide, say, whether socialism is desirable. In constitutional terms, it should shed light on whether the Supreme Court ought to protect property rights, and whether poverty should be deemed a “suspect classification.”

Judged by that criterion, this book fails. Here, for example, is Professor Shklar's discussion of property rights:

While in principle everyone says that the state of nature is a ridiculous fiction, it has not gone away. The reason is not hard to grasp. No one believes in Robinsonades, colonists without a past, or prepolitical peoples, but there must have been *something*, some *other* relationship among people and between people and the resources of the earth, *before* there was private property. Nothing can emerge from a void, after all. There was either communal ownership before private property was established or no possession of resources at all. Since private property is justified in terms of its origins usually, there must be a before and after. Of course one may wonder if the first person who claimed to “own” an object was even *Homo sapiens*, though that person could and did defend it against all other claims. Property may be older than we are, but history has no bearing on the question. Social logic requires an either-or choice, communal or private ownership. We left the former but may yet return to it. The state of nature remains a plausible alternative to every known historical society, and so it serves as an enduring mirror of possibilities.

It would be unkind to analyze this passage line-by-line. Suffice it to say that when someone as eminent, as learned, and as moderate

as Judith Shklar comes so close to gibberish, we have a mystery worth pondering.

No sensible person justifies the institution of private property "in terms of its origins." If political philosophers usually do so, that tells us a good deal more about political philosophers than about property rights. Private property is justifiable, if at all, chiefly on utilitarian grounds. Even in socialist countries, it seems to be a necessary concession to human selfishness. In capitalist countries, property rights are more extensive; they are essential to a market economy. If capitalism is preferable to any feasible alternative, then private property is desirable, although of course various regulations of it may also be desirable. The "state of nature" has no more bearing on these questions than it does on the contents of the law school curriculum.

If the institution of private property is viewed as instrumental, then it is pointless to discuss fables about the state of nature and social contracts. One must study real-world capitalism and real-world socialism and form conclusions about which system is more conducive to human well-being. In that endeavor, a sweaty journalist—fresh out of Havana—may be equal or even superior to the most elegant dialectician at Yale. It is no accident, perhaps, that dialecticians prefer to discuss the state of nature.

The book's second essay, by Charles Taylor, is called *The Nature and Scope of Distributive Justice*. Professor Taylor, like Shklar, analyzes inequality by dispatching a straw man. His straw man is the theory that those who make a greater contribution to society—surgeons, for example—*deserve* higher incomes than the rest of us. Now I suppose that many people do advance this justification for inequality; it may even be the most common justification. But it is also the easiest to refute. One might begin by questioning whether a surgeon makes a "greater contribution" than a garbageman. Definitional questions aside, the contribution argument, when stripped of all utilitarian overtones, is as weak as metaphysical justifications of property rights. As Taylor says (quoting Rawls): "[N]o one deserves his greater natural capacity nor merits a more favorable starting place in society." "Atomist" modes of thought, Taylor tells us, "are all illusory." For "the talented individual who makes a valuable contribution owes much of his or her capacity to society. It is not just that the training without which this capacity could not flourish is often provided by the larger society, but also that the very fact that someone with this capacity can make a large contribution may depend on a given mode of economy or social life."

And so on. Good points, surely, but not ones that a reasonable adult will have overlooked.

Taylor does not discuss the most powerful economic argument for inequality, that it is an essential incentive. Nor does he address the most powerful sociological justification, that inequality is inevitable, given the wide variations in human talent. Had he done so, he would quickly have become mired in a morass of difficult real-world issues, such as whether it would suffice to pay auto executives twice as much as masons and, if so, whether such a reduction in income disparities is politically feasible. Of all the justifications for inequality, he selects for rebuttal the argument that inequality is good *in principle*. This issue has the great advantage of requiring no factual research, but the great disadvantage of leading only to banal conclusions. It's like appraising monarchy by rebutting the divine right of kings.

Taylor does acknowledge that a totally egalitarian society may not be appropriate. But, true to his vocation, he does so without mentioning any of the real-world phenomena associated with radical collectivism. He doesn't say that it is tyrannical, or that it leads to economic stagnation. He doesn't even say, in so many words, that inequality is a necessary incentive. The problem, in his account, is that the argument for egalitarianism "assumes a society we have not yet got." To scrap the contribution principle, says he, we would have to create

a society in which the major good sought by the majority in engaging in economic activity was no longer individual prosperity, but, for example, some public goal, or the intrinsic satisfaction of the work itself; or else a society where people's needs were few and limited, and where production for the means to life had no interest beyond a certain modest level of prosperity, but where all surplus energies were devoted to other things, that is, the kind of society of which the ancients talked and Rousseau dreamed.

