

The Philosophy of Liberalism

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Chapter 1

Bibliography

Primary Texts

Literature by Rawls:

- A Theory of Justice: first edition [1971b](#) (dropbox); German translation, revised: [1975a](#); second, revised edition: [1999c](#) (dropbox). Short version: “Justice as Fairness: A Restatement” ([2001](#), dropbox)
- Political Liberalism: first edition [1993b](#) (dropbox), second, expanded edition: [2005](#) (dropbox); German translation: [1994](#)
- Law of Peoples: [1999b](#) (dropbox); German translation: [2011](#)
- Lectures: on moral philosophy [2000](#) (dropbox), on political philosophy [2007](#) (dropbox)
- PhD thesis: [1950](#)
- The collections of papers [1999a](#) (dropbox) contains the quasi-totality of Rawls’ articles, namely the following:
 - “Outline of a Decision Procedure for Ethics” ([1951](#))
 - “Two Concepts of Rules” ([1955](#))
 - “Justice as Fairness” ([1958](#))
 - “Constitutional Liberty and the Concept of Justice” ([1963a](#))
 - “The Sense of Justice” ([1963b](#))
 - “Legal Obligation and the Duty of Fair Play” ([1964](#))
 - “Distributive Justice” ([1967](#))
 - “Distributive Justice: Some Addenda” ([1968](#))
 - “The Justification of Civil Disobedience” ([1969](#))
 - “Justice as Reciprocity” ([1971a](#))
 - “Some Reasons for the Maximin Criterion” ([1974b](#))
 - “Reply to [Alexander](#) ([1974](#)) and [Musgrave](#) ([1974](#))” ([1974a](#))
 - “A Kantian Conception of Equality” ([1975d](#))
 - “Fairness to Goodness” ([1975b](#))
 - “The Independence of Moral Theory” ([1975c](#))
 - “Kantian Constructivism in Moral Theory” ([1980](#))
 - “Social Unity and Primary Goods” ([1982b](#))
 - “Justice as Fairness: Political, not Metaphysical” ([1985](#))
 - “Préface” ([1987b](#))
 - “The Idea of an Overlapping Consensus” ([1987a](#))
 - “The Priority of Right and Ideas of the Good” ([1988](#))
 - “The Domain of the Political and Overlapping Consensus” ([1989a](#))
 - “Themes in Kant’s Moral Philosophy” ([1989b](#))
 - “The Law of Peoples” ([1993a](#))

- “Fifty Years after Hiroshima” (1995)
- “The Idea of Public Reason Revisited” (1997)
- “Interview with John Rawls” (1998)

Literature by Nozick:

- Anarchy, State and Utopia: first edition 1974 (dropbox); second edition: 2013 (dropbox)
- Philosophical Explanations (1981), contains a part on value

Literature by Hayek:

- The Road to Serfdom: first edition 1944, ‘definitive’ edition: 2007 (dropbox)
- The Constitution of Liberty: first edition 1960, ‘definitive’ edition: 2011 (dropbox)
- Three volumes of “Law, Legislation and Liberty”: 1973, 1976, 1979; combined editions: 1982, 2013

Surveys and Introductions

A quite good and surprisingly exhaustive summary in German: https://de.wikipedia.org/wiki/A_Theory_of_Justice.

Some relevant SEP entries:

- John Rawls: <https://plato.stanford.edu/entries/rawls/>
- Original Position: <https://plato.stanford.edu/entries/original-position/>
- Contemporary Approaches to the Social Contract: <https://plato.stanford.edu/entries/contractarianism-contemporary/>
- Robert Nozick: <https://plato.stanford.edu/entries/nozick-political/>
- Justice: <https://plato.stanford.edu/entries/justice/>
- Distributive Justice: <https://plato.stanford.edu/entries/justice-distributive/>
- Liberalism: <https://plato.stanford.edu/entries/liberalism/>
- Libertarianism: <https://plato.stanford.edu/entries/libertarianism/>
- Property and Ownership: <https://plato.stanford.edu/entries/property/>

Secondary Literature on Rawls in German (selection)

Höffe (1998b, 2013) is an introduction to “Theory of Justice” in German, with the following individual files on dropbox: Höffe (1998a), O’Neill (1998), Koller (1998), Maus (1998), Kliemt (1998), Hart (1998), Pogge (1998), Höffe (1998d), Forst (1998), Kersting (1998), Scarano (1998), Hinsch (1998), Höffe (1998c).

Höffe (2015d) is an introduction to “Political Liberalism” in German, with the following individual files on dropbox: Höffe (2015c), Hinsch (2015), Koller (2015), Pinzani & Werle (2015), Brantl (2015), Höffe (2015b), Özmen (2015), Larmore (2015), Meyer (2015), Horn (2015), Höffe (2015a).

Secondary Literature on Rawls in English (selection)

There are three “symposia” in the journal *Ethics*:

- 99.4 (1989) containing Arneson (1989); Galston (1989); Cohen (1989b); Hill (1989); Baier (1989); Hampton (1989); Doppelt (1989); Buchanan (1989); Kymlicka (1989); Cohen (1989a)
- 105.1 (1994) containing Scheffler (1994a); Okin (1994); McCarthy (1994)
- 110.4 (2000) containing Beitz (2000); Buchanan (2000)

The classic collection of papers discussing Rawls is Daniels (1975b), which contains:

- Barber, Benjamin, “Justifying Justice: Problems of Psychology, Politics, and Measurement” (Barber 1975)
- Feinberg, Joel, “Rawls and Intuitionism” (Feinberg 1975)
- Fisk, Milton, “History and Reason in Rawls’ Moral Theory” (Fisk 1975)

- Lyons, David, “Nature of Soundness of the Contract and Coherence Arguments” (Lyons 1975)
- Michelman, Frank I., “Constitutional Welfare Rights and *A Theory of Justice*” (Michelman 1975)
- Scanlon, Thomas Michael, “Rawls’ Theory of Justice” (Scanlon 1975)
- Daniels, Norman, “Equal Liberty and Unequal Worth of Liberty” (Daniels 1975a)
- Sen, Amartya, “Rawls versus Bentham: An axiomatic examination of the pure distribution problem” (Sen 1974)
- Dworkin, Gerald, “Non-Neutral Principles” (Dworkin 1974)
- Hart, H.L.A., “Rawls on Liberty and Its Priority” (Hart 1973)
- Hare, Richard M., “Rawl’s Theory of Justice -I” (Hare 1973a)
- Miller, Richard W., “Rawls and Marxism” (Miller 1974)
- Dworkin, Ronald, “The Original Position” (Dworkin 1973)

A useful resource on the early reception is the end-of-the-century collection of papers on Rawls edited by Henry S. Richardson:

Vol. 1 , “Development and Main Outlines of Rawls’s Theory of Justice” (1999a) contains:

- Pogge, Thomas W., “A Brief Sketch of Rawls’s Life” (Pogge 1999)
- Gutmann, Amy, “The Central Role of Rawls’s Theory” (Gutmann 1989)
- Mardiros, Anthony M., “A Circular Procedure in Ethics” (Mardiros 1952)
- Margolis, Joseph, “Rule-Utilitarianism” (Margolis 1965)
- McCloskey, H.J., “Two Concepts of Rules -A Note” (McCloskey 1972)
- Care, Norman S., “Contractualism and Moral Criticism” (Care 1969)
- Scanlon, Thomas Michael, “Rawls’ Theory of Justice” (Scanlon 1975)
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- Hampton, Jean, “Contracts and Choice: Does Rawls Have a Social Contract Theory?” (Hampton 1980)
- Ricoeur, Paul, “On John Rawls’ *A Theory of Justice*: Is a Pure Procedural Theory of Justice Possible?” (Ricoeur 1990)
- Arrow, Kenneth J., “Some Ordinalist-Utilitarian Notes on Rawls’s *Theory of Justice*” (Arrow 1973)
- Schwartz, Adina, “Moral Neutrality and Primary Goods” (Schwartz 1973)
- Buchanan, Allen, “Revisability and Rational Choice” (Buchanan 1975)
- Sen, Amartya, “Justice: Means versus Freedoms” (Sen 1990)
- Gauthier, David P., “Justice and Natural Endowment: Toward a Critique of Rawls’s Ideological Framework” (Gauthier 1974)
- Musgrave, Alan, “Maximin, Uncertainty, and the Leisure Trade-Off” (Musgrave 1974)
- Harsanyi, John C., “Can the Maximin Principle Serve as a Basis for Morality? A Critique of John Rawls’s Theory” (Harsanyi 1975)
- Agarwala, Binod Kumar, “In Defence of the use of Human Maximin Principle of Choice Under Uncertainty in Rawl’s Original Position” (Agarwala 1986)
- Cohen, Joshua, “Democratic Equality” (Cohen 1989b)
- Bond, Doug and Park, Jong-Chul, “An Empirical Test of Rawls’s Theory of Justice: A Second Approach, in Korea and the United States” (Bond & Park 1991)

Vol. 2 , “The Two Principles and Their Justification” (1999b) contains:

- Hart, H.L.A., “Rawls on Liberty and Its Priority” (Hart 1973)
- Daniels, Norman, “Equal Liberty and Unequal Worth of Liberty” (Daniels 1975a)
- Pogge, Thomas W., “The interpretation of Rawls’ First Principle of Justice” (Pogge 1982)
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- Leininger, Wolfgang, “Rawls’ Maximin Criterion and Time-Consistency: Further Results” (Leininger 1985)
- Voice, Paul, “Rawls’s Difference Principle and a Problem of Sacrifice” (Voice 1991)
- van Parijs, Philippe, “Social Justice and Individual Ethics” (van Parijs 1995)
- Cohen, Gerald A., “Where the Action Is: On the Site of Distributive Justice” (Cohen 1997)

- Barry, Brian M., “John Rawls and the Priority of Liberty” (Barry 1973)
 - Shue, Henry, “Liberty and Self-Respect” (Shue 1975)
 - Estlund, David, “The Survival of Egalitarian Justice in John Rawls’s *Political Liberalism*” (Estlund 1996)
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 - Darwall, Stephen L., “A Defense of the Kantian Interpretation [against Johnson (1974)]” (Darwall 1976)
 - Galston, William A., “Moral Personality and Liberal Theory: John Rawls’s ‘Dewey Lectures’” (Galston 1982)
 - Brink, David O., “Rawlsian Constructivism in Moral Theory” (Brink 1987)
 - Hare, Richard M., “Rawl’s Theory of Justice -I” (Hare 1973a)
 - dePaul, Michael Raymond, “The Problem of the Criterion and Coherence Methods in Ethics” (dePaul 1988)
 - Ebertz, Roger P., “Is Reflective Equilibrium a Coherentist Model?” (Ebertz 1993)
- Vol. 3** , “Opponents and Implications of *A Theory of Justice*” (1999c) contains:
- Lyons, David, “Rawls versus Utilitarianism” (Lyons 1972)
 - Kavka, Gregory S., “Rawls on Average and Total Utility” (Kavka 1975)
 - Barry, Brian M., “Rawls on Average and Total Utility: A Comment [on Kavka (1975)]” (Barry 1977)
 - Nielsen, Kai, “The Choice between Perfectionism and Rawlsian Contractarianism” (Nielsen 1977)
 - Sher, George, “Effort, Ability, and Personal Desert” (Sher 1979)
 - Ball, Stephen W., “Maximin Justice, Sacrifice, and the Reciprocity Argument: A Pragmatic Reassessment of the Rawls/Nozick Debate” (Ball 1993)
 - Hill, Jr., Thomas E., “Kantian Constructivism in Ethics” (Hill 1989)
 - Beitz, Charles R., “Justice and International Relations” (Beitz 1975)
 - Pogge, Thomas W., “An Egalitarian Law of Peoples” (Pogge 1994)
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 - Pritchard, Michael S. and Robison, Wade L., “Justice and the Treatment of Animals: A Critique of Rawls” (Pritchard & Robison 1981)
 - Singer, Brent A., “An Extension of Rawls’s *Theory of Justice* to Environmental Ethics” (Singer 1988)
 - Nisbet, Robert A., “The Pursuit of Equality” (Nisbet 1974)
 - Macpherson, Crawford Brough, “Rawls’s Model of Man and Society” (Macpherson 1973)
 - DiQuattro, Arthur, “Rawls and Left Criticism” (DiQuattro 1983)
 - Okin, Susan Moller, “Reason and Feeling in Thinking about Justice” (Okin 1989)
 - Baehr, Amy R., “Toward a New Feminist Liberalism: Okin, Rawls, and Habermas” (Baehr 1996)
- Vol. 4** , “Moral Psychology and Community” (1999a) contains:
- Deigh, John, “Shame and Self-Esteem: A Critique” (Deigh 1983)
 - Sachs, David, “How to Distinguish Self-Respect from Self-Esteem” (Sachs 1981)
 - Thomas, Laurence, “Rawlsian Self-Respect and the Black Consciousness Movement” (Thomas 1977)
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 - Bates, Stanley, “The Motivation to Be Just” (Bates 1974)
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 - Freeman, Samuel, “Reason and Agreement in Social Contract Views” (Freeman 1990)
 - McClennen, Edward F., “Justice and the Problem of Stability” (McClennen 1989)
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 - Proudfoot, Wayne and Robison, Wade L., “Rawls on the Individual and the Social” (Proudfoot 1974)
 - Sandel, Michael, “The Procedural Republic and the Unencumbered Self” (Sandel 1984)
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Vol. 5 , “Reasonable Pluralism” (1999b) contains:

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- Kymlicka, Will, “Liberal Individualism and Liberal Neutrality” (Kymlicka 1989)
- Cohen, Joshua, “Moral Pluralism and Political Consensus” (Cohen 1993)
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- Hollenbach, David, “Contexts of the Political Role of Religion: Civil Society and Culture” (Hollenbach 1993)
- Young, Iris Marion, “Toward a Critical Theory of Justice” (Young 1981)
- McCarthy, Thomas, “Kantian Constructivism and Reconstructivism: Rawls and Habermas in Dialogue” (McCarthy 1994)
- Habermas, Jürgen, “Reconciliation Through the Public Use of Reason: Remarks on John Rawls’s *Political Liberalism*” (Habermas 1995)

Since the turn of the century, a lot of collections have appeared. Among the more useful are:

- The Cambridge Companion to Rawls (ed. Samuel Freeman, 2002a), containing:
 - Cohen, Joshua, “For a Democratic Society” (Cohen 2002)
 - Daniels, Norman, “Democratic Equality: Rawls’s Complex Egalitarianism” (Daniels 2002)
 - Dreben, Burton, “On Rawls and Political Liberalism” (Dreben 2002)
 - Freeman, Samuel, “Introduction: John Rawls – An Overview” (Freeman 2002c)
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 - Scheffler, Samuel, “Rawls and Utilitarianism” (Scheffler 2002)
 - van Parijs, Philippe, “Difference Principles” (van Parijs 2002)
- A [Blackwell] Companion to Rawls (ed. Mandle / Reidy, 2013a), containing:
 - Mandle, Jon and Reidy, David A., “Introduction” (Mandle & Reidy 2013b)
 - Reidy, David A., “From Philosophical Theology to Democratic Theory: Early Postcards from an Intellectual Journey” (Reidy 2013)
 - Weithman, Paul J., “Does Justice as Fairness Have a Religious Aspect?” (Weithman 2013)
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 - Krasnoff, Larry, “Kantian Constructivism” (Krasnoff 2013)
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 - Stemplowska, Zofia and Swift, Adam, “Rawls on Ideal and Nonideal Theory” (Stemplowska & Swift 2013)
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 - Taylor, Richard C., “The Priority of Liberty” (Taylor 2013)
 - Macleod, Colin M., “Applying Justice as Fairness to Institutions” (Macleod 2013)
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- Kaufman, Alexander, “Political Authority, Civil Disobedience, Revolution” (Kaufman 2013)
- Gaus, Gerald F., “The Turn to a Political Liberalism” (Gaus 2013)
- James, Aaron, “Political Constructivism” (James 2013)
- Quong, Jonathan, “On the Idea of Public Reason” (Quong 2013)
- Martin, Rex, “Overlapping Consensus” (Martin 2013)
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- Kelly, Erin I., “Inequality, Difference, and Prospects for Democracy” (Kelly 2013)
- Williams, Huw Lloyd, “The Law of Peoples” (Williams 2013)
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- Miller, Richard W., “Global Poverty and Global Inequality” (Miller 2013)
- Moellendorf, Darrel, “Just War” (Moellendorf 2013)
- Riley, Jonathan, “Rawls, Mill, and Utilitarianism” (Riley 2013)
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- Brudney, Daniel, “The Young Marx and the Middle-Aged Rawls” (Brudney 2013)
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- Little, Daniel, “Rawls and Economics” (Little 2013)
- Lloyd, Sharon A., “Learning from the History of Political Philosophy” (Lloyd 2013)
- Guyer, Paul, “Rawls and the History of Moral Philosophy: The Cases of Smith and Kant” (Guyer 2013)
- Property-Owning Democracy: Rawls and Beyond (ed. O’Neill/Williamson, 2012b), containing
 - Alperovitz, Gar, “The Pluralist Commonwealth and Property-Owning Democracy” (Alperovitz 2012)
 - Brettschneider, Corey, “Public Justification and the Right to Private Property: Welfare Rights as Compensation for Exclusion” (Brettschneider 2012)
 - Chambers, Simone, “Justice or Legitimacy, Barricades or Public Reason? The Politics of Property-Owning Democracy” (Chambers 2012)
 - Hsieh, Nien-hê, “Work, Ownership, and Productive Enfranchisement” (Hsieh 2012)
 - Hussain, Waheed, “Nurturing the Sense of Justice: The Rawlsian Argument for Democratic Corporatism” (Hussain 2012)
 - Jackson, Ben, “Property-Owning Democracy: A Short History” (Jackson 2012)
 - O’Neill, Martin and Williamson, Thad, “Introduction” (O’Neill & Williamson 2012a)
 - O’Neill, Martin, “Free (and Fair) Markets without Capitalism: Political Values, Principles of Justice, and Property-Owning Democracy” (O’Neill 2012)
 - Robeyns, Ingrid, “Care, Gender, and Property-Owning Democracy” (Robeyns 2012)
 - Schweickart, David, “Property-Owning Democracy or Economic Democracy?” (Schweickart 2012)
 - Sodha, Sonia, “The Empirical and Policy Linkage between Primary Goods, Human Capital, and Financial Capital: What Every Political Theorist Needs to Know” (Sodha 2012)
 - Thomas, Alan, “Property-Owning Democracy, Liberal Republicanism, and the Idea of an Egalitarian Ethos” (Thomas 2012)
 - White, Stuart, “Property-Owning Democracy and Republican Citizenship” (White 2012)
 - Williamson, Thad, “Realizing Property-Owning Democracy: A 20-Year-Strategy to Create an Egalitarian Distribution of Assets in the United States” (Williamson 2012b)
 - Williamson, Thad, “Is Property-Owning Democracy a Politically Viable Aspiration?” (Williamson 2012a)
- The Original Position (ed. Hinton, 2015c), containing:
 - Hinton, Timothy, “Introduction: the original position and *The Original Position* – an Overview” (Hinton 2015a)
 - Brink, David O., “Justice as Fairness, Utilitarianism, and Mixed Conceptions” (Brink 2015)

- Gaus, Gerald F. and Thrasher, John, “Rational Choice and the Original Position: the (many) Models of Rawls and Harsanyi” (Gaus & Thrasher 2015)
- Waldron, Jeremy, “The Strains of Commitment” (Waldron 2015)
- Clayton, Matthew, “Rawls and Dworkin on Hypothetical Reasoning” (Clayton 2015)
- Baehr, Amy R., “Feminist Receptions of the Original Position” (Baehr 2015)
- Estlund, David, “G.A. Cohen’s Critique of the Original Position” (Estlund 2015)
- Hinton, Timothy, “Liberals, Radicals, and the Original Position” (Hinton 2015b)
- Cohen, Joshua, “The Original Position and Scanlon’s Contractualism” (Cohen 2015b)
- Reath, Andrews, “The “Kantian Roots” of the Original Position” (Reath 2015)
- Weithman, Paul J., “Stability and the Original Position from *Theory* to *Political Liberalism*” (Weithman 2015)
- Brock, Gilian, “The Original Position in *The Law of Peoples*” (Brock 2015)

Liberalism

During the summer of 2018, the British weekly “The Economist” ran a four-part series on liberalism in their “school briefs” section:

- August 4, 2018: *The father of liberalism: Against the tyranny of the majority*;
- August 11, 2018: *The French exception: Alexis de Tocqueville*;
- August 18, 2018: *Was he a liberal? John Maynard Keynes*;
- August 25, 2018: *The exiles fight back: Schumpeter, Popper and Hayek*;
- September 1, 2018: *Rawls rules: Berlin, Rawls and Nozick*;
- September 8, 2018: *The prophets of illiberal progress: Rousseau, Marx and Nietzsche*;
- September 15, 2018: *A manifesto: The Economist at 175*.

