

of the first principles of a conception of justice which is to regulate all subsequent criticism and reform of institutions." (TJ, 13/11-12) These abstract principles, when combined with specific information regarding particular societies, specify a range of permissible institutional arrangements. The four-stage sequence allows us to incorporate information that is relevant to the application of the principles to particular societies. "In the original position the only particular facts known to the parties are those that can be inferred from the circumstances of justice." (TJ, 200/175) In the subsequent stages, however, "the general facts about their society are made available to them." (TJ, 200/175) This means that the decisions made at subsequent stages will not be universal in the way that the principles themselves are intended to be. Although a society will be just according to justice as fairness when it satisfies the two principles, different institutional mechanisms will do this most effectively (or even minimally adequately) in different circumstances.

Second, a just society will have a democratic political structure that allows it to make decisions for itself. Obviously, this provides the opportunity for different societies to make different decisions and to diverge from one another in significant ways. It also presents them with the possibility of making unjust decisions. This is because, as we have seen, "there is no scheme of procedural political rules which guarantees that unjust legislation will not be enacted." (TJ, 198/173) Is it acceptable for a society to make a democratic decision that departs from the requirements of the two principles? That depends on what is meant by "acceptable." On the one hand, Rawls holds that such a departure would be unjust – or at least it would not be fully just. On the other hand, as long as the injustice is not too great, a democratic decision may still be legitimate and therefore binding on citizens. While his most extensive discussion of legitimacy is found in *Political Liberalism*,⁵⁸ already in *A Theory of Justice* Rawls argued that "our natural duty to uphold just institutions binds us to comply with unjust laws and policies, or at least not to oppose them by illegal means as long as they do not exceed certain limits of injustice." (TJ, 354/311) Thus, the sense in which Rawls intends to "impose" limitations on a society's democratic decisions is very attenuated. A

⁵⁸ See, for example, pp. 216–17.

Rawlsian citizen will advocate decisions and policies in accordance with the two principles, but if a democratic polity makes a decision that she believes to be unjust, within certain limits she will continue to recognize the legitimacy of that decision.

Finally, turning to the issue of distributive justice more narrowly, Rawls does not believe that his principles require any specific allocation of goods to particular individuals. The specific allocation of goods is a matter of pure procedural justice. It is unpredictable, and we should not expect or demand that all societies that satisfy the principles of justice will be characterized by any single pattern of distribution. The next section will consider this issue in more depth.

NOZICK AND DISTRIBUTIVE EQUALITY

Within three years of the publication of *A Theory of Justice*, Robert Nozick, Rawls's colleague at Harvard, published *Anarchy, State, and Utopia*, a book that many people take to be the definitive libertarian reply to Rawls.⁵⁹ Nozick is critical of Rawls's egalitarianism and presents his so-called "entitlement theory of justice" as an alternative that emphasizes individual rights and liberty. This framing of the contrast led to a widespread image of a stand-off between those (like Rawls) who value equality and those (like Nozick) who value liberty. As Alasdair MacIntyre represents the dispute:

Rawls makes primary what is in effect a principle of equality with respect to needs . . . Nozick makes primary what is a principle of equality with respect to entitlements. For Rawls how those who are now in grave need came to be in grave need is irrelevant; justice is made into a matter of present patterns of distribution to which the past is irrelevant.⁶⁰

Furthermore, according to MacIntyre, no principled resolution of this dispute is possible, "[f]or how can a claim that gives priority to equality of needs be rationally weighed against one which gives priority to entitlements?"⁶¹ Nozick himself encourages this interpretation, suggesting that any egalitarian conception of justice will objectionably interfere with individual liberty and rights.

⁵⁹ Nozick, *Anarchy, State, and Utopia*.

⁶⁰ MacIntyre, *After Virtue*, p. 248.