Instead of drawing the obvious conclusion that no such utopia is attainable, Taylor advises us that one can try to achieve this society in any of several ways: "The Marxist vision of the classless society" is one possibility, "but there are others, such as the ideal of a commune life based on limited needs in some balance with nature."

Professor Michael Walzer lashes out at another straw man. For him, private enterprise is obsolete. Why so? Because in early capitalism "all transactions, or by far the greater number of transactions, can plausibly be talked about in the language of free exchange." This is no longer true:

For corporations are—this is now a commonplace of American political science—private government; their transactions are significantly political in character, taking the form of command and obedience rather than free exchange; their owners and

agents make decisions that determine the costs and the risks that other people must live with.

Although corporate apologists deny that such “private government” exists, “the denial is false” and so “justice requires that we challenge the exemption and explore systematically the alternatives to private government: public ownership and workers’ control and various combinations of the two.”

Of course, even if old-fashioned capitalism was truly “free exchange,” it may have been an inferior economic system; and even if modern capitalism is “private government,” it may be a superior economic system. These labels raise false issues. The important question is what we will discover when, in Walzer’s words, we “explore systematically” the differences between real capitalism and real socialism, and this is the question that is avoided, in Walzer’s essay as in the others.

Depending on one’s political inclinations, the faults of political philosophy may seem more glaring in left-wing or in right-wing essays. But the characteristic weaknesses of the genre are not limited to thinkers of any particular persuasion; conservatives like Walter Berns employ some of the same rhetorical techniques that I have criticized in Walzer and Taylor. Berns’s essay, *Equally Endowed with Rights*, is an eloquent defense of the Hamilton-Harlan thesis that the foundation of our liberty is the institutional structure established by the original Constitution, more than the Bill of Rights. This argument, so contrary to a dominant assumption of modern constitutional thought, is a valuable counterweight to conventional discussions of rights. It exemplifies the best type of political philosophy, grounded in reality and expounded by a master.

Whether it can carry the weight that Professor Berns wants it to carry is another question. Berns’s sonorous abstractions, like those of most political philosophers, often hover between platitude and falsehood, depending on how they are interpreted. He tells us, for example, that the founders realized that “there is no way, consistent with natural right, that government can guarantee equal success” in the pursuit of happiness. If we take this literally, it is the baldest of platitudes, a conservative’s straw man. (Not even Michael Walzer would maintain that the government can guarantee equal happiness.) If we take it less literally, and perceive an innuendo that specific programs like food stamps for the poor are unwise, it ceases to be a platitude but becomes a non sequitur. (From the undoubted fact that “equal success” is unattainable, it is a very long leap to the conclusion that inequalities should not be *alleviated*, which is all the justification any real-world proposal needs.)

Berns maintains that modern egalitarians favor “equality of condition rather than the equality of rights affirmed in the Declaration of Independence and embodied in the Constitution.” They do so because, unlike the framers, they refuse “to accept the political and social consequences of recognizing the respects in which people are by nature *unequal*.” I happen to agree with that statement, and I’m happy to see it made. But of course it doesn’t tell me anything useful about any particular issue. A debater could grant all of Berns’s abstractions, yet defend the liberal side of every current social controversy. Comparable worth statutes, for example, are customarily defended as exceptions to market principles. Similarly, racial criteria in admissions and hiring are defended as exceptions to traditional criteria. Berns and I may agree that these rationales are specious, and even occasionally insincere. If we can make a convincing argument to that effect, we don’t need to invoke the framers’ ideas about equality. And if we can’t, it won’t help to invoke the framers.

The root fallacy of this book would have been obvious if its title had promised discussions of “poverty” instead of “equality.” Poverty is a colossal problem; equality, except in contexts where it is merely a euphemism for poverty, or for severe oppression, is a relatively trivial issue. But “equality” connotes abstract justice; “poverty” connotes concrete suffering that cries out for remedies. If the topic is equality, one turns to philosophers; but poverty plainly calls for more worldly specialists—economists, agronomists, demographers, some down-to-earth sociologists, and politicians. They must answer dozens, if not hundreds, of practical questions, some of which are very large and complex. How much inequality, and of what sorts, is needed as an incentive to achievement? What are the political limits on soaking the rich in a capitalist democracy? Do these limits differ as between small, homogeneous societies like Sweden and large, heterogeneous ones like the United States? Do they differ, at bottom, from the difficulties of reducing the privileges of Soviet officials? How should redistribution be carried out? To what extent does it necessarily entail loss of civil liberties and indeed of democracy itself? What are its other costs? Are the poor better off in socialist countries? Is the average man?

Such books have been written. But not, so far as I know, by philosophers. It would be a good project for one of the contributors to *Justice and Equality*.