Cf. also the video feature “Reinventing liberalism for the 21st century” at <https://www.youtube.com/watch?v=viW-Sq53YCA&autoplay=true>.

The Swiss newspaper “Neue Züricher Zeitung” (to use its German name) made similar claims on the 29th of September 2018, including, somewhat bizarrely, an article by the renowned liberal thinker Slavoj Žižek.

Informative is the Cambridge Companion on Liberalism by Wall (2015a), containing

- Wall, Steven, “Introduction” (Wall 2015b)
- Button, Mark E., “American liberalism from colonialism to the Civil War and beyond” (Button 2015)
- Jennings, Jeremy, “Liberalism and the morality of commercial society” (Jennings 2015)
- Ryan, Alan James, “Liberalism 1900 – 1940” (Ryan 2015)
- Cook, Philip, “Liberalism, contractarianism, and the problem of exclusion” (Cook 2015)
- Gaus, Gerald F., “Public reason liberalism” (Gaus 2015)
- Christman, John, “Autonomy and liberalism: a troubled marriage?” (Christman 2015)
- Wall, Steven, “Liberalism, neutrality, and democracy” (Wall 2015c)
- Cohen, Andrew Jason, “Contemporary liberalism and toleration” (Cohen 2015a)
- Arneson, Richard, “Liberalism and equality” (Arneson 2015)
- Christiano, Thomas, “Disagreement and the justification of democracy” (Christiano 2015)
- Von Platz, Jeppe and Tomasi, John, “Liberalism and economic liberty” (Von Platz & Tomasi 2015)
- Wolterstorff, Nicholas, “Liberalism and religion” (Wolterstorff 2015)
- Weinstock, Daniel, “Liberalism and multiculturalism” (Weinstock 2015)
- Kelly, Paul, “Liberalism and nationalism” (Kelly 2015)
- Zerilli, Linda M. G., “Feminist critiques of liberalism” (Zerilli 2015)
- Lovett, Frank, “The republican critique of liberalism” (Lovett 2015)
- Skorupski, John, “The conservative critique of liberalism” (Skorupski 2015)

Secondary Literature on Nozick, Hayek and Neoliberalism

Companions:

- The Cambridge Companion to Nozick's *Anarchy, State and Utopia* (ed. Bader / Meadowcroft, 2011), containing:
 - Bader, Ralf M. and Meadowcroft, John, “Introduction” (Bader & Meadowcroft 2011)
 - Arneson, Richard, “Side Constraints, Lockean Individual Rights, and the Moral Basis of Libertarianism” (Arneson 2011)
 - Otsuka, Michael, “Are Deontological Constraints Irrational?” (Otsuka 2011)
 - Feldman, Fred, “What We Learn from the Experience Machine” (Feldman 2011)
 - Mack, Eric, “Nozickian Arguments for the More-than-Minimal State” (Mack 2011)
 - Gaus, Gerald F., “Explanation, Justification, and Emergent Properties: an Essay on Nozickian Metatheory” (Gaus 2011)
 - Vallentyne, Peter, “Nozick’s Libertarian Theory of Justice” (Vallentyne 2011)
 - Meadowcroft, John, “Nozick’s Critique of Rawls: Distribution, Entitlement, and the Assumptive World of *A Theory of Justice*” (Meadowcroft 2011)
 - Schmidtz, David, “The Right to Distribute” (Schmidtz 2011)
 - Fried, Barbara H., “Does Nozick Have a Theory of Property Rights?” (Fried 2011)
 - Bader, Ralf M., “The Framework for Utopia” (Bader 2011)
 - Kukathas, Chandran, “*E pluribus plurum*, or, How to fail to get to utopia in spite of really trying” (Kukathas 2011)

Monographs:

- Bader, Robert Nozick (2015)
- Hunt, Anarchy, State and Utopia – An Advanced Guide (2015)

Collections:

- Neoliberalism, A Critical Reader (ed. Saad-Filho / Johnston, ?), containing
 - Duménil, Gérard and Lévy, Dominique, “The Neoliberal (Counter-)Revolution” (?)
 - Palley, Thomas I., “From Keynesianism to Neoliberalism: Shifting Paradigms in Economics” (?)
 - Lapavistas, Costas, “Mainstream Economics in the Neoliberal Era” (?)
 - Shaikh, Anwar, “The Economic Mythology of Neoliberalism” (?)
 - Clarke, Simon, “The Neoliberal Theory of Society” (?)
 - Munck, Ronaldo, “Neoliberalism and Politics, and the Politics of Neoliberalism” (?)
 - Colás, Alejandro, “Neoliberalism, Globalisation and International Relations” (?)
 - Byres, Terence J., “Neoliberalism and Primitive Accumulation in Less Developed Countries” (?)
 - Radice, Hugo, “Neoliberal Globalisation: Imperialism without Empires?” (?)
 - Deranyiagala, Sonali, “Neoliberalism in International Trade: Sound Economics or a Question of Faith?” (?)
 - Toporowski, Jan, “‘A Haven of Familiar Monetary Practice’: The Neoliberal Dream in International Money and Finance” (?)
 - Saad-Filho, Alfredo, “From Washington to Post-Washington Consensus: Neoliberal Agendas for Economic Development” (?)
 - Veltmeyer, Henry and Petras, James, “Foreign Aid, Neoliberalism and US Imperialism” (?)
 - Oya, Carlos, “Sticks and Carrots for Farmers in Developing Countries: Agrarian Neoliberalism in Theory and Practice” (?)
 - Johnston, Deborah, “Poverty and Distribution: Back on the Neoliberal Agenda?” (?)
 - MacGregor, Susanne, “The Welfare State and Neoliberalism” (?)
 - Hoggart, Lesley, “Neoliberalism, the New Right and Sexual Politics” (?)
 - Levidow, Les, “Neoliberal Agendas for Higher Education” (?)
 - Sinha, Subir, “Neoliberalism and Civil Society: Project and Possibilities” (?)

- MacEwan, Arthur, “Neoliberalism and Democracy: Market Power versus Democratic Power” (?)
- Arestis, Philip and Sawyer, Malcolm, “Neoliberalism and the Third Way” (?)
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- Milios, John, “European Integration as a Vehicle of Neoliberal Hegemony” (?)
- Toporowski, Jan, “Neoliberalism: The Eastern European Frontier” (?)
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- Bond, Patrick, “Neoliberalism in Sub-Saharan Africa: From Structural Adjustment to NEPAD” (?)
- McCartney, Matthew, “Neoliberalism and South Asia: The Case of Narrowing Discourse” (?)
- Itoh, Makoto, “Assessing Neoliberalism in Japan” (?)
- Chang, Dae-oup, “Neoliberal Restructuring of Capital Relations in East and South-East Asia” (?)
- Left-Libertarianism and its Critics (ed. Vallentyne / Steiner, ?), containing:
 - Vallentyne, Peter, “Introduction: Left-Libertarianism – A Primer” ([Vallentyne 2000](#))
 - Gibbard, Allan F., “Natural Property Rights” (?)
 - Brody, Baruch A., “Redistribution without Egalitarianism” (?)
 - Grunebaum, James, “Autonomous Ownership” (?)
 - Steiner, Hillel, “Original Rights and Just Redistribution” (?)
 - van Parijs, Philippe, “Real-Libertarianism” (?)
 - Otsuka, Michael, “Self-Ownership and Equality: A Lockean Reconciliation” (?)
 - Kirzner, Israel M., “Entrepreneurship, Entitlement, and Economic Justice” (?)
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 - Arneson, Richard, “Lockean Self-Ownership: Towards a Demolition” (?)
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Chapter 2

Introduction, Background and Stage-Setting

Political philosophy, like ethics, belongs to what is called (in German-speaking countries, that is) “practical philosophy” (after the 2nd *Critique*), i.e. that part of philosophy which answers normative questions. Social philosophy, on the other hand, belongs to theoretical philosophy, as does meta-ethics (“what does it mean to say of an action that it is good?”, e.g.) and meta-politics (“what does it mean to say of a society that it is good?”, e.g.).

A typical question of social philosophy is whether a society *is* just a group / aggregate / set of individuals. Social individualists, who are reductionists about such things as ‘societies’, answer in the affirmative, social holists in the negative.¹

A typical question of political philosophy is whether a society *should* adopt a particular conception of the good. Anti-liberalists answer in the affirmative, liberalists in the negative.

One way of making room for ‘upstream’ criticism of particular answers to questions of political philosophy is to assert the primacy of social to political philosophy: if there is no such thing as a society, what do the questions of political philosophy speak about? Or, to put it impressionistically (but perhaps better): who is the ‘we’ we talk about when we ask whether ‘we’ should agree on a common conception of the good or the just? I and my friends, my neighbours, my fellow nationals, my fellow permanent residents, my fellow humans, my fellow sentient beings? One way of making this question stick to Rawls: who are the people we are supposed to agree with when projecting ourselves into the original position: Chinese family entrepreneurs, refugees, future (and past?) generations?

Prima facie, we distinguish social from non-social things and, among social things, between institutional and non-institutional social things, by example:

1. non-social things: the tempest, the stone, Maria’s hair-colour, the sound of the door slammed shut, hepatitis C, the avalanche, Mars and universal gravitation, chlorophyll, light, vagueness.
2. social things: Jules’ right to vote, marriage, the brain-drain, the socialdemocrats, the supporters of Xamax, the Tupperware party, language, the Eiffel tower, the intention to win the *Tour de France*.
3. non-institutional social things: societies, groups, collective actions, collective beliefs and intentions.
4. institutional social things: rules, laws, borders, the status of being the president, language, money.

According to [Searle \(1995\)](#), institutional social things share the following characteristics:

1. they depend on some mental states, mental states that several people have with respect to them;
2. they may be created by performative speech acts (speech acts that create the things they represent);
3. they depend generically on non-institutional things (they need some ‘material support’);

1. The equivalent of this in the philosophy of the social sciences is: is sociology (anthropology, economy) reducible to psychology?

4. they depend on other social things (money needs a system of exchange; such a system needs a system of property);
5. they depend on language.

The priority of collective / social things over institutional things may perhaps be cashed out in terms of ‘uptake conditions’: I may declare myself king, but only under the right circumstances am I thereby made king; it is not enough that I am the strongest or otherwise able to force everyone else into submission: my declaration needs to be recognised, in the right way and by the right people, as what it is for it to have the intended effect.

(To see why such uptake conditions are needed, compare the analysis of pornography as performative speech act *effecting* (rather than just stating or resulting from) the discrimination of women.)

Political liberalism is the view that a society is politically good if and only if it permits to the greatest possible extent that each one of its members determines and pursues their own conception of the good.

Political liberalism leaves open the question whether the direction of explanation is from left-to-right, from right-to-left or in neither direction in this biconditional.

For some, liberalism in political philosophy is founded on, or justified by, social reductionism in social philosophy:

“[People constantly requesting government intervention] are casting their problems at society. And, you know, there’s no such thing as society. There are individual men and women and there are families. And no government can do anything except through people, and people must look after themselves first. It is our duty to look after ourselves and then, also, to look after our neighbours.” (Margaret Thatcher, interview on September 23, 1987, to *Woman’s Own*, published October 31, 1987)

It is a much stronger claim, however, that liberalism, or at least some sort of liberalism, *presupposes* social reductionism, such that we can criticise the former by criticising the latter, as – on some interpretations at least² – communitarians do.

Political liberalism is opposed by those who think that more is necessary for a good society (e.g. justice, equality) or less (e.g. that a society is already good if it makes anyone as good as they can be). Perhaps there are other ways of opposing liberalism as well (**can you think of any?**).

Classical liberalism cashes out the priority of good (or rather the individual (conceptions of the) good(s)) over the just in the following ways:

1. liberal equality: each individual deserves equal consideration; there is no political reason to favour one conception of the good over another;
2. neutrality of the state: because there are, in principle and in practice, many different conceptions of the good, the state should not, to the extent this is possible, favour one over the other;
3. negative liberty: people should be negatively free, i.e. not be hindered by anyone else in the determination and the pursuit of what they consider their own good;
4. limitation of the range of legitimate state interventions: the state may only intervene to hinder individuals harming each other.

2. Cf. e.g.: “Starting with Michael Sandel’s (1982) famous criticism of Rawls, a number of critics charge that liberalism is necessarily premised on an abstract conception of individual selves as pure choosers, whose commitments, values and concerns are possessions of the self, but never constitute the self.” (Gaus et al. 2018: 22)

Chapter 3

Rawls: Theory

3.1 Methodology

Rawls' theory is characterised by a number of methodological choices.

One of the most important is the central place given to the notion of justice. To develop political philosophy, or even a general theory of social normativity, starting from the concept of justice marks an important theoretical decision. Other concepts that have been put on center-stage include: authority; liberty/freedom; power; rights.

3.2 The Principles of Justice

The two principles:

Principle of freedom Each person has the same inalienable claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all.

Equality Social and economic inequalities are to satisfy two conditions:

- They are to be attached to offices and positions open to all under conditions of **fair equality of opportunity**;
- They are to be to the greatest benefit of the least-advantaged members of society (the **difference principle**).

It has been much discussed whether there are specific application conditions for the theory, i.e. whether Rawls' arguments make empirical presuppositions. Candidates of such presuppositions are:

- some degree of natural equality: quantitative, no qualitative differences (handicaps? Übermenschen?);
- a well-ordered society: “[a society that is] not only designed to advance the good of its members but [...] is also effectively regulated by a public conception of justice” (1999c: 27), “Everyone is presumed to act justly and to do his part in upholding just institutions.” (1999c: 31), “in a well-ordered society, one effectively regulated by a shared conception of justice, there is also a public understanding as to what is just and unjust” (1999c: 72, §6g)
- reasonable citizens;

Distributive justice, as its name says, is concerned with the justice of distributions – typically distributions of income, wealth, status, advantages or ‘goods’ quite generally –, typically within some society, i.e. some ‘system of cooperation’ within a geographically well-defined region and among a well-defined group of people who have equal claims to count as ‘full’ members of that society.

What does it mean to say that such a distribution is just? This is a surprisingly difficult question. Usually, it is just assumed that the just distribution is the one that a society (our society, any society, this society?) *should* have. Sometimes, their ‘guiding role’ is written into the very definition of principles of distributive justice:

Principles of distributive justice are therefore best thought of as providing moral guidance for the political processes and structures that affect the distribution of benefits and burdens in societies, and any principles which do offer this kind of moral guidance on distribution, regardless of the terminology they employ, should be considered principles of distributive justice. (Lamont & Favor 2017: 2)

As a principle of distributive justice, Lamont & Favor (cf. 2017: 8ff.) contrast Rawls' difference principle (any social or economic inequality should be beneficial for the least advantaged members of society) with strict egalitarianism: every person should have the same level of material goods (including burdens) and services.

Strict egalitarianism, in their view, suffers from two main problems: The index problem is how to measure sameness of level – this is a problem for any principle of distributive justice (is it?). The other, more serious problem which favours the difference principle is how to avoid pareto-suboptimal distributions (distributions that can be changed in ways that improve them for some people without making them worse for anyone). It seems that a pareto suboptimal distribution should be improved. (It seems quite generally assumed that there is no problem moving from “a less pareto-suboptimal distribution would be better” (or “...better for all / for them / for those whose lot can be improved”) to “such a distribution would be more just” -I am not sure that step is really that unproblematic!).

Of the difference principle, Lamont & Favor (2017: 12-13) say that “it materially collapses to a form of strict equality under empirical conditions where differences in income have no effect on the work incentive of people (and hence, no tendency to increase growth)”. This assumes that the inequality tolerated by the difference principle improves the situation of the poorest by motivating others to work for them more or better – but this is just one of many possibilities! Another use of incentives is to find the best candidates for some social position requiring special skills.

The Methodological Role of the Original Position

Methodological: Is there a way of characterising people in a way such that the just becomes their good, i.e. that they will agree on the principles of a just society just by maximising their own expected utility (by ‘rational choice’? If so, what is it?

Rousseauian: What characteristics of people should be abstracted from when answering the question what actions done to them are morally good? What does it mean to ‘treat people as ends in themselves’?

Kantian: Which ones of our own characteristics should we abstract from when answering the question what we should do (‘categorically’, i.e. morally)?

Hobbesian: What of our characteristics are sufficiently general and ‘non-contingent’ / ‘non-arbitrary’ / ‘not due to luck’ to be plausibly attributed to us with respect to some hypothetical ‘state of nature’?

Humean: if morality is (at least psychologically, perhaps philosophically as well) based on some sentiment of sympathy, what is required for and what elicits this sentiment?