Nozick contrasts historical principles of distributive justice, of which his entitlement theory is one, with end-result principles. An end-result principle is "patterned if it specified that a distribution is to vary along with some natural dimension."⁶² Nozick suggests that "[a]lmost every suggested principle of distributive justice is patterned: to each according to his moral merit, or needs, or marginal product, or how hard he tries, or the weighted sum of the foregoing, and so on."⁶³ And obviously equality is a pattern of distribution as well. Nozick does not find it surprising that Rawls would endorse a patterned principle of distributive justice, since "[a] procedure that founds principles of distributive justice on what rational persons who know nothing about themselves or their histories would agree to *guarantees that end-state principles of justice will be taken as fundamental*."⁶⁴

In contrast, Nozick's entitlement theory relies on historical principles that recognize that "past circumstances or actions of people can create differential entitlements or differential deserts to things."⁶⁵ The specification of the entitlement theory requires that we identify two principles. First, we need a principle for the just acquisition of goods that were previously not owned—a principle of "original acquisition." Second, we need a principle for the just transfer of goods that are already owned from one person to another. Then the entitlement theory simply says:

1. A person who acquires a holding in accordance with the principle of justice in acquisition is entitled to that holding.
2. A person who acquires a holding in accordance with the principle of justice in transfer, from someone else entitled to the holding, is entitled to the holding.
3. No one is entitled to a holding except by (repeated) applications of 1 and 2.⁶⁶

Nozick acknowledges that additional principles will be necessary in order to correct violations of the principles of original acquisition and transfer. And strikingly, referring to the difference principle specifically, he suggests the possibility that "some patterned principles of distributive justice [may serve] as rough rules of thumb meant to approximate the general results of applying the principle

of rectification of injustice."⁶⁷ Still, in the ideal, if there were no violations of the first two principles, the entitlement theory would not require that the distribution of goods conformed to any pattern.

Nozick supports the view that only an entitlement theory like his is consistent with liberty with his famous "Wilt Chamberlain" example. Under the heading "How liberty upsets patterns," he writes:

suppose a distribution favored by one of these non-entitlement conceptions is realized. Let us suppose it is your favorite one and let us call this distribution D_1 ; perhaps everyone has an equal share, perhaps shares vary in accordance with some dimension you treasure. Now suppose that Wilt Chamberlain is greatly in demand by basketball teams; being a great gate attraction. . . . The season starts, and people cheerfully attend his team's games; they buy their tickets, each time dropping a separate 25 cents of their admission price into a special box with Chamberlain's name on it. They are excited to see him play; it is worth the total admission price to them. . . . Is he entitled to the income? Is this new distribution D_2 , unjust?⁶⁸

For Nozick, the answer is obvious, since under D_2 nobody has grounds to complain that they were treated unjustly: certainly not Chamberlain or the individuals who "were entitled to dispose of the resources to which they were entitled (under D_1)."⁶⁹ Nor are their grounds for third parties to complain: "After someone transfers something to Wilt Chamberlain, third parties *still* have their legitimate shares; *their* shares are not changed."⁷⁰ Nozick concludes that "no end-state principle or distributional patterned principle of justice can be continuously realized without continuous interference with people's lives."⁷¹ Hence, it appears that a commitment to any egalitarian distributive principles really will conflict with a commitment to individual liberty.

Strictly speaking, however, Nozick is in no position to determine whether the distribution D_2 is just until we have specified the principles for original acquisition and just transfer. As Jonathan Wolff points out,

The entitlement theory is not completely stated until we are told the precise content of Nozick's principles of justice in acquisition, transfer, and rectification, and so we should expect a detailed statement and justification of

⁶² Nozick, *Anarchy, State, and Utopia*, p. 156.

⁶⁴ *Ibid.*, pp. 198–9.

⁶⁵ *Ibid.*, p. 155.

⁶⁶ *Ibid.*, p. 151.

⁶⁷ *Ibid.*, pp. 156–7.

⁶⁸ *Ibid.*, p. 231.

⁶⁹ *Ibid.*, pp. 160–1.

⁷⁰ *Ibid.*, p. 161.

⁷¹ *Ibid.*, p. 163.