That the original position is more something like an image, or a metaphor, for the kind of abstraction that we should engage in when thinking about the question whether some proposed basic structure of a society is just becomes clear once we compare it to the formulation it replaced:

A practice is just if it is in accordance with the principles which all who participate in it might reasonably be expected to propose or to acknowledge before one another when they are similarly circumstanced and required to make a firm commitment in advance without knowledge of what will be their peculiar condition, and thus when it meets standards which the parties could accept as fair should occasion arise for them to debate its merits. (1958: 183)

It is a mistake to focus attention on the varying relative positions and well-being of particular persons, who may be known to us by their proper names, and to require that every change of position and well-being, as a once-for-all transaction viewed in isolation, be in itself just. It is the system of institutions which is to be judged, and judged from a general point of view. Unless one is prepared to criticize the system of institutions from the standpoint of a representative man holding some particular office, one has no complaint against it. (1963b: 76)

Egalitarianism

The veil of ignorance ensures egalitarian choices:

The principles of justice are chosen behind a veil of ignorance. This ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances. (1999c: 11)

Once we decide to look for a conception of justice that prevents the use of the accidents of natural endowment and the contingencies of social circumstance as counters in the quest for political and economic advantage, we are led to these principles. They express the result of leaving aside those aspects of the social world that seem arbitrary from a moral point of view. (1999c: 14)

The original position is defined in such a way that it is a status quo in which any agreements reached are fair. It is a state of affairs in which the parties are equally represented as moral persons and the outcome is not conditioned by arbitrary contingencies or the relative balance of social forces. Thus justice as fairness is able to use the idea of pure procedural justice from the beginning. (1999c: 104)

The idea of the original position is to set up a fair procedure so that any principles agreed to will be just. The aim is to use the notion of pure procedural justice as a basis of theory. Somehow we must nullify the effects of specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to their own advantage. Now in order to do this I assume that the parties are situated behind a veil of ignorance. They do not know how the various alternatives will affect their own particular case and they are obliged to evaluate principles solely on the basis of general considerations. (1999c: 118)

We want to define the original position so that we get the desired solution. If a knowledge of particulars is allowed, then the outcome is biased by arbitrary contingencies. [...] If the original position is to yield agreements that are just, the parties must be fairly situated and treated equally as moral persons. The arbitrariness of the world must be corrected for by adjusting the circumstances of the initial contractual situation. (1999c: 122)

That the veil of ignorance is needed is itself something that can be universally agreed upon:

Thus it seems reasonable and generally acceptable that no one should be advantaged or disadvantaged by natural fortune or social circumstances in the choice of principles. It also seems widely agreed that it should be impossible to tailor principles to the circumstances of one's own case. We should insure further that particular inclinations and aspirations, and persons' conceptions of their good do not affect the principles adopted. (1999c: 16)

We should not abstract from all characteristics, however, as the example of intergenerational justice shows:

The question arises, however, whether the persons in the original position have obligations and duties to third parties, for example, to their immediate descendants. To say that they do would be one way of handling questions of justice between generations. However, the aim of justice as fairness is to try to derive all duties and obligations of justice from other reasonable conditions. So, if possible, this way out should be avoided. There are several other courses open to us. We can adopt a motivation assumption and think of the parties as representing a continuing line of claims. For example, we can assume that they are heads of families and therefore have a desire to further the well-being of at least their more immediate descendants. Or we can require the parties to agree to principles subject to the constraint that they wish all preceding generations to have followed the very same principles. By an appropriate combination of such stipulations, I believe that the whole chain of generations can be tied together and principles agreed to that suitably take into account the interests of each (§§24, 44). If this is right, we will have succeeded in deriving duties to other generations from reasonable conditions. (1999c: 111)

The Veil of Ignorance

It is assumed, then, that the parties do not know certain kinds of particular facts. First of all, no one knows his place in society, his class position or social status; nor does he know his fortune in the distribution of natural assets and abilities, his intelligence and strength, and the like. Nor, again, does anyone know his conception of the good, the particulars of his rational plan of life, or even the special features of his psychology such as his aversion to risk or liability to optimism or pessimism. More than this, I assume that the parties do not know the particular circumstances of their own society. That is, they do not know its economic or political situation, or the level of civilization and culture it has been able to achieve. The persons in the original position have no information as to which generation they belong. (1999c: 118)

Asking what principles it would be rational to adopt under the veil of ignorance is abstracting *both*

- from ‘objective’ characteristics, such as social background, natural endowments and fortune;
- from ‘subjective’ characteristics, such as, most importantly, our “conception of our good”

Subjective characteristics: In his 1999 preface, Rawls makes the following remarks on how he revised the justification of the basic liberties in response to the criticism of Hart (1973):

The basic rights and liberties and their priority are there [i.e. in Rawls’ 1982a] said to guarantee equally for all citizens the social conditions essential for the adequate development and the full and informed exercise of their two moral powers -their capacity for a sense of justice and their capacity for a conception of the good -in what I call the two fundamental cases. Very briefly, the first fundamental case is the application of the principles of justice to the basic structure of society by the exercise of citizens’ sense of justice. The second fundamental case is the application of citizens’ powers of practical reason and thought in forming, revising, and rationally pursuing their conception of the good. The equal political liberties, including their fair value [...], and freedom of thought, liberty of conscience, and freedom of association, are to insure that the exercise of the moral powers can be free, informed, and effective in these two cases. (1999c: xii–xiii)

N.B., Rawls here speaks of their “conceptions of *the* good”, not their “conceptions of *their* good”!

Importantly, this abstraction does *not* concern the question what the primary goods are.

Whatever they are, however, primary goods are things to be used to realise conceptions of the good. Primary goods are indicative of expectations because they can be used to realise individual plans:

Regardless of what an individual’s rational plans are in detail, it is assumed that there are various things which he would prefer more of rather than less. With more of these goods men can generally be assured of greater success in carrying out their intentions and in advancing their ends, whatever these ends may be. The primary social goods, to give them in broad categories, are rights, liberties, and opportunities, and income and wealth. (1999c: 79)

Such plans are supposed to be life-plans, or at least long-term:

It should be noted that I make no restrictive assumptions about the parties’ conceptions of the good except that they are rational long-term plans. (1999c: 11)

Rawls also stipulates some positive requirements for deciders under the veil of ignorance: they are rational, and also ‘reasonable’, at least to the extent that they lack envy (p. 1999c: 124), or at least “decide as if they are not moved by envy” (1999c: 131)), are not moved by affection or rancor, and “can rely on each other to understand and to act in accordance with whatever principles are finally agreed on” (1999c: 125). This seems to require quite a lot of other positive characteristics: that they are sincere, have a strong will (or at least: are not akratic), are (at least: to some extent) disciplined. The rationality assumption is *also* an assumption about procedural justice:

The assumption only says that the parties have a capacity for justice in a purely formal sense: taking everything relevant into account, including the general facts of moral psychology, the parties will adhere to the principles eventually chosen. They are rational in that they will not enter into agreements they know they cannot keep, or can do so only with great difficulty. [...] Thus in assessing conceptions of justice the persons in the original position are to assume that the one they adopt will be strictly complied with. The consequences of their agreement are to be worked out on this basis. (1999c: 126)

Objective characteristics. Natural endowments vary within the ‘normal’ range only:

I shall assume that everyone has physical needs and psychological capacities within the normal range, so that the questions of health care and mental capacity do not arise. Besides prematurely introducing matters that may take us beyond the theory of justice, the consideration of these hard cases can distract our moral perception by leading us to think of persons distant from us whose fate arouses pity and anxiety. (1999c: 83–84)

This is in stark contrast with Hume! It is in this sense that the difference principle amounts to a pooling of talents:

The difference principle represents, in effect, an agreement to regard the distribution of natural talents as in some respects a common asset and to share in the greater social and economic benefits made possible by the complementarities of this distribution. Those who have been favored by nature, whoever they are, may gain from their good fortune only on terms that improve the situation of those who have lost out. The naturally advantaged are not to gain merely because they are more gifted, but only to cover the costs of training and education and for using their endowments in ways that help the less fortunate as well. No one deserves his greater natural capacity nor merits a more favorable starting place in society. But, of course, this is no reason to ignore, much less to eliminate these distinctions. Instead, the basic structure can be arranged so that these contingencies work for the good of the least fortunate. Thus we are led to the difference principle if we wish to set up the social system so that no one gains or loses from his arbitrary place in the distribution of natural assets or his initial position in society without giving or receiving compensating advantages in return. (1999c: 87)

Rawls justifies the need to go beyond liberal equality of opportunity by the contingency of the ‘natural lottery’:

...even if it [the liberal conception of equality of opportunity] works to perfection in eliminating the influence of social contingencies, it still permits the distribution of wealth and income to be determined by the natural distribution of abilities and talents. Within the limits allowed by the background arrangements, distributive shares are decided by the outcome of the natural lottery; and this outcome is arbitrary from a moral perspective. There is no more reason to permit the distribution of income and wealth to be settled by the distribution of natural assets than by historical and social fortune. (1999c: 64)

Distributive justice is concerned with the question how just a certain distribution of goods among a certain group of people is:

- what goods? the so-called “primary goods” (defined as the things that rational persons want whatever else they want);
- which people? everyone, in principle.

Primary goods

With respect to the primary goods, Rawls says the following in the 1999 preface:

Unhappily that account [in the original 1971 edition] left it ambiguous whether something’s being a primary good depends solely on the natural facts of human psychology or whether it also depends

on a moral conception of the person that embodies a certain ideal. This ambiguity is to be resolved in favor of the latter: persons are to be viewed as having two moral powers (those mentioned above) and as having higher-order interests in developing and exercising those powers. Primary goods are now characterized as what persons need in their status as free and equal citizens, and as normal and fully cooperating members of society over a complete life. Interpersonal comparisons for purposes of political justice are to be made in terms of citizens' index of primary goods and these goods are seen as answering to their needs as citizens as opposed to their preferences and desires. (1999c: xii–xiii)

He then refers to the “fuller statement” he has given in his 1982b.

In ch. 2, primary goods are introduced as ‘values’:

...it should be observed that these principles are a special case of a more general conception of justice that can be expressed as follows.

All social values – liberty and opportunity, income and wealth, and the social bases of self-respect – are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage.

Injustice, then, is simply inequalities that are not to the benefit of all. Of course, this conception is extremely vague and requires interpretation.

As a first step, suppose that the basic structure of society distributes certain primary goods, that is, things that every rational man is presumed to want. These goods normally have a use whatever a person's rational plan of life. For simplicity, assume that the chief primary goods at the disposition of society are rights, liberties, and opportunities, and income and wealth. (Later on in Part Three the primary good of self-respect has a central place.) These are the social primary goods. Other primary goods such as health and vigor, intelligence and imagination, are natural goods; although their possession is influenced by the basic structure, they are not so directly under its control. Imagine, then, a hypothetical initial arrangement in which all the social primary goods are equally distributed: everyone has similar rights and duties, and income and wealth are evenly shared. This state of affairs provides a benchmark for judging improvements. If certain inequalities of wealth and differences in authority would make everyone better off than in this hypothetical starting situation, then they accord with the general conception. (1999c: 54–55)

The central role of the primary goods is that it is their distribution is subject to the difference principle, whereas other, non-primary goods vary among people along the differences in their conceptions of the good. This matters because primary goods include not only assets, but also opportunities, rights and duties:

The second principle applies, in the first approximation, to the distribution of income and wealth and to the design of organizations that make use of differences in authority and responsibility. (1999c: 53)

Suppose that everyone agrees under the veil of ignorance that a just society is to have a military and that the military should be organised hierarchically, with commanders be given the power to give orders to their troops. If it turns out that I am a soldier, I am then bound, by the reasoning of the original position, to obey my commanders' orders, *whatever these are* (as long as they are competent to give them).

But it is precisely with respect to such questions – how conscientious objectors should be treated – that people may rationally disagree; so they may not just differ in their conception of the good, but in what they think should count as primary goods. It is unclear to me how Rawls treats this case.

Another constraint is ‘materialistic’: The primary goods – what is to be distributed according to the difference principle – are, or at least determine, “expectation[s] of well-being” or “prospects” (1999c: 56). Feedback-loops, where e.g. these prospects depend on which principles of justice are chosen, are forbidden.

The Priority of the Right over the Good

In the claim that we have to abstract from our conceptions of our good in determining what is socially just lies one principal difference to utilitarianism:

In utilitarianism the satisfaction of any desire has some value in itself which must be taken into account in deciding what is right. In calculating the greatest balance of satisfaction it does not matter, except indirectly, what the desires are for. We are to arrange institutions so as to obtain the greatest sum of satisfactions; we ask no questions about their source or quality but only how their satisfaction would affect the total of well-being. Social welfare depends directly and solely upon the levels of satisfaction or dissatisfaction of individuals. [Thus if men take a certain pleasure in discriminating against one another, in subjecting others to a lesser liberty as a means of enhancing their self-respect, then the satisfaction of these desires must be weighed in our deliberations according to their intensity, or whatever, along with other desires. If society decides to deny them fulfillment, or to suppress them, it is because they tend to be socially destructive and a greater welfare can be achieved in other ways.]...] In justice as fairness, on the other hand, persons accept in advance a principle of equal liberty and they do this without a knowledge of their more particular ends. They implicitly agree, therefore, to conform their conceptions of their good to what the principles of justice require, or at least not to press claims which directly violate them. An individual who finds that he enjoys seeing others in positions of lesser liberty understands that he has no claim whatever to this enjoyment. The pleasure he takes in others' deprivations is wrong in itself: it is a satisfaction which requires the violation of a principle to which he would agree in the original position. The principles of right, and so of justice, put limits on which satisfactions have value; they impose restrictions on what are reasonable conceptions of one's good. In drawing up plans and in deciding on aspirations men are to take these constraints into account. Hence in justice as fairness one does not take men's propensities and inclinations as given, whatever they are, and then seek the best way to fulfill them. Rather, their desires and aspirations are restricted from the outset by the principles of justice which specify the boundaries that men's systems of ends must respect. We can express this by saying that in justice as fairness the concept of right is prior to that of the good. A just social system defines the scope within which individuals must develop their aims, and it provides a framework of rights and opportunities and the means of satisfaction within and by the use of which these ends may be equitably pursued. The priority of justice is accounted for, in part, by holding that the interests requiring the violation of justice have no value. Having no merit in the first place, they cannot override its claims. (1999c: 27–28)

In this way, abstracting from our conception of the good is already putting the right before the good, i.e. accept the constraint that only goods may be pursued the pursuit of which is compatible with the principles of justice.

3.3 Against Utilitarianism

The Structure of the Argument

In his 1999 preface, Rawls says:

If I were writing *A Theory of Justice* now, there are two things I would handle differently. One concerns how to present the argument from the original position (see Chapter III) for the two principles of justice (see Chapter II). It would have been better to present it in terms of two comparisons. In the first parties would decide between the two principles of justice, taken as a unit, and the principle of (average) utility as the sole principle of justice. In the second comparison, the parties would decide between the two principles of justice and those same principles but for one important change: the principle of (average) utility is substituted for the difference principle. (The two principles after this substitution I called a mixed conception, and here it is understood that the principle of utility is to be applied subject to the constraints of the prior principles: the principle of the equal liberties and

the principle of fair equality of opportunity.) Using these two comparisons has the merit of separating the arguments for the equal basic liberties and their priority from the arguments for the difference principle itself. The arguments for the equal basic liberties are at first glance much stronger, as those for the difference principle involve a more delicate balance of considerations. The primary aim of justice as fairness is achieved once it is clear that the two principles would be adopted in the first comparison, or even in a third comparison in which the mixed conception of the second comparison is adopted rather than the principle of utility. I continue to think the difference principle important and would still make the case for it, taking for granted (as in the second comparison) an institutional background that satisfies the two preceding principles. But it is better to recognize that this case is less evident and is unlikely ever to have the force of the argument for the two prior principles. (1999c: xiv)

The two steps are:

1. utility vs. equal liberty + equal opportunity + difference principle;
2. equal liberty + equal opportunity + utility (= mixed conception) vs. equal liberty + equal opportunity + difference principle;

The second step is in §49. Here we are only concerned with the first.

The formal requirements of generality and universality rule out the different forms of egoistic principles. The three other conditions – publicity, ordering, finality – are used to argue for the two principles of justice.

The first part of the argument, that the two principles would be preferred over any principle of utility, is in two steps:

1. that the principle of average utility would be preferred over the classical principle of (total) utility;
2. that the two principles would be preferred over the principle of average utility.

Ad 1. The only relevant difference brought about by averaging is that utility is summed in proportion to the fraction of society occupying the relevant position. This is preferable because it is irrational for people to accept to lose out if they themselves do not gain anything (because the population just becomes bigger).

Ad 2. To do their averaging, utilitarians have to know the probability to end up in a given position within society: under the veil of ignorance, they do not have that knowledge, nor do they have justification to assume that all positions are equally probable. The second problem is that utilitarians behind the veil of ignorance will be asked to sum the utility their choices have for others applying the criteria for utility possessed by these others:

...the individual is thought to choose as if he has no aims at all which he counts as his own. He takes a chance on being any one of a number of persons complete with each individual's system of ends, abilities, and social position. (1999c: 150)

In their state of ignorance, they can only calculate *their* expected utility if they identify it with whatever is the utility of the people occupying the relevant positions:

It is crucial to note that this reasoning presupposes a particular conception of the person. The parties are conceived as having no definite highest-order interests or fundamental ends by reference to which they decide what sorts of persons they care to be. They have, as it were, no determinate character of will. They are, we might say, bare-persons: as settled by certain comparison rules, they are equally prepared to accept as defining their good whatever evaluations these rules assign to the realization of their, or anyone else's, final ends, even if these evaluations conflict with those required by their existing fundamental interests. But we have assumed that the parties do have a determinate character and will, even though the specific nature of their system of ends is unknown to them. They are, so to speak, determinate-persons: they have certain highest-order interests and fundamental ends by reference to which they would decide the kind of life and subordinate aims that are acceptable to them. It is these interests and ends, whatever they are, which they must try to protect. Since they know that the

basic liberties covered by the first principle will secure these interests, they must acknowledge the two principles of justice rather than the principle of utility. (1999c: 152)

The Positive Arguments

Based on the formal requirements that the choice of principles in the original position must be public and final, Rawls gives two positive arguments for his principles of justice.

The argument from the strains of commitment. Our choices have to be final, and we know that; that they are final means that we must commit to them, whatever happens. The choice matters, because it governs our life prospects. Our knowledge of human psychology must allow us to predict that we would be able to ‘stick to’ our decision even in the case of getting assigned the worst position in the social structure. The two principles of justice respect this risk-aversion that it is rational to have in the original position, the utility principles do not:

...if we make an agreement, we have to accept the result; and so to give an undertaking in good faith, we must not only intend to honor it but with reason believe that we can do so. Thus the contract condition excludes a certain kind of randomizing. One cannot agree to a principle if there is a real possibility that it has any outcome that one will not be able to accept. (1999c: 159)

The argument from self-compatibility. Because conceptions of justice embody a certain self-image of the humans the society of which they govern, they can be evaluated with respect to the question whether knowledge of such self-images (guaranteed by the publicity constraint) makes their successful implementation less or more probable: the Rawlsian conception is in this sense self-supporting, the utilitarian conception self-undermining. The Rawlsian conception is self-supporting because it is in every single member’s of society self-interest:

When the two principles are satisfied, each person’s basic liberties are secured and there is a sense defined by the difference principle in which everyone is benefited by social cooperation. (1999c: 154)

Comment. This seems implausible to me: the “sense defined...” is the sense in which we evaluate self-interest as what is in the interest of people *in the original position*, that is under the veil of ignorance. But how is this *self*-interest, given that we are not (and never were) in the original position?

The utilitarian conception is self-undermining because it not only demands great sacrifices, also of the already worst-off, but does so in a way that leads them themselves (by the publicity constraint) to consider their life-plans as not being worth being carried out:

If the parties accept the utility criterion, they will lack the support to their self-respect provided by the public commitment of others to arrange inequalities to everyone’s advantage and to guarantee the basic liberties for all. In a public utilitarian society men, particularly the least advantaged, will find it more difficult to be confident of their own worth. (1999c: 158)

To the parties in the original position, it maximises their expected utility to not choose utilitarianism, but rather to choose the Rawlsian principles instead.

The Analysis of Utilitarianism

If utilitarianism is wrong, why did such great minds defend it?

The utilitarian method to determine the just principles of a society is to ask which principles an ideally rational and impartial spectator possessing all relevant knowledge would choose. The key assumption is that the impartial spectator is a perfectly sympathetic being, i.e. someone who, to the highest possible degree, reproduces in his experience the satisfactions and pleasures which she recognizes to be felt by others.

The impartial spectator aggregates all pleasures into one consciousness:

In the classical conception one chooses as if one will for certain live through the experiences of each individual, *seriatim* as Lewis says, and then sum up the result. The idea of taking a chance on which person one will turn out to be does not arise. (1999c: 165)

This conception, however, rests on the mistaken assumption that the desires the satisfaction of which creates pleasure do not conflict.

3.4 Equal Liberties and Equality of Opportunity

The Priority of Liberty

The lexicographical precedence of the first principle (same liberties) over the second and of the first part of the second principle (equality of opportunity) over the second (the difference principle) can be illustrated by imagining the creation of a just society to proceed in stages, from the original position to a constitutional convention (equal liberty), then to legislation (difference principle), and then to the interpretation of legal rules by judges and administrators (in the 'spirit' of the difference principle).

Liberties play two roles in Rawls' theory: they are to be guaranteed, to the maximum extent possible and equally for all citizens, by the constitutional convention, and they are themselves, according to the worth they have, primary goods to be distributed by legislation according to the difference principle:

Freedom as equal liberty is the same for all; the question of compensating for a lesser than equal liberty does not arise. But the worth of liberty is not the same for everyone. Some have greater authority and wealth, and therefore greater means to achieve their aims. The lesser worth of liberty is, however, compensated for, since the capacity of the less fortunate members of society to achieve their aims would be even less were they not to accept the existing inequalities whenever the difference principle is satisfied. But compensating for the lesser worth of freedom is not to be confused with making good an unequal liberty. Taking the two principles together, the basic structure is to be arranged to maximize the worth to the least advantaged of the complete scheme of equal liberty shared by all. (1999c: 179)

Arguments in favour of the claim that in the original position people would choose to guarantee a certain equal liberty (from certain limitations, to do certain things) will depend on the liberty in question. They will choose, e.g., to guarantee equal liberty of conscience because they do not know their religious or moral views but take them seriously enough to want to have them:

Now it seems that equal liberty of conscience is the only principle that the persons in the original position can acknowledge. They cannot take chances with their liberty by permitting the dominant religious or moral doctrine to persecute or to suppress others if it wishes. Even granting (what may be questioned) that it is more probable than not that one will turn out to belong to the majority (if a majority exists), to gamble in this way would show that one did not take one's religious or moral convictions seriously, or highly value the liberty to examine one's beliefs. (1999c: 181)

This is an instance of a more general pattern which applies to all basic liberties:

...the initial agreement on the principle of equal liberty is final. An individual recognizing religious and moral obligations regards them as binding absolutely in the sense that he cannot qualify his fulfillment of them for the sake of greater means for promoting his other interests. Greater economic and social benefits are not a sufficient reason for accepting less than an equal liberty. It seems possible to consent to an unequal liberty only if there is a threat of coercion which it is unwise to resist from the standpoint of liberty itself. For example, the situation may be one in which a person's religion or his moral view will be tolerated provided that he does not protest, whereas claiming an equal

liberty will bring greater repression that cannot be effectively opposed. But from the perspective of the original position there is no way of ascertaining the relative strength of various doctrines and so these considerations do not arise. The veil of ignorance leads to an agreement on the principle of equal liberty; and the strength of religious and moral obligations as men interpret them seems to require that the two principles be put in serial order, at least when applied to freedom of conscience. (1999c: 182)

By the same token, religious beliefs are subsumed under the individual conceptions of the good of which we abstract when considering the original position:

...from the standpoint of the original position, no particular interpretation of religious truth can be acknowledged as binding upon citizens generally; nor can it be agreed that there should be one authority with the right to settle questions of theological doctrine. Each person must insist upon an equal right to decide what his religious obligations are. He cannot give up this right to another person or institutional authority. (1999c: 191)

The Same Fair Chances for All

When it comes to the establishment of the constitution, equalities of liberties translates into the so-called “principle of participation”:

It requires that all citizens are to have an equal right to take part in, and to determine the outcome of, the constitutional process that establishes the laws with which they are to comply. Justice as fairness begins with the idea that where common principles are necessary and to everyone’s advantage, they are to be worked out from the viewpoint of a suitably defined initial situation of equality in which each person is fairly represented. The principle of participation transfers this notion from the original position to the constitution as the highest-order system of social rules for making rules. If the state is to exercise a final and coercive authority over a certain territory, and if it is in this way to affect permanently men’s prospects in life, then the constitutional process should preserve the equal representation of the original position to the degree that this is practicable. (1999c: 194–195)

Rawls characterises equality of opportunity as a liberal principle:

The thought here is that positions are to be not only open in a formal sense, but that all should have a fair chance to attain them. Offhand it is not clear what is meant, but we might say that those with similar abilities and skills should have similar life chances. More specifically, assuming that there is a distribution of natural assets, those who are at the same level of talent and ability, and have the same willingness to use them, should have the same prospects of success regardless of their initial place in the social system. In all sectors of society there should be roughly equal prospects of culture and achievement for everyone similarly motivated and endowed. (1999c: 63)

Rawls captures equality of opportunity by the requirement that a basic social structure must contain only offices and positions of power ‘open to all’. This is much less than most people ordinarily understand by “equality of opportunity”. Whatever else than just openness is understood by “equality” (e.g.: that people have a realistic chance of securing the good, that special compensation is made for handicaps, that diversity counts etc. etc.), most people mean by “opportunity”, not just the possession of official or status functions.

The rule of law is directly justified by the equality of liberties, without recourse to their worth (which would fall under the remit of the difference principle):

Liberty, as I have said, is a complex of rights and duties defined by institutions. The various liberties specify things that we may choose to do, if we wish, and in regard to which, when the nature of the

liberty makes it appropriate, others have a duty not to interfere.²³ But if the precept of no crime without a law is violated, say by statutes, being vague and imprecise, what we are at liberty to do is likewise vague and imprecise. The boundaries of our liberty are uncertain. And to the extent that this is so, liberty is restricted by a reasonable fear of its exercise. [...] The principle of legality has a firm foundation, then, in the agreement of rational persons to establish for themselves the greatest equal liberty. To be confident in the possession and exercise of these freedoms, the citizens of a well-ordered society will normally want the rule of law maintained. (1999c: 210–211)

3.5 Non-Ideal Theory

Political Agency

Positive part: self-binding – we have to keep our promises:

...a person is required to do his part as defined by the rules of an institution when two conditions are met: first, the institution is just (or fair), that is, it satisfies the two principles of justice; and second, one has voluntarily accepted the benefits of the arrangement or taken advantage of the opportunities it offers to further one's interests. The main idea is that when a number of persons engage in a mutually advantageous cooperative venture according to rules, and thus restrict their liberty in ways necessary to yield advantages for all, those who have submitted to these restrictions have a right to a similar acquiescence on the part of those who have benefited from their submission. We are not to gain from the cooperative labors of others without doing our fair share. The two principles of justice define what is a fair share in the case of institutions belonging to the basic structure. So if these arrangements are just, each person receives a fair share when all (himself included) do their part. (1999c: 96)

Negative part: all bets are off – we are not bound to do what we have not promised:

By the principle of fairness it is not possible to be bound to unjust institutions, or at least to institutions which exceed the limits of tolerable injustice (so far undefined). In particular, it is not possible to have an obligation to autocratic and arbitrary forms of government. The necessary background does not exist for obligations to arise from consensual or other acts, however expressed. Obligatory ties presuppose just institutions, or ones reasonably just in view of the circumstances. (1999c: 96)

This is supposed to be compatible with our “duty of justice”:

From the standpoint of justice as fairness, a fundamental natural duty is the duty of justice. This duty requires us to support and to comply with just institutions that exist and apply to us. It also constrains us to further just arrangements not yet established, at least when this can be done without too much cost to ourselves. Thus if the basic structure of society is just, or as just as it is reasonable to expect in the circumstances, everyone has a natural duty to do his part in the existing scheme. Each is bound to these institutions independent of his voluntary acts, performative or otherwise. Thus even though the principles of natural duty are derived from a contractarian point of view, they do not presuppose an act of consent, express or tacit, or indeed any voluntary act, in order to apply. The principles that hold for individuals, just as the principles for institutions, are those that would be acknowledged in the original position. These principles are understood as the outcome of a hypothetical agreement. If their formulation shows that no binding action, consensual or otherwise, is a presupposition of their application, then they apply unconditionally. (1999c: 99)

Our duty of justice also applies in unjust societies:

When the basic structure of society is reasonably just, as estimated by what the current state of things allows, we are to recognize unjust laws as binding provided that they do not exceed certain limits of

injustice. (1999c: 308) ...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. (1999c: 31)

At the same time, Rawls acknowledges that the step from the duty of justice to the duty of compliance is questionable:

The contract doctrine naturally leads us to wonder how we could ever consent to a constitutional rule that would require us to comply with laws that we think are unjust. (1999c: 31)
...when they adopt the majority principle the parties agree to put up with unjust laws only on certain conditions. Roughly speaking, in the long run the burden of injustice should be more or less evenly distributed over different groups in society, and the hardship of unjust policies should not weigh too heavily in any particular case. Therefore the duty to comply is problematic for permanent minorities that have suffered from injustice for many years. And certainly we are not required to acquiesce in the denial of our own and others' basic liberties, since this requirement could not have been within the meaning of the duty of justice in the original position, nor consistent with the understanding of the rights of the majority in the constitutional convention. Instead, we submit our conduct to democratic authority only to the extent necessary to share equitably in the inevitable imperfections of a constitutional system. Accepting these hardships is simply recognizing and being willing to work within the limits imposed by the circumstances of human life. (1999c: 312)

The question thus boils down to the presumed interest we have in having a well-ordered society at all. It is not clear to me why this question should be answered from the perspective of the original position.

Rawls here sounds almost utilitarian, asking us to weigh up the hardship of injustice with the presumed advantage we have by "shar[ing] equitably in the inevitable imperfections of a constitutional system". However: no such weighing will ever, by his own lights, increase the legitimacy of unjust institutions nor the authority they have over us. What is more: it is not clear why the presumed advantages of being members of a certain society, i.e. our own, should have any weight at all – we did not (not even hypothetically) say yes to that!

In his early sketch, when he did not yet have the conception of a hypothetical original position, Rawls derived the duty of justice directly from the knowing acceptance of the benefits of communal life:

The rights and duties so arising are special rights and duties in that they depend on previous actions voluntarily undertaken, in this case on the parties having engaged in a common practice and knowingly accepted its benefits. [fn. omitted] It is not, however, an obligation which presupposes a deliberate performative act in the sense of a promise, or contract, and the like. An unfortunate mistake of proponents of the idea of the social contract was to suppose that political obligation does require some such act, or at least to use language which suggests it. It is sufficient that one has knowingly participated in and accepted the benefits of a practice acknowledged to be fair. [...] If a person rejects a practice, he should, so far as possible, declare his intention in advance, and avoid participating in it or enjoying its benefits.(1958: 179–180)

In my opinion, the plausibility of this claim – that society itself is justified by our 'engagement' in it via some hypothetical consent that is implicit in our engagement – represents an important difference between what Rawls calls the "ideal" and the "non-ideal" theory of justice.

Chapter 4

Rawls: Criticism

4.1 Types of Criticism

Rawls' theoretical aims are roughly speaking reconstructive: to defend a version of the social contract theory as the best answer to the question of how to evaluate whether or not and to what extent our actual societies (and possible variants of them) are just. Possible criticism comes in (at least) three varieties:

downstream : accept the basic methodological principles and argue that they give different results Rawls says they do; ex.: Nozick; most interesting, but also most difficult;

same level : disagree with Rawls on what a theory of justice should do; ex.: Hayek; more 'realistic', but less 'pure';

upstream : question why we need a theory of justice in the first place; ex.: Rorty perhaps? me? less committal, but more facile.

The strict egalitarian critique of the difference principle

Relative position matters. Rawls think that only possible improvements of the most disadvantaged's absolute position counts: a distribution is just iff it cannot be further improved in absolute terms, even though relative improvements may still be possible (because it is not strictly egalitarian). Crocker and G.A. Cohen 1992 have argued that relative position sometimes counts, because less differences in relative positions show greater solidarity (Crocker) or exclude unfair advantages to the talented who would use their talents to the advantage of all even if they would not thus improve their absolute position (Cohen): "...if larger incomes are necessary only because the talented are taking advantage of the demand for their talent to seek maximal economic gain, then the Difference Principle should not be interpreted as sanctioning them." (Lamont & Favor 2017: 14). But why not? If fulfilling their selfish wish improves the condition of the worst-off, the difference principle is satisfied.

The liberal critique of the difference principle

Rights. Equality of rights may be taken to comprise more than possession of the same set of fundamental rights. Property rights, for example, may be said to be equal iff they give each person the same right about their possessions, *irrespective* of what possessions these are. If we start from an unjust society, it may always be unjust (to some extent) to make it more just, because doing so infringes on someone's property rights.

Absolute position matters more. Though Rawls determines justice by absolute position, the question who's absolute position matters (i.e.: those of the least well-off) is determined relatively. But perhaps the absolute position of the whole distribution curve, its average or its median also matters: perhaps some more inegalitarian distribution is preferable if it is required for a generally more affluent society, irrespective whether it specifically helps the poorest. (This is also relevant for the question whether property rights are fundamental.)

The perfectionist critique of the difference principle

Desert. Rawls determines the justice of some distribution in a situation where people only know their (equal) needs, but nothing about the past that may entitle or not to some possessions. If some past action entitles you to a higher level of primary goods, it does so independently of whether this reward also improves the situation of the least disadvantaged.

The external critique

The Revolutionary. Human nature, if there is such a thing at all, is certainly not fixed nor permanent. Society changes humans, and their conceptions of justice as well. The way humans change is often painful to them, and they may change to the(ir) better in unpleasant ways, i.e. even if that change requires temporary disadvantages: it may thus be perfectly just to disadvantage some, or all, if this makes them better people and so leads to a better outcome for future generations.

The Anti-Elitist. “Harvard Professor Found Out What Should Be Done”, in his armchair, paid for by the National Endowment for Humanities, a Professor of Philosophy! Go and tell that to your buddies – you may add that said professor also argues that all rational and reasonable people, who do not rely on considerations that are irrelevant and parochial, must, by rational necessity, agree with him. You will not be surprised that your friends will be somewhat skeptical, and disinclined to do as told.

The Relativist. Rawls assumes that, within one society, everyone will agree on whether or not its fundamental structure is just. But with what right do we assume that this decision will be the same for every society? Such variety may arise in different ways: perhaps there are trade-offs between different elements of the structure, of parts of it that are irrelevant to its overall justice, or perhaps, even behind the veil of ignorance, some factors matter that differ among societies (e.g.: the size, demographic structure, gender distribution). If there may be different, equally just or equally unjust societies, principles of justice do not offer unique, mono-directional guidance.

The Believer. Rawls assumes that people are competent to determine the justice, or not, of societies and thus indirectly also of individual acts and persons. But justice may depend on, or even be a measure of, the correspondence with some quality humans are not competent to assess, e.g. “worth” (“to everyone according to their worth”). If only God knows the worth of people, only God knows what different people deserve, i.e. what distribution is just.

The Spontaneous One. It is contrary elementary and unchangeable facts of human nature to expect people to be bound by decisions they, or even their ancestors, took long ago. If such decisions are purely hypothetical, and under a veil of ignorance, even more so. To judge people by standards you cannot reasonably expect them to respect is unjust, so no permanent decision on justice, even the justice of supposedly unchangeable features of society (its “basic structure”, whatever this is supposed to be), can ever be justifiably made.

The Pessimist. Rawls’ arguments have an empirical, and empirically false, premiss: that it is possible, at least in principle, that everyone has a minimally decent life. But some, say 10 % of the population, are irrevocably doomed: either because there is not enough to eat, or because there is an evil monster who demands to eat one out of 10 every year. It may thus be just, or at least rational under the veil of ignorance, to give each one a fair chance to survive, e.g. by having a fair lottery determining who dies.

4.2 Kantianism, Self-Respect

The importance of self-respect is an argument in favour of the Rawlsian principles:

...self-respect implies a confidence in one’s ability, so far as it is within one’s power, to fulfill one’s intentions. When we feel that our plans are of little value, we cannot pursue them with pleasure or take delight in their execution. Nor plagued by failure and self-doubt can we continue in our endeavors. It is clear then why self-respect is a primary good. Without it nothing may seem worth doing, or if some things have value for us, we lack the will to strive for them. All desire and activity

becomes empty and vain, and we sink into apathy and cynicism. Therefore the parties in the original position would wish to avoid at almost any cost the social conditions that undermine self-respect. The fact that justice as fairness gives more support to self-esteem than other principles is a strong reason for them to adopt it. (1999c: 386)

The connection to equality of opportunity is not explicitly spelt out.

Nussbaum (2011: 85) argues that we have to “consider an alternative to Rawls’s theory” to solve what she claims are three important problems at the “frontiers of justice”: justice across national boundaries, the fair treatment of people with disabilities; and the fairness of our treatment of nonhuman animals. On the second issue, Nussbaum says:

...the assumptions of rough equality and mutual advantage mean that the view cannot deal well with cases in which we find a deep asymmetry of power between the parties that is not easily corrected by simply rearranging income and wealth. Precisely for that reason, people with severe physical and cognitive disabilities are explicitly omitted from the Original Position and are not included under the definition of the capacities of citizens in the Well Ordered Society. Their needs, says Rawls, are to be dealt with at some point but are not taken into account when society selects its most basic principles and structures. In effect, they are to be dominated, though the domination is to be beneficial. (2011: 87)

With respect to the question “what sorts of beings are owed the guarantees of justice”, Rawls says in §77:

...The natural answer seems to be that it is precisely the moral persons who are entitled to equal justice. Moral persons are distinguished by two features: first they are capable of having (and are assumed to have) a conception of their good (as expressed by a rational plan of life); and second they are capable of having (and are assumed to acquire) a sense of justice, a normally effective desire to apply and to act upon the principles of justice, at least to a certain minimum degree. [...] Thus equal justice is owed to those who have the capacity to take part in and to act in accordance with the public understanding of the initial situation. One should observe that moral personality is here defined as a potentiality that is ordinarily realized in due course. It is this potentiality which brings the claims of justice into play. [...] It should be stressed that the sufficient condition for equal justice, the capacity for moral personality, is not at all stringent. When someone lacks the requisite potentiality either from birth or accident, this is regarded as a defect or deprivation. There is no race or recognized group of human beings that lacks this attribute. Only scattered individuals are without this capacity, or its realization to the minimum degree, and the failure to realize it is the consequence of unjust and impoverished social circumstances, or fortuitous contingencies. (1999c: 442, 443)

While the appeal to potentialities assures that the principle – “Those who can give justice are owed justice.” (1999c: 446) – applies to all humans, non-human animals are excluded. Their treatment raises moral, but not political questions:

...we should recall here the limits of a theory of justice. Not only are many aspects of morality left aside, but no account is given of right conduct in regard to animals and the rest of nature. A conception of justice is but one part of a moral view. While I have not maintained that the capacity for a sense of justice is necessary in order to be owed the duties of justice, it does seem that we are not required to give strict justice anyway to creatures lacking this capacity. But it does not follow that there are no requirements at all in regard to them, nor in our relations with the natural order. Certainly it is wrong to be cruel to animals and the destruction of a whole species can be a great evil. The capacity for feelings of pleasure and pain and for the forms of life of which animals are capable clearly imposes duties of compassion and humanity in their case. (1999c: 442, 443)

4.3 The objection from a Menschenbild

So-called ‘communitarianist’ critics such as MacIntyre, Taylor and Sandel also claim that people in Rawls’ original position are implausibly individualist, according to a

...conception in which the self, shorn of all its contingently-given attributes, assumes a kind of supra-empirical status, essentially unencumbered, bounded in advance and given prior to its ends, a pure subject of agency and possession, ultimately thin.