Nozick's versions of these principles. But again at a crucial point, we are offered nothing like this.⁷²

Nozick assumes that the transfers that occur in the Chamberlain example are consistent with any reasonable principle of just transfer because they are voluntary. But what exactly are the fans doing when they put 25 cents in the box? They are attempting to follow their society's rules for just transfer. Without such rules, there would be no mechanism for making this exchange. But Nozick cannot generate the rules of just transfer from some prior account of voluntary transfers, because without the rules no transfers would be possible at all — voluntary or otherwise. The mistake is clear when Nozick asks rhetorically, “[i]f the people were entitled to dispose of the resources to which they were entitled (under *D*), didn't this include their being entitled to give it to, or exchange it with, Wilt Chamberlain?”⁷³ This is a bluff. We don't know whether they are entitled to give it to Chamberlain until we know what the rules of just transfer are, and calling the transfer to Chamberlain “voluntary” does not answer this question. Nozick simply assumes without argument that property rights must include a right to transfer the full market value of the property. But this is not the only possible scheme of property rights and, in fact, is arguably in tension with Lockean principles that he claims as inspiration.⁷⁴

Suppose, for example, we thought that individuals had the right to transfer not the full market value of their holdings but only 80 percent, with the remaining 20 percent transferred to the poorest

⁷² Jonathan Wolff, *Robert Nozick: Property, Justice and the Minimal State* (Stanford University Press, 1991), p. 78.

⁷³ Nozick, *Anarchy, State, and Utopia*, p. 161.

⁷⁴ Specifically, Barbara Fried argues that “Lockean theory has been plagued from the start by the difficulty of justifying a private right to that portion of market price that reflects scarcity rents.” (“Wilt Chamberlain Revisited: Nozick's Justice in Transfer and the Problem of Market-Based Distribution,” *Philosophy and Public Affairs*, 24 (1995), p. 236) See also Thomas Nagel, “Libertarianism without Foundations” [1973] in *Reading Nozick: Essays on Anarchy, State, and Utopia*, Jeffrey Paul, ed. (Blackwell, 1981), esp. pp. 200–2; and Lawrence Becker, “Against the Supposed Difference between Historical and End-State Theories,” *Philosophical Studies*, 41 (1982). It is also worth noting that both Locke and Kant, whom Nozick sometimes cites as inspiration, rejected anything like Nozick's libertarian conception of property rights. See, for example, John Locke, *Two Treatises of Government* [1690], Peter Laslett, ed. (Cambridge University Press, 1960), p. 170 [1.42], and Immanuel Kant, *The Metaphysics of Morals* [1797], Mary Gregor, trans. (Cambridge University Press, 1996), p. 101 [Ak.6:326].

individuals in the society. If that were the case, each time 25 cents was dropped into Chamberlain's box, Chamberlain would only be entitled to 20 cents with the balance rightfully belonging to the poor. The crucial point is that this scheme would not involve violating the principle of just transfer. On the contrary, taxing Chamberlain's gross income would be required in order to follow the principle. To be sure, some transactions that were permissible under Nozick's libertarian scheme would be prohibited. This would be necessary in order to enforce the property rights of the poor under this alternative scheme. Furthermore, under this scheme all exchanges would be completely voluntary, and nobody's liberty (as Nozick conceives it) would be restricted. This is because Nozick holds that whether a restriction limits liberty depends on whether an individual had a right to perform the action in the first place.⁷⁵ But according to this principle of just transfer, fans do not have a right to transfer money to Chamberlain without also giving some to the least advantaged. It may be tempting to say with Nozick that “[p]atterned principles of distributive justice necessitate redistributive activities.”⁷⁶ The thought is something like this: first, Chamberlain gets the full 25 cents, and then some of it is taken from him and given to someone else. But this is misleading. Although the 5 cents may be sitting in his box, under our revised transfer principle, he has no right to it. It belongs to the poor. If he were to fail to pay the tax that he owes, he would be stealing money from its rightful owners and engaging in an objectionable and unjust form of redistribution of goods from their rightful owners. It is no restriction on his liberty to prevent him from doing this.