It is difficult to assess this line of criticism. Certainly, *some* of our otherwise important features are morally irrelevant and should be disregarded when asking questions about justice. The relevant question does not concern our self-conception as morally evaluable actors, nor our motivations or aims in behaving more or less morally, but rather the grounds of the duties we have towards others and of the rights we have against them. Nozick puts this point, as a criticism of Rawls, quite well as follows:

[Some people] will wonder whether any reconstruction of Kant that treats people’s abilities and talents as resources for others can be adequate. “The two principles of justice ...rule out even the tendency to regard men as means to one another’s welfare.” [fn.: “Rawls, *Theory of Justice*, p. 183”¹] Only if one presses *very* hard on the distinction between men and their talents, assets, abilities, and special traits. Whether any coherent conception of a person remains when the distinction is so pressed is an open question. Why we, thick with particular traits, should be cheered that (only) the thus purified men within us are not regarded as means is also unclear. (1974: 228)

Nozick point is that our use of others’ natural abilities as means (or rather: our use of them, with respect to their natural abilities) is not excluded (or even encouraged) by a conception that takes Rawls’ original position as the right perspective for moral considerations. This is a defensible point, though I think it is wrong both in its own right and as an interpretation of Kant:

The description of the original position resembles the point of view of noumenal selves, of what it means to be a free and equal rational being. Our nature as such beings is displayed when we act from the principles we would choose when this nature is reflected in the conditions determining the choice. Thus men exhibit their freedom, their independence from the contingencies of nature and society, by acting in ways they would acknowledge in the original position. (1999c: 225)

TO DO: distinguish two different strands of criticism:

- from the restriction of the domain of applicability, turning on the plausibility with which Rawls can claim Kantian inspiration
- from the Menschenbild (communitarians)

4.4 Self-Binding by Hypothetical Consent

4.5 Justice as a Societal Virtue

The emphasis on “society” was not present in Rawls’ early work. When first presenting the main ideas of his conception of justice, Rawls took it to regulate “practices”, i.e. social regularities or customs as he had defined them in his 1955:

1. This is missing from the revised edition. Instead, we find: “To regard persons as ends in themselves in the basic design of society is to agree to forgo those gains which do not contribute to everyone’s expectations. By contrast, to regard persons as means is to be prepared to impose on those already less favored still lower prospects of life for the sake of the higher expectations of others. Thus we see that the difference principle, which at first appears rather extreme, has a reasonable interpretation.” (1999c: 157)

Throughout I consider justice only as a virtue of social institutions, or what I shall call practices. The principles of justice are regarded as formulating restrictions as to how practices may define positions and offices, and assign thereto powers and liabilities, rights and duties. Justice as a virtue of particular actions or of persons I do not take up at all. (1958: 164–165)

Comparing his (then, rough) view to those of the Greek sophists, Rawls wrote in “Justice as fairness”:

Justice is thought of as a pact between rational egoists the stability of which is dependent on a balance of power and a similarity of circumstances. (1958: 174)

Chapter 5

Nozick: Theory

5.1 Justifying the State

In part I, Nozick wants to show that a minimal state (“limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on”, 1974: ix) is legitimate, in part II that no more-than-minimal state is and in part III that the minimal state is attractive (“inspiring as well as right” (1974: ix), or at least “not uninspiring” (1974: 53)).

The guiding question is how to justify the state:

The fundamental question of political philosophy, one that precedes questions about how the state should be organized, is whether there should be any state at all. Why not have anarchy? (1974: 4)

Here, having a state is presented as something optional for us; in Rawls, on the other hand, *any* well-ordered society will have a basic structure, obeying to certain principles, which may be assessed as more or less just. Faced with the “choice between the state and anarchy” (1974: 5), we seek a justification of the state:

If one could show that the state would be superior even to this most favored situation of anarchy, the best that realistically can be hoped for, or would arise by a process involving no morally impermissible steps, or would be an improvement if it arose, this would provide a rationale for the state’s existence; it would justify the state. (1974: 5)

The justification of the state takes the form of a fundamental explanation of it in terms of some non-politically characterised state of nature (a so-called “invisible-hand explanation”).

What does “justification of the state” mean? It does not mean that the *de facto* existence of the state does violate a legal or moral provision, but that attention to the circumstances of its coming about shows that in fact its existence is not against the legal or moral law, but an exception to its provisions (this is what “justification” roughly means in Swiss penal law), nor does it mean that some action, by ourselves, or a group to which we belong, that brought about the state is explainable by (or at least makes sense against) a background of intentions and motivations that show that it was only apparently violating some norm. Whether or not there exists even a *prima facie* case against the state and whether or not there are excusable or understandable actions that brought it about is precisely what is to be established.

Nor is the question about the desirability or justifiability of a course of actions that would, or could, or was at least aimed at bringing the state’s existence to an end (or at least make our own state cease to be) – the question then would have to be whether there is a sequence of permissible steps that bring us from the state to anarchy, not the reverse question which Nozick asks whether there is such a sequence bringing us from anarchy to the state.

Because the state is a reality and its continued existence is not in question, the question of its justifiability is the one of its legitimacy, whether we may be *reconciled* with its existence. But why should we, and why should we want to be? This question is not asked (at least it is not asked by Nozick). Rather, he only argues that the state is not (always) unjustified, not in all cases by itself a violation of natural rights:

...the process of accumulating sole effective enforcement and overseeing power may take place without anyone's rights being violated; [that]... a state may arise by a process in which no one's rights are violated. (1974: 133)

Nozick's genealogy of the minimal state takes the following steps:

1. a system of protective agencies becoming a monopoly;
2. a protective agency imposing a monopoly on the use of force (the ultraminimalist state);
3. a protective agency imposing a constraint to be protected (the minimalist state).

Let us look at them in turn.

Step 1. The State of Nature. In the state of nature, people have rights, a tendency to violate the rights of others and a tendency to seek compensation for the harm done to them. Rights are conceived of as boundaries, and harms are boundary crossings (cf. 1974: 34f, fn. 12)

There is an interesting difference in the choice situations Nozick and Rawls start with:

- In Rawls's original position, it is upon us to decide *as a group*, i.e. we should decide on what all of us are to do. This allows us to screen off the choices other make or will make – we know in advance that there will be only one collective choice be made.
- In Nozick's situation, on the contrary, each one is to decide for herself what she is to do, anticipating as far as is possible the choices others will make in the same situation.

One consequence of this difference is that only Nozick's 'original' people, but not Rawls's, are free not to choose.

A consequence of this is that Nozick's 'original' people, but not Rawls' are susceptible to the so-called Prisoners' Dilemma, which Rawls rules out with the publicity condition.¹

Step 2. Protective agencies are formed. People will want to buy protection from an agency which protects and enforces their rights and uses a procedure to determine what rights on others (members and non-members) its members have and what constitutes a violation of their rights (the use and publicity of the procedure is needed to enable the prospective members to predict how their agency will act on their behalf). In addition to payment, people will also have (i) either to forfeit their right to enforce their rights themselves or to exact compensation for their violation, or (ii), at least, to accept that they will not be protected by the agency in the case of retaliation for the enactment of self-help justice against members of the same association.²

The first step starts with the need of humans to protect themselves against each other and their teaming up to assure such protection. What do they need protection from? Nozick focusses largely on physical aggression and theft, and more generally violent violations of natural rights (such as the right to physical integrity), and this is the kind of protection that can be 'out-sourced' in the way he imagines. This is certainly not true for all types of protection we need, i.e. for all natural rights that can be violated by other humans. It is even doubtful that it extends to all protections of physical integrity: Imagine two members of the same association arrive, both equally starved, simultaneously at a food deposit that will save, but only if eaten in entirety, one life. What should they do? Both have the right to act in self-defense. Another problem arises with the knowledge required on the part of the members to satisfy the publicity requirement. Suppose I have agreed not to kill other members of the

1. The Prisoners' Dilemma, of which (and its iterations) exist many variations, is a much discussed puzzle in decision theory that shows that impeccable reasoning about individual courses of action may lead to suboptimal results, as shows by a pay-out matrix that offers a betray-your-friend-or-stay-silent choice to two prisoners individually, sending them to prison for six years if they are betrayed but do not, 3 each if both are betrayed but only for 2 years if both stay silent. Each prisoner will correctly reason that betrayal is better whatever the other does (the choice is of 3 against 6 years if the other chooses betrayal and of 0 against 2 if he does not), leading to a result (both getting 3 years) that is sub-optimal for both.

2. This may help protective agencies to get around same case of the 'innocent threat' dilemma sketched later, where both parties fight in self-defense.

association unless in self-defense and that, unbeknownst to me, my smoking kills some of them. Am I obliged to pay compensation even though I have not consented to my quitting smoking?

Nozick also assumes that everyone joins just one protective agency. But why should there be not several, corresponding to different rights and exacting compensation or punishment only within *their* sphere of rights? I could have my physical integrity protected by one, my psychological integrity protected by another and my sexual integrity protected by a third association. Indeed, is not the family a protective agency of such a limited kind? Such variety between associations may change the way they compete with each other, and perhaps counteract the natural pull towards hegemony of one among them. Suppose that my protective agency, catering mostly to fishermen like me, not only insures me against the threat posed by others (including our neighbours who work the land on the coast and mostly belong to another agency, which is much bigger) but also against storms that sink my ship. Because no such insurance is available from the agricultural agency, I have a reason not to join it, even if I have frequent quarrels with peasants. Or I could join it but try to retain my weather-insurance from my old agency, splitting up my loyalty between the two.

Step 3. Competition between protective agencies. Different protective agencies will compete over the same territory. (Note that “competition”, like “monopoly”, requires two contrasting quantities: the total market (the people who live in some territory) and the market share (the people signed up to the agency).)

Nozick assumes that the market for protective agencies will be fair: that people are free to leave their agency and join another one, and that they will do so merely on their estimation of the quality of the services provided. This is highly unrealistic: my choice of protective agency will depend, to a rather great degree, how reliable I think its procedure is, but also what rights it protects in what ways (if I do not like being tickled, I will not join the association that punishes minor offenses by tickling; if I like to tickle non-consenting others, I will not join the association that considers this a crime). It also depends on whom I think I need protection from: if peasants are more prone to tickling than fishermen, I would want to stay with the fishermen agency.

Nozick assumes that the only difference in the protective associations is the procedures they use to establish guilt or innocence; but they may also *create* different rights by offering different types of insurance. It seems to me that this changes the calculation involving the independents and also the nature of their competition.

Step 4. Emergence of a monopoly. Because the value offered by a protective agency is relative – less if opponents are stronger –, a monopoly will naturally emerge:

The worth of the product purchased, protection against others, is *relative*: it depends upon how strong the others are. Yet unlike other goods that are comparatively evaluated, maximal competing protective services cannot coexist; the nature of the service brings different agencies not only into competition for customers' patronage, but also into violent conflict with each other. Also, since the worth of the less than maximal product declines disproportionately with the number who purchase the maximal product, customers will not stably settle for the lesser good, and competing companies are caught in a declining spiral. (1974: 17)

But is this right? Is not Nozick assuming that my rights are less likely to be violated by members of other agencies than by members of my own agency? Is this a calculation I am supposed to make when choosing the agency?

The emergence of a monopoly also seems to depend on the assumptions noted earlier: that I join only one agency to protect all my (relevant) rights; that the competing agencies protect the same (kind of) rights and that the competition between them only depends on their price and the protection they offer.

The dominant protective agency differs from a minimal state in two ways:

- It does not have the right to claim a monopoly on the use of force: it has no claim against the enactment of self-help justice by its members (except if it is in retaliation to self-help justice enacted by other members of the same association, in which case the association will only protect its retaliating member from counterretaliation if it has given its permission for the retaliation first).
- It does not offer equal protection, neither among the people living in their territory nor among its members.

Why assume that these are the only two ways it differs from even a minimal state?

Why assume that “territory” marks of the sphere where the agency should offer equal protection? Why not race, ethnicity, ideology, hair-colour etc.?

Step 5. The dominant agency establishes a monopoly on the use of force. This is the step to the “ultra-minimalist state”:

A state claims a monopoly on deciding who may use force when; it says that only it may decide who may use force and under what conditions; it reserves to itself the sole right to pass on the legitimacy and permissibility of any use of force within its boundaries; furthermore it claims the right to punish all those who violate its claimed monopoly. (1974: 23)

But is this right? “Force” here must have a restricted meaning; “right to pass” must mean “legally pass, juridicate” (private opinions remain permitted); “boundaries” is a glitch – meant is “among its members”; “the right to punish” – would this not normally mean “the right to exclude”? In general, it seems quite difficult to decide on whom the monopoly is legitimately claimed over; suppose that within the territory of some protection agency (i.e. the territory across which it is ‘dominant’, whatever that means), someone uses force in a way not permitted by the agency. How do we distinguish between:

- The person is a member of the agency and violates a duty she has consented to when joining the agency.
- The person now is an independent and his action concerns the agency only if its other party is a member of the agency.

Nozick avoids having to make this distinction by circumscribing the ‘territory’, within which the dominant agency claims a monopoly on the use of force, by the set of actions that pose a risk to the members of the agency:

An independent might be prohibited from privately exacting justice because his procedure is known to be too risky and dangerous – that is, it involves a higher risk (than another procedure) of punishing an innocent person or overpunishing a guilty one – or because his procedure isn’t known not to be risky. (1974: 88)

To deal with the case where the unreliable procedure is applied to a client of the agency who is in fact guilty, an epistemic requirement is added:

If someone knows that doing act *A* would violate *Q*’s rights unless condition *C* obtained, he may not do *A* if he has not ascertained that *C* obtains through being in the best feasible position for ascertaining this. (1974: 106–107)

This creates a right of the agency against the independent who is punishing one of its guilty members if that independent does not know and show to the client (i.e. the agency) that his procedure is reliable.

The monopoly is established by a prohibition of self-help justice on the grounds that any other procedure of determining punishment than the one used by the dominant agency is not known to be not unreliable:

...a protective agency may punish a wielder of an unreliable or unfair procedure who (against the client’s will) has punished one of its clients, independently of whether or not its client actually is guilty and therefore even if its client is guilty. (1974: 107–108)

But how is its reliability established? Is there any reason to assume that the *dominant* agency’s procedure is more likely to be reliable than any other?

Nozick claims that no such independent evaluation is needed, as the monopoly is a *de facto* one:

Although no monopoly is claimed, the dominant agency does occupy a unique position by virtue of its power. It, and it alone, enforces prohibitions on others’ procedures of justice, as it sees fit. It does

not claim the right to prohibit others arbitrarily; it claims only the right to prohibit anyone's using actually defective procedures on its clients. But when it sees itself as acting against actually defective procedures, others may see it as acting against what it thinks are defective procedures. It alone will act freely against what it thinks are defective procedures, whatever anyone else thinks. As the most powerful applier of principles which it grants everyone the right to apply *correctly*, it enforces its will, which, from the inside, it thinks *is* correct. From its strength stems its actual position as the ultimate enforcer and the ultimate judge with regard to its own clients. (1974: 108–109)

That the dominant agency is not violating anyone's rights in exercising its monopoly is not due to the fact that its procedures are better than those of others (agencies or independents), but simply on the fact that it is *in a better epistemic position* to determine guilt or innocence:

When only one agency actually exercises the right to prohibit others from using their unreliable procedures for enforcing justice, that makes it the *de facto* state. Our rationale for this prohibition rests on the ignorance, uncertainty, and lack of knowledge of people. In some situations, it is not known whether a particular person performed a certain action, and procedures for finding this out differ in reliability or fairness. (1974: 140–141)

It seems to me, however, that the situation is more complicated: may not a client of the agency who wants to enact self-help justice (for example because he thinks that the procedure of his agency will give the wrong result in his case) simply do so if he also revokes his consent to transfer his right to exact compensation to the agency, i.e. becomes an independent? If he is judged guilty by the agency and quarreling with one of its members, such an independent will then have to fight the agency. If he is in conflict with another independent, however, this will be none of the agency's business – he may enact self-help justice and then join the agency again.

We have to distinguish between compensation and punishment: when I am wronged and at the time of the violation of my rights a member of the agency, I have a right to be compensated, but have transferred the right to enforce this right to the agency I am a member of. I have previously agreed to let the agency adjudicate my claim to compensation; I can forfeit it, but can not ask for more than the agency determines as just. The victim of the crime has no right, however, that the perpetrator be punished; no one owns the punishment of the perpetrator to anyone else than to the perpetrator himself (1974: 138). The right to punish the perpetrator belongs to the agency alone, on the grounds that it is a public good that is violated (if the perpetrator would not be punished, all its clients would be made more fearful and less secure).

Step 6. The ultraminimalist state extends its protection to everyone. The step from the ultraminimalist to the minimalist state is to extend the agency's protection to the independents, for free or at a lower prize than the one its clients have to pay. This is justified by the principle of compensation, on the grounds that the agency forbids them to enact self-help justice against its own clients:

If the protective agency deems the independents' procedures for enforcing their own rights insufficiently reliable or fair when applied to its clients, it will prohibit the independents from such self-help enforcement. The grounds for this prohibition are that the self-help enforcement imposes risks of danger on its clients. Since the prohibition makes it impossible for the independents credibly to threaten to punish clients who violate their rights, it makes them unable to protect themselves from harm and seriously disadvantages the independents in their daily activities and life. [...] The clients of the protective agency [...] must compensate the independents for the disadvantages imposed upon them by being prohibited self-help enforcement of their own rights against the agency's clients. Undoubtedly, the least expensive way to compensate the independents would be to supply them with protective services to cover those situations of conflict with the paying customers of the protective agency. (1974: 110)

The coverage offered for free only applies to conflicts between the newcomers and the old clients of the agency; but as the agency becomes more dominant, there are less and less independents and more clients. The requirement for the agency (ie. its clients) to do so is a *moral* one:

...the agency protects those nonclients in its territory whom it prohibits from using self-help enforcement procedures on its clients, in their dealings with its clients, even if such protection must be financed (in apparent redistributive fashion) by its clients. It is morally required to do this by the principle of compensation, which requires those who act in self-protection in order to increase their own security to compensate those they prohibit from doing risky acts which might actually have turned out to be harmless for the disadvantages imposed upon them. (1974: 114)

Who is “everyone”? This matters a lot because it directly affects the costs of the seemingly redistributive policy. In circumscribing the intended domain of application of the monopoly, Nozick shifts from ‘posing a risk if applying an unreliable procedure’, via ‘those whose use of self-help justice is prohibited’, to ‘everyone’ – is this transition legitimate?

There is another inequality in the provision of protection by the dominant agency: it may offer more protection to some and less to other. In what way do the arguments for redistribution carry over to this case?

The dominant association which is the territory’s “sole effective judge over the permissibility of violence” (1974: 118) is *the* state in that territory.

5.2 Rights as Side-Constraints

Starting from a strong conception of individual rights, Nozick characterises them as boundaries, as grounds of the absolute inviolability of the individual. Nozick’s rights are

- omissive / negative: my rights determine what prohibitions, what you have the obligation not to do and are rights to be left alone in certain ways;
- absolute: a violation of a right is wrong per se, and is right under no circumstances;
- owned: individuals have an absolute power to consent: rights are not violated if I consent to the boundary crossing.

Nozick’s criticism of utilitarianism extends to a criticism of an “utilitarianism of rights”, which takes the minimization of right-violation to be the moral goal. To this goal-directed structure, he opposes the side-constraint structure, which maximises its goal insofar as maximising it does not violate the constraints. This difference accounts for a moral difference between actions and omissions:

The position held by this proponent of the ultraminimal state will be a consistent one if his conception of rights holds that your being *forced* to contribute to another’s welfare violates your rights, whereas someone else’s not providing you with things you need greatly, including things essential to the protection of your rights, does not *itself* violate your rights, even though it avoids making it more difficult for someone else to violate them. (1974: 30)

Nozick argues for the rationality of the imposition of side-constraints on the grounds that individuals are inviolable, ends and not merely means.

Someone is used as a means, according to Nozick, if he does not consent to the use she is put, or, at least “stands to gain enough from the exchange so that he is willing to go through with it” (1974: 31). It is this *hypothetical* consent that matters morally:

Another party, however, who would not choose to interact with you if he knew of the uses to which you intend to put his actions or good, is being used as a means, even if he receives enough to choose (in his ignorance) to interact with you. (“All along, you were just using me” can be said by someone who chose to interact only because he was ignorant of another’s goals and of the uses to which he himself would be put.) Is it morally incumbent upon someone to reveal his intended uses of an interaction if he has good reason to believe the other would refuse to interact if he knew? Is he using the other person, if he does not reveal this? And what of the cases where the other does not choose to be of use

at all? In getting pleasure from seeing an attractive person go by, does one use the other solely as a means? [fn. 3] Does someone so use an object of sexual fantasies? (1974: 31–32)

I find this a very interesting passage (the questions are rhetorical, Nozick's answer is in the affirmative), especially footnote 3, which reads

Which does which? Often a useful question to ask, as in the following:

- “What is the difference between a Zen master and an analytic philosopher?”
- “One talks riddles and the other riddles talks.” (1974: 337)

The ‘which does which’ question points to the possibility that the “being used as a means / tool” relation may be symmetric. I use the person I am leching after as a means if he did not (or would not) consent to being used by me for my pleasure; he uses me as a means if I did not (or would not) consent to being stimulated in this way. I may myself using myself as a tool by bringing me into a situation in which I am used as a tool in this way; and so may he. By using him as a tool (by leching after him without his consent) for something he did voluntarily and in knowledge of the consequences (he saw me standing by and knows my reaction, but does not consent to it), he is using *himself* as a tool (by making me use him as a tool).

Interesting as it is, Nozick immediately stops this discussion:

These and related questions raise very interesting issues for moral philosophy; but not, I think, for political philosophy.

Political philosophy is concerned only with certain ways that persons may not use others; primarily, physically aggressing against them. (1974: 32)

But is this right? Is not political philosophy more broadly concerned with *political* rights and obligations, i.e. those that arise in the political arena in virtue of our social interactions within a political community?

Someone may make such claims with respect to what they might call “the inauthentic life” in today’s consumerist society. Public publicity, it may be argued, uses me as a tool and makes it practically inevitable for me not to use myself as a tool – this may violate my rights, and give me a right to protect myself against it.

More speculatively, perhaps moral obligations more generally arise from the symmetry in cases where each one of two parties uses the other as a tool. The drowning child uses me as a means to survive, and uses itself as a tool by so using me. This may be said to create two correlative moral positions: my right not to be so used (a negative non-interference right, which makes my saving the child supererogatory), but also an obligation to help the child live the moral life (not to be used as a tool by herself), i.e. to prevent it from getting into a situation where it has to rely on the help of people who did not (or would not) consent to helping her.

Even more speculatively, we can extend this case to the celebrity and the influencer. The celebrity uses me, and is used in my use – my obligation is to help her not to become a celebrity or to cease to be a celebrity.

My right to protect myself from physical aggression allows “the use of force in defense against another party who is a threat” (1974: 34–35), including

- innocent threats (such as babies that may be aborted);
- innocent shields of threats (necessarily harmed in the defense against the threat).

In the first case, you become an innocent threat to the other as well; both parties have the right to self-defense (assuming that they cannot avoid being threats to each other); in the second case, the shield (assuming they cannot avoid being threats to you) also is entitled to self-defense. In both cases, we may get wars where both sides are right.

Nozick further illustrates his conception of rights by a powerful criticism of “Kantianism for people, negative utilitarianism for animals” and by the thought-experiment of the experience machine. He suggests (implicitly) that we should be Kantians as well for at least those animals who would not use the experience machine.

Prohibition and Compensation

Nozick compares two moral views on harm = violation of rights (or, at least, such violations as you do not consent to):

- harm is forbidden and is punished;
- harm is permitted provided it is compensated.

Both the deterrence theory of punishment and the retribution theory of punishment fail. The second, because it cannot impose a maximum on the retribution, but must factor in the possibly indefinitely small chance of detection. The first faces the same dilemma with respect to the question how much deterrence is to be achieved. The second is in a slightly better position because it is not committed to assigning less weight to the happiness of the perpetrator than to the happiness of the victim.

Harms fall into the first category and should be forbidden if their possibility (and probability) causes fear among those who do not suffer it:

Some things we would fear, even knowing we shall be compensated fully for their happening or being done to us. To avoid such general apprehension and fear, these acts are prohibited and made punishable. (1974: 66)

Such public wrongs ('wrongs having a public component') should be punished not only because of the fear their possibility arouses, but also because of the fear their non-prohibition (and non-punishment) *would* arouse.

Risky activities may be forbidden as well, though their potential agents must be compensated for this prohibition. This is the so-called "principle of compensation":

...those who are *disadvantaged* by being forbidden to do actions that only *might* harm others must be compensated for these disadvantages foisted upon them in order to provide security for the others. (1974: 82-83)

5.3 The Entitlement Theory

With respect to the topic of 'distributive justice' (a term Nozick dislikes), he defends the so-called "entitlement theory", consisting of three principles, for which, though he refuses to "specify the details" (1974: 153), he gives necessary conditions (1974: 160):

- original acquisition of holdings: someone is entitled to a holding if she *makes* it out of things she is entitled to;
- transfer of holdings: a transfer of holdings creates entitlement if it is the product of a (free?) choice;
- rectification of injustice in holdings;

(Only!) together with an inductive base (a distribution singled out as just), the following inductive definition then defines what a just distribution is: a distribution is just iff it arises out of a just distribution by the following inductive steps:

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. (1974: 151)

Rectification of injustice must be possible as well, and it creates a just situation by re-attributing holdings from people who are not entitled to them.

The entitlement theory is a historical, rather than an end-state theory of justice, because it makes justice turn on the past. More precisely, justice is inherited if historical developments from an initial just situation satisfy some side-constraints.

How is initial entitlement created? One way is by “making” things:

Whoever makes something, having bought or contracted for all other held resources used in the process (transferring some of his holdings for these cooperating factors), is entitled to it. The situation is *not* one of something’s getting made, and there being an open question of who is to get it. Things come into the world already attached to people having entitlements over them. (1974: 160)

Discussing ‘Lockean’ rights, Nozick speaks of each person “having a right to reap the benefits of what he did” (1974: 171). Earlier on, he agreed with the socialists that workers own the fruits of their labor:

One traditional socialist view is that workers are entitled to the product and full fruits of their labor; they have earned it; a distribution is unjust if it does not give the workers what they are entitled to. [...] This socialist rightly, in my view, holds onto the notions of earning, producing, entitlement, desert, and so forth ... (1974: 154, 155)

Property rights and the Lockean proviso

Free actions, in particular (doubly) free transactions, are important transmitters of justice, because they entitle their actors to a right of non-interference against all others:

By what process could such a transfer among two persons give rise to a legitimate claim of distributive justice on a portion of what was transferred, by a third party who had no claim of justice on any holding of the others *before* the transfer? (1974: 161–162)

This is an important strand of classical liberalism in Nozick: what consenting adults do among themselves is no business to anyone else, unless that other party is disadvantaged by it, where being disadvantaged by a transaction is understood as having “a claim of justice” on its object. This claim is justified in a footnote just following the quoted passage:

Might not a transfer have instrumental effects on a third party, changing his feasible options? (But what if the two parties to the transfer independently had used their holdings in this fashion?) I discuss this question below, but note here that this question concedes the point for distributions of ultimate intrinsic noninstrumental goods (pure utility experiences, so to speak) that are transferrable. It also might be objected that the transfer might make a third party more envious because it worsens his position relative to someone else. I find it incomprehensible how this can be thought to involve a claim of justice. [...] (1974: 162, fn.)

The potentially adverse effects of consensual trading on third parties is further illustrated (by analogy) in the discussion of Lockean original appropriation. The right to such appropriating – making yours what did not belong to anyone – is one of Locke’s ‘natural’ rights and is claimed only under the proviso that there be “enough and as good left in common for others”, where this is understood as “left to use”, not as “left to appropriate” (1974: 176):

Is the situation of persons who are unable to appropriate (there being no more accessible and useful unowned objects) worsened by a system allowing appropriation and permanent property? Here enter the various familiar social considerations favoring private property: it increases the social product by putting means of production in the hands of those who can use them most efficiently (profitably); experimentation is encouraged, because with separate persons controlling resources, there is no one person or small group whom someone with a new idea must convince to try it out; private property enables people to decide on the pattern and types of risks they wish to bear, leading to specialized types of risk bearing; private property protects future persons by leading some to hold back resources from current consumption for future markets; it provides alternate sources of employment for unpopular persons who don’t have to convince any one person or small group to hire them, and so on. (1974: 177)

These utilitarian arguments, however, are arguments for the institution of private property as such; they fall well short, however, as providing even a schema for principles of just original acquisition of holdings, for such principles have to cover the question to what fruits of one's labour one is entitled. To how much is the derivatives trader entitled who 'earns' a million in five minutes (and 'loses' another one in the next five minutes)? The reason most people are unable to appropriate in this way is not a scarcity of unowned objects, but rather the special position the trader occupies within a societal system. To the degree the position of others is worsened by my original appropriation, I owe them compensation:

A process normally giving rise to a permanent bequeathable property right in a previously unowned thing will not do so if the position of others no longer at liberty to use the thing is thereby worsened. (1974: 178)

By unjust appropriation, rights to compensation are created on the behalf of others, but also no property rights are created:

Once it is known that someone's ownership runs afoul of the Lockean proviso, there are stringent limits on what he may do with (what it is difficult any longer unreservedly to call) "his property." Thus a person may not appropriate the only water hole in a desert and charge what he will. Nor may he charge what he will if he possesses one, and unfortunately it happens that all the water holes in the desert dry up, except for his. This unfortunate circumstance, admittedly no fault of his, brings into operation the Lockean proviso and limits his property rights. [fn.: "The situation would be different if his water hole didn't dry up, due to special precautions he took to prevent this. Compare our discussion of the case in the text with Hayek, *The Constitution of Liberty*, p. 136; and also with Ronald Hamowy, "Hayek's Concept of Freedom; A Critique," *New Individualist Review*, April 1961, pp. 28-31."] (1974: 180)

This takes some unpacking. Nozick follows Hayek in understanding freedom as the absence of coercion, or rather "that condition of men in which coercion of some by others is reduced as much as is possible in society" (Hayek 2011: 57). The Lockean proviso defines the acceptable minimum of coercion and thus sets limits to property rights – I only own what I have (what I have originally acquired or what has been transferred to me from the owner) to the extent that my owning it does not make the situation of others worse than their baseline situation. This 'baseline situation' is set, without much argument, very low, lower than what others need to survive, and so we can forget about it:

I believe that the free operation of a market system will not actually run afoul of the Lockean proviso. [...] If this is correct, the proviso will not play a very important role in the activities of protective agencies and will not provide a significant opportunity for future state action. (1974: 182)

With this, Hayek agrees:

So long as the services of a particular person are not crucial to my existence or the preservation of what I most value, the conditions he exacts for rendering these services cannot properly be called "coercion." [...] ...unless a monopolist is in a position to withhold an indispensable supply, he cannot exercise coercion, however unpleasant his demands may be for those who rely on his services. (Hayek 2011: 203)

The first sentence of the footnote may indicate that Nozick thinks (with Hamowy) that Hayek goes too far: that the owner of the only water, if he is responsible for its being available at all, may refuse to sell it at any price and let all others die. Here, the 'baseline' would be that without the owner's actions, the others would die anyway. Again, we have an important, morally and politically crucial asymmetry between action and omission, loss and forsaken gains. I am not entitled to take away from others what they need to live, but under no obligation to give them what they need or want.

The unimportance of the Lockean proviso explains, to some extent at least, why Nozick thinks that any deviation from the entitlement principles will violate some rights:

Since deviation from the first two principles of justice (in acquisition and transfer) will involve other persons' direct and aggressive intervention to violate rights, and since moral constraints will not exclude defensive or retributive action in such cases, the entitlement theorist's problem [with rectification actions that violate moral constraints] rarely will be pressing. (1974: 173)

The implicit assumption here is that if I take more than I am entitled to (and thus violate the principles of justice in the acquisition of holdings) then this is because I am taking it from someone who is entitled to it – this person will then have a rectification right against and I may justly be punished.

Self-ownership and Autonomy

That the state, or anyone else, has no right to intervene in what people freely do is a consequence, for Nozick, of the fact that people own themselves and are entitled to owning themselves. They own their time in the same way they own their holdings and their earnings. This is why “[t]axation of earnings from labor is on a par with forced labor” (1974: 169). Stealing one's time is equivalent to stealing what one could earn during this time:

...if it would be illegitimate for a tax system to seize some of a man's leisure (forced labor) for the purpose of serving the needy, how can it be legitimate for a tax system to seize some of a man's goods for that purpose? Why should we treat the man whose happiness requires certain material goods or services differently from the man whose preferences and desires make such goods unnecessary for his happiness? Why should the man who prefers seeing a movie (and who has to earn money for a ticket) be open to the required call to aid the needy, while the person who prefers looking at a sunset (and hence need earn no extra money) is not? Indeed, isn't it surprising that redistributionists choose to ignore the man whose pleasures are so easily attainable without extra labor, while adding yet another burden to the poor unfortunate who must work for his pleasures? If anything, one would have expected the reverse. (1974: 170)

Surely, this claim has to be qualified: taxing someone on what she has earned is a historical principle, taking into account the contingencies of the actual world; but how could we tax someone on what she *could* have earned? how realistic has this estimate to be and how far back could such a claim reach? do we indebt ourselves by not working as long as we possible could, or even by not earning as much as we could, in principle, in practice, if we were lucky?

The equivalence between the way you own your time and the way you own your earnings is central to Nozick's claim that redistributive claims treat people as means, not as ends:

Seizing the results of someone's labor is equivalent to seizing hours from him and directing him to carry on various activities. If people force you to do certain work, or unrewarded work, for a certain period of time, they decide what you are to do and what purposes your work is to serve apart from your decisions. This process whereby they take this decision from you makes them a *part-owner* of you; it gives them a property right in you. (1974: 172)

Again, however, the details are murky: the claimed “equivalence” is not easily cashed out. To the seizing of what is my own hour of forced labour equivalent? To what I would have earned in an hour in my normal job, or what I could have earned during this time in another job, or if I would have been lucky (I could be a professional gambler) or to what I in fact *lost* during my hour of stock-market investment? If I am a bad trader and regularly losing money (my own and my clients'), should I *pay* others to force me to shovel away snow?

5.4 The Argument against Patterned Principles of Distribution

Against paternalism: Only your own actions may bind you

As part of his general anti-paternalist argument, Nozick discusses Hart's "principle of fairness" which obliges those profiting from a pact to join it, or more exactly:

...when a number of persons engage in a just, mutually advantageous, cooperative venture according to rules and thus restrain their liberty in ways necessary to yield advantages for all, those who have submitted to these restrictions have a right to similar acquiescence on the part of those who have benefited from their submission. (1974: 90)

Nozick argues against this principle by the counterexample of the community radio:

Suppose some of the people in your neighborhood (there are 364 other adults) have found a public address system and decide to institute a system of public entertainment. They post a list of names, one for each day, yours among them. On his assigned day (one can easily switch days) a person is to run the public address system, play records over it, give news bulletins, tell amusing stories he has heard, and so on. After 363 days on which each person has done his part, your day arrives. Are you obligated to take your turn? You have benefited from it, occasionally opening your window to listen, enjoying some music or chuckling at someone's funny story. The other people have put themselves out. But must you answer the call when it is your turn to do so? As it stands, surely not. Though you benefit from the arrangement, you may know all along that 364 days of entertainment supplied by others will not be worth your giving up one day. You would rather not have any of it and not give up a day than have it all and spend one of your days at it. (1974: 93)

Quite surprisingly, Nozick makes an even stronger claim: you're not even obliged to cooperate if you have *nothing* better to do:

The benefits might only barely be worth the costs to you of doing your share, yet others might benefit from this institution much more than you do; they all treasure listening to the public broadcasts. As the person least benefited by the practice, are you obligated to do an equal amount for it? Or perhaps you would prefer that all cooperated in another venture, limiting their conduct and making sacrifices for it. It is true, given that they are not following your plan (and thus limiting what other options are available to you), that the benefits of their venture are worth to you the costs of your cooperation. However, you do not wish to cooperate, as part of your plan to focus their attention on your alternative proposal which they have ignored or not given, in your view at least, its proper due. (You want them, for example, to read the Talmud on the radio instead of the philosophy they are reading.) By lending the institution (their institution) the support of your cooperating in it, you will only make it harder to change or alter. (1974: 94-95)

This is an interesting argument, because the second consideration seems to give the one unwilling to cooperate a right against the institution *as such*. It also underscores the importance of the right not to choose – one may refrain from participating in a collective activity, even if it benefits one and one has nothing better to do, just because it is a *collective* activity.