The point of the previous paragraph was not to argue that a transfer principle that included a 20 percent tax would be superior to one without it. The point, rather, was that either principle could be part of an entitlement theory, and Nozick gives us no reason to prefer one over the other. He simply assumes that it is obvious which principles of acquisition and transfer (and perhaps of rectification) we should rely on. But it is not at all obvious. It is not even clear on what grounds we should declare one set of principles superior to another. As we have seen, the declaration cannot be based on the

⁷⁵ See, for example, Nozick, *Anarchy, State, and Utopia*, p. 262.

⁷⁶ *Ibid.*, p. 168, his emphasis.

claim that only one preserves our liberties while the other involves restrictions on our rights. We can only make such a determination after we know what our rights and liberties are – that is, after we know which principles should govern our acquisition and transfer of property.

By now it should be clear that Rawls is interested in answering the question that Nozick hardly even recognizes – what are the grounds on which we can declare one scheme of property rights more or less just than another? The principles of justice are to be used to evaluate rival institutional schemes, including economic institutions that specify the principles of just acquisition, transfer, and rectification of property. The principles of justice, including the difference principle, are not to be used to evaluate the distribution of goods directly. Rawls makes the point this way: "If it is asked in the abstract whether one distribution of a given stock of things to definite individuals with known desires and preferences is better than another, then there is simply no answer to this question." (*TJ*, 88/76) Once a just institutional scheme is in place, we rely on pure procedural justice to allocate specific shares to particular individuals: "the distribution that results will be just (or at least not unjust) whatever it is." (*TJ*, 304/267) Assuming the procedures are not violated, a large inequality would be unjust only if it undermined the fair value of the political liberties or interfered with fair equality of opportunity. Beyond this, a large inequality may be evidence that the basic structure is unjust if it seems likely that the least advantaged would do better under some other scheme. Although the difference principle makes reference to a pattern, justice as fairness is a historical theory according to Nozick's definition: "whether a distribution is just depends upon how it came about."⁷⁷ The disagreement between Rawls and Nozick is not about whether equality or liberty is more fundamental. Rather, it concerns which are the just institutions and procedures within which individuals and associations pursue their goals and acquire their specific entitlements. As Rawls puts it: "We have a right to our natural abilities and a right to whatever we become entitled to by taking part in a fair social process. The problem is to characterize this process."⁷⁸

⁷⁷ *Ibid.*, p. 133.

⁷⁸ John Rawls, "A Kantian Conception of Equality" [1975] in Freeman, *Collected Papers*, p. 263, footnote excluded.

COHEN AND LUCK EGALITARIANISM

In recent years this focus on the basic structure and on pure procedural justice has led some critics to charge justice as fairness with being too timid and insufficiently egalitarian. The most prominent of these critics is G. A. Cohen. For Cohen, "justice cannot be a matter only of the state-legislated structure in which people act but is also a matter of the acts they choose within that structure, the personal choices of their daily lives."⁷⁹ Now from one point of view it may seem as though there is no real disagreement with Rawls here. Although he does not explore them much detail, Rawls agrees that principles for the evaluation of individual conduct "are an essential part of any theory of justice." (*TJ*, 108/93) But Rawls also holds that the principles appropriate to evaluating individual conduct are not necessarily the same principles that we use to evaluate the basic structure itself: "The principles of justice for institutions must not be confused with the principles which apply to individuals and their actions in particular circumstances. These two kinds of principles apply to different subjects and must be discussed separately." (*TJ*, 54–5/47) Cohen, in contrast, insists that principles of justice are those that concern the "just distribution of benefits and burdens in society" and that these apply "to the choices that people make *within* the legally coercive structures to which... [the] principles of justice (also) apply."⁸⁰ Furthermore, Cohen holds that when the difference principle is properly applied to both the basic structure and to individual conduct, it will sanction far less inequality than it would when applied to the basic structure alone. The effect of Rawls's limited application of his principles to the basic structure is to make his conception insufficiently egalitarian.

To see why this might be so, recall which inequalities the difference principle permits when it is applied only to the basic structure. The difference principle permits a structural inequality only when the least advantaged position has a higher expected share of primary goods than the least advantaged position would have under a scheme

⁷⁹ G. A. Cohen, *If You're an Egalitarian, How Come You're So Rich?* (Harvard University Press, 2000), p. 122.

⁸⁰ *Ibid.*