How Liberty Upsets Patterns

Nozick's case against redistribution rests on the assumption that while individuals have inviolable rights which have to be respected as side-constraints, nothing else (no social entity) has any such rights:

Side constraints express the inviolability of other persons. But why may not one violate persons for the greater social good? Individually, we each sometimes choose to undergo some pain or sacrifice

for a greater benefit or to avoid a greater harm: we go to the dentist to avoid worse suffering later; we do some unpleasant work for its results; some persons diet to improve their health or looks; some save money to support themselves when they are older. In each case, some cost is borne for the sake of the greater overall good. Why not, *similarly*, hold that some persons have to bear some costs that benefit other persons more, for the sake of the overall social good? But there is no *social entity* with a good that undergoes some sacrifice for its own good. There are only individual people, different individual people, with their own individual lives. Using one of these people for the benefit of others, uses him and benefits the others. Nothing more. What happens is that something is done to him for the sake of others. Talk of an overall social good covers this up. (Intentionally?) To use a person in this way does not sufficiently respect and take account of the fact that he is a separate person, that his is the only life he has. *He* does not get some overbalancing good from his sacrifice, and no one is entitled to force this upon him – least of all a state or government that claims his allegiance (as other individuals do not) and that therefore scrupulously must be *neutral* between its citizens. (1974: 32–33, fn. omitted)

The Wilt Chamberlain example illustrates “how liberty upsets patterns”:

It is not clear how those holding alternative conceptions of distributive justice can reject the entitlement conception of justice in holdings. For 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. (Also suppose contracts run only for a year, with players being free agents.) He signs the following sort of contract with a team: In each home game, twenty-five cents from the price of each ticket of admission goes to him. (We ignore the question of whether he is “gouging” the owners, letting them look out for themselves.) The season starts, and people cheerfully attend his team’s games; they buy their tickets, each time dropping a separate twenty-five cents of their admission price into a special box with Chamberlain’s name on it. They are excited about seeing him play; it is worth the total admission price to them. Let us suppose that in one season one million persons attend his home games, and Wilt Chamberlain winds up with \$ 250’000, a much larger sum than the average income and larger even than anyone else has. Is he entitled to this income? Is this new distribution D_2 , unjust? If so, why? There is *no* question about whether each of the people was entitled to the control over the resources they held in D_1 ; because that was the distribution (your favorite) that (for the purposes of argument) we assumed was acceptable. Each of these persons chose to give twenty-five cents of their money to Chamberlain. They could have spent it on going to the movies, or on candy bars, or on copies of *Dissent* magazine, or of *Montly Review* [sic]. But they all, at least one million of them, converged on giving it to Wilt Chamberlain in exchange for watching him play basketball. If D_1 was a just distribution, and people voluntarily moved from it to D_2 , transferring parts of their shares they were given under D_1 (what was it for if not to do something with?), isn’t D_2 also just? (1974: 160–161)

The question, of course, is rhetorical: D_2 *is* just, in the sense that “there is nothing that anyone has that anyone else has a claim of justice against”. The example is to illustrate two separate points:

- critical: redistributive, “patterned” theories of justice are (at best) *incomplete*; for any distribution they declare just, there is another distribution, resulting from free actions in a just way, which is also just, but do not satisfy the desired pattern of holdings;
- positive: because just about any distribution can be imagined to have created by just steps from a just distribution in this way; and because such a distribution will be just, by the principle that just changes to a just distribution do not create an unjust distribution; patterns do not determine justice, and justice does not depend on patterns, but *solely* on history.

He then invokes the principle of justice in transfer of holdings, generalising it to every “free” action:

The general point illustrated by the Wilt Chamberlain example and the example of the entrepreneur in a socialist society is that no end-state principle or distributional patterned principle of justice can be continuously realized without continuous interference with people's lives. Any favored pattern would be transformed into one unfavored by the principle, by people choosing to act in various ways; for example, by people exchanging goods and services with other people, or giving things to other people, things the transferrers are entitled to under the favored distributional pattern. To maintain a pattern one must either continually interfere to stop people from transferring resources as they wish to, or continually (or periodically) interfere to take from some persons resources that others for some reason chose to transfer to them. (1974: 163)

The problem with such interference is not just that it is an unjust taking from people of things they are entitled to; it itself is unjust because it attributes rights that no one has, either to the state (who does not have rights other than those justly conferred to it) or to individual people (who have no rights on others). Patterned principles of justice wrongly assume that people have rights over others.

The Wilt Chamberlain example brings out another feature of pattern-based (i.e. substantial, not just procedural) principles of distributive justice: they are in principle unable to respect strong property rights (i.e. rights in things that are among the things to be distributed according to a certain pattern). In Rawls' just society, Nozick would say, none of your holdings is really yours, because almost anything you could do with it would produce an unjust distribution and thus is forbidden – but what good is it to receive your fair share of primary goods if you cannot do anything with them? This consequence was noted, and happily embraced, by Thomas Nagel:

...absolute entitlement to property is not what would be allocated to people under a partially egalitarian distribution. Possession would confer the kind of qualified entitlement that exists in a system under which taxes and other conditions are arranged to preserve certain features of the distribution, while permitting choice, use, and exchange of property compatible with it. What someone holds under such a system will not be *his property* in the unqualified sense of Nozick's system of entitlement. (Nagel 1975: 147)

5.5 Nozick's Criticism of Rawls

In the second part of the seventh chapter, Nozick articulates six arguments against Rawls' theory of justice.

1. **Nothing to distribute.** Nozick denies the very need for Rawlsian principles of justice, on the grounds that there is nothing unowned and thus nothing to be distributed, even in the case where social cooperation creates extra value. This extra value, even by Rawls' own lights, is attributable to specific people and these are thus entitled to it. **Answer.** Rawls' theory requires attributability to positions, or representatives, not to actual people: behind the veil of ignorance, we can decide that there will be a role of administrator, for example, and to give this person more than the equal share; if the position is filled in a fair competition, the person chosen will be entitled to their extra gain, but could not claim these gains before it, just on the grounds of their talents that made them the right candidates for the jobs.

2. **Voluntariness.** Nozick disputes the claim that the retrospective assessment by the better-endowed of the distribution will be positive, that "those worse endowed could expect the willing cooperation of others" (1974: 192), on the grounds that the better endowed will reason, and reason correctly, that they would be better off if their scheme of social cooperation involved only themselves, and not also the worse endowed, and thus that the worse endowed gain *more* from the cooperation than they do. **Answer.** This criticism is an *ignoratio elenchi*, a tendentious misconstrual of Rawls, as Nozick himself dimly realises (1974: 196, fn.): even after the social contract is concluded, it can only be evaluated from the point of view of the original position, i.e. abstracting from whether or not one belongs to the better or worse endowed.³ The retrospective justification stems from the self-binding, of which we can convince ourselves in the following way: independently of where we now stand in society, the position we are

3. Nozick is right that Rawls talks in some places (pp. 15, 103 of the original edition) of justifying the principles of justice to the more or less well endowed, but that is just a mistake on Rawls' part.

occupying is one that receives its fair share of the total amount of distributable basic goods – fair in the sense that rational and reasonable people abstracting from irrelevant considerations would have decided to allot it such a share.

3. **Historicity and processes.** Nozick claims that the requirement that principles of justice be chosen behind a veil of ignorance excludes historical principles because it makes it impossible for people to evaluate their options in their best interest:

The nature of the decision problem facing persons deciding upon principles in an original position behind a veil of ignorance limits them to end-state principles of distribution. The self-interested person evaluates any non-end-state principle on the basis of how it works out for him; his calculations about any principle focus on how he ends up under the principle. (1974: 201)

This exclusion, Nozick claims, constitutes an important bias of the Rawlsian methodology and also makes it impossible to take into account, even to a lesser degree, the principles of justice of acquisition, transfer and rectification:

If historical-entitlement principles are fundamental, then Rawls' construction will yield approximations of them at best; it will produce the wrong sorts of reasons for them, and its derived results sometimes will conflict with the precisely correct principles. The whole procedure of persons choosing principles in Rawls' original position presupposes that no historical-entitlement conception of justice is correct. (1974: 202)

Answer. Nozick forgets about the lexicographically prior first principle: to the extent historical processes have to obey side-constraints, i.e. not violate any rights, these rights have to be considered fundamental and be guaranteed by the first principle. “Distributive justice” only concerns goods over which we do not have absolute rights; and Rawls thinks that property rights fall into this category. For Rawls, nothing is ever really (i.e.: absolutely) yours, not even your talents.

4. **Focus on the basic structure.** Rawls' principles are said to apply to the basic structure of the society; but why are they not supposed to apply to each and every situation? The first principle is ‘distributive’ in this way, why is the difference principle not? Why would it not be just to favour the least well-off always and under all circumstances? Nozick calls principles that allow an unjust distribution to ‘emerge’ from a just one by ‘deletion’ (i.e.: abstraction) of some people and their shares “organic”:

The difference principle *is* organic. If the least well-off group and their holdings are deleted from a situation, there is no guarantee that the resulting situation and distribution will maximize the position of the new least well-off group. Perhaps that new bottom group could have more if the top group had even less (though there was no way to transfer from the top group to the previous bottom group). [fn.: “The difference principle thus creates two conflicts of interest: between those at the top and those at bottom; and between those in the middle and those at bottom, for if those at bottom were gone the difference principle might apply to improve the position of those in the middle, who would become the new bottom group whose position is to be maximized.”] (1974: 209)

Answer. Nozick is wrong to characterise this as a “conflict of interest”; rather, it is *ressentiment*, a “a psychological state resulting from suppressed feelings of envy and hatred which cannot be satisfied”. “If those at bottom were gone” can *only* mean (consistent with the priority of the first principle) that they would be better off, i.e. no longer “at bottom”, but if this is what it means then the supposed ‘conflict of interest’ does not make sense.⁴

5. **Arbitrariness.** Rawls considers the “initial distribution of income and wealth, and of natural talents and abilities” (1999c: 62) as morally irrelevant because he considers it to be arbitrary. Nozick rejects this conception, on the basis that they are also the results of choices and that past choices determine entitlement and merit:

4. Incidentally, Nozick is wrong to think that his entitlement principles are “aggregative” (1974: 210), i.e. are such that any combination of just distributions is a just distribution: for new people will bring new entitlements, and some acquisitions that were just will turn out unjust, as they concern things to which some of the new people are entitled.

This line of argument can succeed in blocking the introduction of a person's autonomous choices and actions (and their results) only by attributing *everything* noteworthy about the person completely to certain sorts of "external" factors. So denigrating a person's autonomy and prime responsibility for his actions is a risky line to take for a theory that otherwise wishes to buttress the dignity and self-respect of autonomous beings; especially for a theory that founds so much (including a theory of the good) upon persons' choices. One doubts that the unexalted picture of human beings Rawls' theory presupposes and rests upon can be made to fit together with the view of human dignity it is designed to lead to and embody. (1974: 214)

Part of our autonomy, Nozick contends, is that we are entitled to our natural assets, whether or not we also deserve them. Even if the distribution of natural assets is morally arbitrary, and if the distribution of holdings depends on them, this does not make the distribution of holdings morally arbitrary. Nozick generalises this claim, asking why it is that inequality needs special justification:

Why must differences between persons be justified? Why think that we must change, or remedy, or compensate for any inequality which can be changed, remedied, or compensated for? (1974: 223)

Answer. To consider natural and social inequalities to be morally irrelevant is not to 'denigrate' people's autonomy, because their unequal worth is itself a product of society and of social decisions. If tall people earn more in fruit-picking, e.g., this is because their potential for higher productivity is *regarded* as deserving a higher wage, a choice that may be understandable, but may nevertheless be considered unjust. If we decide to pay fruit-pickers relative to their height, we make a morally relevant choice which we have to justify to a fruit-picker who claims to be discriminated against by earning less just because she is short.

6. **Collectivism.** Rawls' original position concerns the distribution of the totality of primary goods, taking into account the unequal distribution of 'natural talents' and compensating for it by a correspondingly unequal distribution of attributable goods. Nozick wonders whether restrictions would have to be placed on the use people make of their talents, prohibiting for example their non-use for the benefit of others, and considers such restrictions unjust. **Answer.** This again presupposes that it is a natural, non-social, not morally relevant fact what counts as a talent. What the socially useful talents are, however, is part of what the people in the original decision decide, by construing positions that receive a higher share of primary goods in order to benefit the worst-off. If height, e.g., is rewarded for fruit-pickers, for example, then this is a violation of strict equality of opportunity which has to be justified, and can be justified only by the difference principle.

Chapter 6

Nozick: Criticism

6.1 Absolute Rights

Arneson (2011) has argued against the absoluteness of Nozick's side-constraints, on the basis that hypothetical consent is enough to satisfy the Kantian injunction not to treat others as means:

Nozick just assumes that given a background in which people are not interacting and none is harming anyone in ways that count as libertarian rights violations, forcing someone to act as one wills (who has not consented to be so treated) is immediately and obviously morally wrong. But once one has in mind the possibility that my refusal actually to consent to what you propose may reflect grotesque stupidity on my part or my horrible failure to show due consideration for myself or for other persons or both things together, Nozick's assumption looks to be flatly wrong. (Arneson 2011: 16)

This is paternalistic. Let us assume that the person whose rights are at stake could, in principle, consent, i.e. satisfies minimal physiological requirements to give consent in a way that most jurisdictions and common sense would consider binding. If this assumption is not satisfied, it is plausible not that person's consent, actual or hypothetical, that matters, but her guardian's or someone institutionally authorised to represent her interests. The same may hold, perhaps with restrictions, for situations of urgency, when the person's consent can not be obtained, nor its hypothetical consent empirically determined. In all other cases, however, Nozick is right that only actual consent can legitimize a violation of rights. To say otherwise, is to denigrate the person's autonomy, to substitute for the right they have over themselves a set of abstract considerations, *X*, which are taken to *determine* their hypothetical consent; "hypothetical consent" could then just be replaced by *X*. Paternalism is in full force: *we*, the attributors of hypothetical consent will determine whether *X* applies to the given case, and use our interpretation of *X* (and of 'the given case') as our guide; we will decide for her and to say that we do so 'on her behalf' or 'for her best' is an excuse the right to which we have not earned.¹

How is the absoluteness of Nozick's rights as side-constraints compatible with the possibility of compensation?

Here are some considerations Nagel clearly means as a criticism of Nozick:

It is far less plausible to maintain that taking some of an innocent man's property is an impermissible means for the prevention of a serious evil, than it is to maintain that killing him is impermissible. These rights vary in importance and some are not absolute even in the state of nature. (Nagel 1975: 142)

Nagel then cites the passage about the inviolability of persons quoted above (p. 41) and says he sees no need to invoke "the silly idea of a social entity" to conclude that sometimes "a benefit to one or more persons can [...]

1. How low the bar is set by (the attribution of) "grotesque stupidity" may be seen by comparison with the much more tolerant defense of "gambling, or drunkenness, or incontinence, or idleness, or uncleanness," by John Stuart Mill (*On Liberty*, ?: 280).

outweigh a cost borne by someone else”. He misses, however, Nozick’s point: who is he to determine that some person, call her Ivanka, is to bear a burden for the sake of some others? Does she not have at least have the right to be compensated? Nagel, of course, is free to sacrifice himself for the benefit of others; but who or what gives him the right to impose such sacrifice on Ivanka?

As Nagel’s continuation makes clear, he operates with a drastically more restrictive notion of ‘right’ or ‘violation of right’ than Nozick:

The fact that each person’s life is the only one he has does not render us incapable of making these judgments, and if a choice among such alternatives does not involve the violation of any rights or entitlements, but only the allocation of limited time or resources, then we regard those comparisons as excellent reasons for picking one alternative rather than the other. If we can help either 10 people or one person, not included in the 10, and we help the 10, then we can say that rescue of the 10 outweighs the loss of the one, despite the fact that he does not get some overbalancing good from his sacrifice, and his is the only life he has. (Nagel 1975: 143)

Either Nagel requires that a violation is intentional, premeditated or desired-as-such, or he does not recognise a right to live. If I let one die in order to save 10, then one person’s right to live is violated, and this as a consequence of my action (or, at least: as a consequence of an omission of mine). That I do the right thing, that my action is excusable, understandable, perhaps even commendable, does not show that no right of his has been violated, nor that in the alternative course of actions not more rights would have been violated.²

More generally, we can draw an important lesson from Nozick’s discussion, that is, as far as I can see, almost universally ignored in the relevant literature: it is pointless and in principle inadequate to answer questions about rights by asking ‘what should be done’ questions concerning fancy trolley-type examples and utilitarian weighing up of good and bad consequences of your action alternatives.³ Answers to such questions just do not teach us anything about what and whose rights were or were not violated, but at best whether it was excusable, permissible or even good to violate someone’s rights.

6.2 Against the Entitlement Theory

We have seen that Nozick’s own theory and his criticism of end-state theories rest on two apparently plausible claims:

making You are entitled to what you make out of things you are entitled to (and entitled to use in this way).

giving Anyone is entitled to what of the things you are entitled to you freely give to them.

How plausible are these principles? How do they have to be cashed out to be acceptable in full generality?

One requirement of the first principle is that what you make is a *thing*, something one can be entitled to, i.e. legitimately own. Some of the things you make are not of this kind: if you ‘make’ a hole in the Ozone layer, a forest fire, a pollution of a river, or a beautiful scenery, you may be said to be responsible for the consequences of your actions, but these consequences are temporally and spatially bounded and not ‘owable’ in the paradigmatic sense of the word.

The same restrictions seem to apply to the second principle: not everything ownable is givable, and not everything givable is ownable. Another, epistemic, restriction is probably needed for “freely”: free giving in this sense requires some knowledge, or at least in-principle access to relevant information, about what you give, and possible uses the other could make of what you give.

2. I therefore simply do not see the justification to summarise Nozick’s point, as e.g. Arneson (2011: 20) does, as a “denial of interpersonal comparisons of good” (even more so if they are said to be grounded in “skepticism about the coherence of commensurability of the good” (2011: 22)). Nozick’s point is just that such comparisons do not undo the violation of someone’s right.

3. Some examples of such procedures are: Arneson (2011: 30–31). ADD OTHERS

6.3 The Illegitimacy of Property

This gives us the acceptable argument *G*:

1. People are entitled to their natural assets.
2. If people are entitled to something, they are entitled to whatever flows from it (via specified types of processes).
3. People's holdings flow from their natural assets.

Therefore,

4. People are entitled to their holdings.
5. If people are entitled to something, then they ought to have it (and this overrides any presumption of equality there may be about holdings).

Whether or not people's natural assets are arbitrary from a moral point of view, they are entitled to them, and to what flows from them. (1974: 225–226)

6.4 Rent Control

The example of the loaned bus also serves against another principle sometimes put forth: that enjoyment and use and occupancy of something over a period of time gives one a title or right over it. Some such principle presumably underlies rent-control laws, which give someone living in an apartment a right to live in it at (close to) a particular rent, even though the market price of the apartment has increased greatly. In a spirit of amity, I might point out to supporters of rent-control laws an even more efficient alternative, utilizing market mechanisms. A defect of rent-control laws is that they are inefficient; in particular they misallocate apartments. Suppose I am living in an apartment for some period of time at a rent of \$ 100 per month, and the market price goes up to \$ 200. Under the rent-control law, I will sit tight in the apartment at \$ 100 per month. But it might be that you are willing to pay \$ 200 per month for the apartment; furthermore, it might well be that I would prefer giving up the apartment if I could receive \$ 200 a month for it. I would prefer to sublet the apartment to you, paying \$ 1200 rent to the owner and receiving \$ 2400 in rent from you for the apartment per year, and I would take some other apartment available on the market, renting at say \$ 150 per month. This would give me \$ 50 extra per month to spend on other things. Living in the apartment (paying \$ 100 per month for it) isn't worth to me the cash difference between its market value and its controlled rent. If I could get this difference, I would be willing to give up the apartment.

This is very easily arranged, if I am allowed freely to sublet the apartment at the market rate, for as long as I wish. I am better off under such an arrangement than under the rent-control laws with out the subletting provision. It gives me an extra option, though it doesn't force me to use it. You are better off, since you get the apartment for \$ 200, which you're willing to pay, whereas you wouldn't get it under the rent-control law with no subletting provision. (Perhaps, during the period of your lease, you may sublet it to yet another person.) The owner of the building is not worse off, since he receives \$ 1200 per year for the apartment in either case. Rent-control laws with subletting provisions allow people to improve their position via voluntary exchange; they are superior to rent-control laws without such provisions, and if the latter is better than no rent control at all, then a fortiori so is rent control with subletting allowed. So why do people find the subletting-allowed system unacceptable? [fn. omitted] Its defect is that it makes explicit the partial expropriation of the owner. Why should the renter of the apartment get the extra money upon the apartment's being sublet, rather than the owner of the building? It is easier to ignore the question of why he should get the subsidy given him by the rent-control law, rather than this value's going to the owner of the building; (1974: 270–271)

6.5 Paternalism and nudging

As part of his argument that there are no good reasons that justify a more than minimal state, Nozick argues that voluntary contribution to some worthy goal is morally better than compulsory taxation even when *everyone* voluntarily contributes. Thomas Nagel disagrees:

Most people are not generous when asked to give voluntarily, and it is unreasonable to ask that they should be. Admittedly there are cases in which a person should do something although it would not be right to force him to do it. But here I believe the reverse is true. Sometimes it is proper to force people to do something even though it is not true that they should do it without being forced. It is acceptable to compel people to contribute to the support of the indigent by automatic taxation, but unreasonable to insist that in the absence of such a system they ought to contribute voluntarily. The latter is an excessively demanding moral position because it requires voluntary decisions that are quite difficult to make. Most people will tolerate a universal system of compulsory taxation without feeling entitled to complain, whereas they would feel justified in refusing an appeal that they contribute the same amount voluntarily. This is partly due to lack of assurance that others would do likewise and fear of relative disadvantage; but it is also a sensible rejection of excessive demands on the will, which can be more irksome than automatic demands on the purse. (Nagel 1975: 146)

Even though it is somewhat commonsensical, this argument is a terrible mess, mixing, at least, the following considerations:

- empirical: we need to be forced because we would not do it otherwise;
- paternalistic: we need to be forced because this makes it easier for us to do it;
- psychological: we need to be forced because otherwise we are psychologically unable to do it;
- political: only a state obligation assures us that there will not be any (unpunished or unpunishable) free-riders;
- fragmentalist: even though it is right for the state to force them, it is not the case that they should do it;
- relativistic: even though they should do it forcedly, it is not the case that they should do it voluntarily.

The first three considerations are out of place and morally irrelevant, and the fourth is discussed by Nozick at some length. The fifth and sixth, imposing a sharp distinction between political and moral obligations, are the most interesting, but also the most problematic.

Chapter 7

Liberalism

7.1 Rawls' Liberalism the priority of the right over the good

According to Rawls, the central characteristic that qualifies his theory of justice as liberal is the priority of the right over the good:

...In a well-ordered society, then, the plans of life of individuals are different in the sense that these plans give prominence to different aims, and persons are left free to determine their good, the views of others being counted as merely advisory. Now this variety in conceptions of the good is itself a good thing, that is, it is rational for members of a well-ordered society to want their plans to be different. [...] The intense convictions of the majority, if they are indeed mere preferences without any foundation in the principles of justice antecedently established, have no weight to begin with. The satisfaction of these feelings has no value that can be put in the scales against the claims of equal liberty. To have a complaint against the conduct and belief of others we must show that their actions injure us, or that the institutions that authorize what they do treat us unjustly. And this means that we must appeal to the principles that we would acknowledge in the original position. Against these principles neither the intensity of feeling nor its being shared by the majority counts for anything. On the contract view, then, the grounds of liberty are completely separate from existing preferences. Indeed, we may think of the principles of justice as an agreement not to take into account certain feelings when assessing the conduct of others. (1999c: 393, 395)

It is precisely this pluralism that speaks against a so-called “private society”, where “each person assesses social arrangements solely as means to his private aims” (Rawls 1999c: 457), and in favour of a “social union”, “a community of humankind the members of which enjoy one another’s excellences and individuality elicited by free institutions, and they recognize the good of each as an element in the complete activity the whole scheme of which is consented to and gives pleasure to all”:

...persons need one another since it is only in active cooperation with others that one’s powers reach fruition. Only in a social union is the individual complete. (1999c: 460, fn. 4)

Not only do the principles of justice support social unions, they make of society itself a social union:

...we can now see how the principles of justice are related to human sociability. The main idea is simply that a well-ordered society (corresponding to justice as fairness) is itself a form of social union. Indeed, it is a social union of social unions. Both characteristic features are present: the successful carrying out of just institutions is the shared final end of all the members of society, and these institutional forms are prized as good in themselves. (1999c: 462)

With respect to the second characteristic, Rawls goes quite far:

...men appreciate and enjoy these attributes in one another as they are manifested in cooperating to affirm just institutions. It follows that the collective activity of justice is the preeminent 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. (1999c: 463)

7.2 Nozick's Liberalism: the priority of rights over the good

7.3 Rawls's Meta-Philosophy

In an important article written after *The Theory of Justice*, "Justice as Fairness: Political, not Metaphysical", Rawls clarifies in an important respect his conception of his own philosophy:

One thing I failed to say in *A Theory of Justice*, or failed to stress sufficiently, is that justice as fairness is intended as a political conception of justice. While a political conception of justice is, of course, a moral conception, it is a moral conception worked out for a specific kind of subject, namely, for political, social, and economic institutions. In particular, justice as fairness is framed to apply to what I have called the "basic structure" of a modern constitutional democracy. (1985: 224)

One way in which theories of justice may themselves be political is by being instruments to build consensus:

There are periods, sometimes long periods, in the history of any society during which certain fundamental questions give rise to sharp and divisive political controversy, and it seems difficult, if not impossible, to find any shared basis of political agreement. Indeed, certain questions may prove intractable and may never be fully settled. One task of political philosophy in a democratic society is to focus on such questions and to examine whether some underlying basis of agreement can be uncovered and a mutually acceptable way of resolving these questions publicly established. (1985: 226)

The political role of the political philosopher is in this way anti-radicalist, a matter of reconciling different views and find elements common or at least acceptable to all of them. It is of great importance to Rawls that this disagreement itself is also philosophical:

A deep disagreement exists as to how the values of liberty and equality are best realized in the basic structure of society. To simplify, we may think of this disagreement as a conflict within the tradition of democratic thought itself, between the tradition associated with Locke, which gives greater weight to what Constant called "the liberties of the moderns," freedom of thought and conscience, certain basic rights of the person and of property, and the rule of law, and the tradition associated with Rousseau, which gives greater weight to what Constant called "the liberties of the ancients," the equal political liberties and the values of public life. (1985: 227)

Because political philosophy has to 'rise above' these differences to fulfill its reconciling role, it follows, somewhat paradoxically, that it has to be politically neutral:

...the aim of justice as fairness as a political conception is practical, and not metaphysical or epistemological. That is, it presents itself not as a conception of justice that is true, but one that can serve as a basis of informed and willing political agreement between citizens viewed as free and equal persons. (1985: 230)

In so far as it offers each divergent groups a way of reconciling themselves with all the other, the political role of the political philosopher is thus reformist and has a tendency to support the status quo. Even though the agreement is

hypothetical and bringing it about is a hitherto not yet realised aim of political philosophy, the latter also has the aim of “securing it”, as Rawls says in the immediate continuation of the quote above:

This agreement when securely founded in public political and social attitudes sustains the goods of all persons and associations within a just democratic regime. To secure this agreement we try, so far as we can, to avoid disputed philosophical, as well as disputed moral and religious, questions. We do this not because these questions are unimportant or regarded with indifference, but because we think them too important and recognize that there is no way to resolve them politically. (1985: 230)

The claim in the last half-sentence has two parts: that philosophical questions are important and that they cannot be resolved politically, that there is no political, nor any other way short of “the autocratic use of state power”, to reach agreement on these philosophical questions. It is because of this empirical claim that philosophers must do their best to maintain the existence of social cooperation:

No political view that depends on these deep and unresolved matters can serve as a public conception of justice in a constitutional democratic state. As I have said, we must apply the principle of toleration to philosophy itself. The hope is that, by this method of avoidance, as we might call it, existing differences between contending political views can at least be moderated, even if not entirely removed, so that social cooperation on the basis of mutual respect can be maintained. (1985: 230)

With respect to this meta-theoretical view about the role of philosophy, one may disagree with Rawls even if one agrees with him about justice itself. We may consistently hold that:

- A just society is one that has a basic structure that satisfies Rawls’s principles of justice and, in particular, is such that *in principle* everyone could recognise that it is in their best interest that society is arranged in this way.
- Because, *in practice*, not everyone does recognise this, we live in a situation where the basic structure of our interactions with each other is fundamentally unjust.
- We do not have, as philosophers or as citizens, any moral or political duty to uphold or respect unjust institutions nor to maintain social cooperation within such a structure.
- We may conceive of our role as partisan and partial, defending our philosophical views and trying to implement them to the degree possible, but without any obligation to make them, in practice, acceptable to all.

One way to defend such an alternative conception of the role of a theory of justice is to challenge Rawls’s enlightenment-picture of society as a human construction:

In their political thought, and in the context of public discussion of political questions, citizens do not view the social order as a fixed natural order, or as an institutional hierarchy justified by religious or aristocratic values. Here it is important to stress that from other points of view, for example, from the point of view of personal morality, or from the point of view of members of an association, or of one’s religious or philosophical doctrine, various aspects of the world and one’s relation to it, may be regarded in a different way. But these other points of view are not to be introduced into political discussion. (1985: 231)

Rawls recommends that we should pursue discussions of political philosophy *as if* the social order (i.e.: the basic structure of society) were not “fixed”. “Fixed” may mean different things, and it is possible to agree with Rawls on some, and to disagree with him on other disambiguations:

- If “not fixed” means “philosophically disputable”, i.e. such that we recognise a plurality of views and opinions people may have of it, Rawls is certainly right; but it then does not follow that we should not regard society as fixed in other ways, even in political discussion.
- If “not fixed” means “changeable by philosophical debate”, the claim is empirically dubious or perhaps to be understood normatively. As a normative claim, however, it is equally dubious: why *should* people regard the

basic structure of society as being changeable by debate (assuming that it is not, or at least only in principle and practically to a very little degree)?

The difference may be illustrated with “all people should be treated as equals”:

- Is it commonly agreed among political philosophers that in a just society, people are treated as equals, and that this is required for a society to be just.
- Should *we* treat people as equals? This is itself an ambiguous question: it is agreed that if we treat people as equal, we make our society more just. But it is another question whether this obligation is an all-things-considered political obligation, i.e. whether it may be outweighed by other political obligations. According to Rawls, it never is; according to the alternative conception, it may well be (“why should people be treated as equals if they are not?”).

The possible disagreement I am sketching one may have with Rawls’s conception of the role of political philosophy perhaps boils down to a difference in the understanding of what politics is:

- On Rawls’s conception, politics is a matter of political debate, where this itself takes the form of a philosophical discussion, where the only force or power allowed is the power of argument.
- On a different, more utopian, conception, politics is a matter of having and exercising power, where philosophy shapes the question what this power is exercised for, i.e. which aims are pursued.

In summary, we see how Rawls applies the priority of the right over the good two times over: as a part of the substantive conception of what a just society is; as a methodological principle governing the debate over what a just society is. It seems possible to agree with the first employment, but not the second, and see philosophical discussion as a pursuit of the good, rather than a pursuit of the right.

7.4 Private Property

Many readers have found it striking to what extent Rawls treats the question of the legitimacy of private property as irrelevant to the theory of justice; for him, it is simply a question in what way public goods are most efficiently produced and distributed:

A final point about public goods. Since the proportion of social resources devoted to their production is distinct from the question of public ownership of the means of production, there is no necessary connection between the two. A private-property economy may allocate a large fraction of national income to these purposes, a socialist society a small one, and vice versa. There are public goods of many kinds, ranging from military equipment to health services. Having agreed politically to allocate and to finance these items, the government may purchase them from the private sector or from publicly owned firms. (1999c: 238–239)

The reason Rawls remains neutral on questions of “regime” (socialist or capitalist) is that the not the manner of effecting the distribution, but only its result matters (as long as the manner of effecting the distribution satisfies the procedural justice, the equality of fundamental rights and of opportunities).¹ The principles of justice talk about goods, and not (directly) about power nor efficiency.

Traditionally, liberal conceptions of liberty have been closely tied to private property – either because liberty rights are considered a form of property, or property a form of freedom, or because private property is deemed necessary as a protection of the other liberties:

There can be no freedom of press if the instruments of printing are under government control, no freedom of assembly if the needed rooms are so controlled, no freedom of movement if the means of transport are a government monopoly. (Hayek 1978: 149)

1. I thus disagree with ? who wants to claim Rawls for marxism: “...if even a minimal set of Marxist empirical theses are correct, Rawls’ theory will choose socialism (i.e., a democratic form of socialism) over capitalism” (? : 378).

Plausibly, it is because of the liberal presupposition that people are fundamentally free (i.e.: that “freedom is normatively basic, and so the onus of justification is on those who would use coercion to limit freedom”) that the need to justify the state arises in the first place (cf. [Gaus et al. 2018](#): 2)

Conceptions of freedom are central to the discussion of Rawls’ theory of justice. The contention of [Nozick \(1974: 160ff.\)](#) that Rawls’ theory is patterned, but not historical, becomes a criticism if we assume that “[n]o end-state principle or distributional patterned principle of justice can be continuously realized without continuous interference with people’s lives.” Nozick’s own “entitlement theory” holds that distributive justice primarily consists of only three principles: (1) the principle of justice in acquisition, (2) the principle of justice in transfer, and (3) the principle of rectification for violations of (1) and (2). This is a fundamentally different understanding of distributive justice.

It is also in terms of private property that [Van der Vossen & Vallentyne \(2014: 4\)](#) characterise libertarianism, as the claim that every person is a full owner of themselves. That they have full property rights over themselves, makes quite ordinary state actions unjust:

The main reason for the illegitimacy of modern states is that they employ forceful means in cases where such force is impermissible. Agents of the state violate the rights of citizens when they punish, or threaten to punish, a person for riding a motorcycle without a helmet, for taking drugs, for refusing to purchase health insurance or serve in the military, for engaging in consensual sexual relations in private, or for gambling. Furthermore, agents of the state violate the rights of citizens when they force, or threaten to force, individuals to transfer their legitimately held wealth to the state in order to bail out large companies, provide for pensions, to help the needy, or to pay for public goods (e.g., parks or roads). ([Van der Vossen & Vallentyne 2014](#): 16)

A contrary argument is possible, however. Private property rights are socially enshrined, and have to be enforced by public means:

Though private property is a system of individual decision-making, it is still a system of social rules. The owner is not required to rely on her own strength to vindicate her right to make self-interested decisions about the object assigned to her: if Jennifer’s employees occupy the steel factory to keep it operating despite her wishes, she can call the police and have them evicted; she does not have to do this herself or even pay for it herself. So private property is continually in need of public justification—first, because it empowers individuals to make decisions about the use of scarce resource in a way that is not necessarily sensitive to others’ needs or the public good; and second, because it does not merely permit that but deploys public force at public expense to uphold it. ([Waldron 2004](#): 4)

Hume goes as far as saying that the very notion of property is posterior to that of justice and depends on it:

Our property is nothing but those goods, whose constant possession is establish’d by the laws of society; that is, by the laws of justice. Those, therefore, who make use of the words property, or right, or obligation, before they have explain’d the origin of justice, or even make use of them in that explanation, are guilty of a very gross fallacy, and can never reason upon any solid foundation. A man’s property is some object related to him. This relation is not natural, but moral, and founded on justice. Tis very preposterous, therefore, to imagine, that we can have any idea of property, without fully comprehending the nature of justice, and shewing its origin in the artifice and contrivance of man. The origin of justice explains that of property. The same artifice gives rise to both. ([Hume 1978](#): 491)

7.5 Liberalism as a Political Stance

“Liberalism”, according to the *Economist*:

- pragmatism: free competition of ideas, negative individual freedoms, progress through open markets

- state interventions justified by collective choice problems
- saving, private property and inheritance: the freedom not to choose
- macroeconomics: fiscal activism, monetary policies
- anti-totalitarianism, anti-collectivism, dynamic innovation by entrepreneurs
- negative, not positive liberties
- the *Economist's* rendering of the difference principle: “Wealth, if it is to be generated, must trickle all the way down. Only such a rule, Rawls thought, could maintain society as a co-operative venture between willing participants. Even the poorest would know that they were being helped, not hindered, by the success of others.”
- the *Economist's* rendering of Nozick’s criticism: “People own their talents. They cannot be compelled to share their fruits.”

Chapter 8

Hayek: Theory

8.1 The Social Order

Seeking to defend evolutionary (critical) rationalism against constructivist rationalism, Hayek emphasises “the distinction between a made order [which he calls “taxis”] and one which forms itself as a result of regularities of the action of its elements [called “cosmos”]” (1973: 27 / 2013: 27), criticising the view “that we owe all beneficial institutions to design” (1973: 9 / 2013: 10):

The desire to remodel society after the image of individual man, which since Hobbes has governed rationalist political theory, and which attributes to the Great Society properties which only individuals or deliberately created organizations can possess, leads to a striving not merely to be, but to make everything rational. Although we must endeavour to make society good in the sense that we shall like to live in it, we cannot make it good in the sense that it will behave morally. It does not make sense to apply the standards of conscious conduct to those unintended consequences of individual action which all the truly social represents, except by eliminating the unintended – which would mean eliminating all that we call culture. (1973: 27 / 2013: 27)

From these premisses in social philosophy, certain claims in political philosophy are said to follow:

We shall see that it is impossible, not only to replace the spontaneous order by organization and at the same time to utilize as much of the dispersed knowledge of all its members as possible, but also to improve or correct this order by interfering in it by direct commands. Such a combination of spontaneous order and organization it can never be rational to adopt. While it is sensible to supplement the commands determining an organization by subsidiary rules, and to use organizations as elements of a spontaneous order, it can never be advantageous to supplement the rules governing a spontaneous order by isolated and subsidiary commands concerning those activities where the actions are guided by the general rules of conduct. This is the gist of the argument against ‘interference’ or ‘intervention’ in the market order. The reason why such isolated commands requiring specific actions by members of the spontaneous order can never improve but must disrupt that order is that they will refer to a part of a system of interdependent actions determined by information and guided by purposes known only to the several acting persons but not to the directing authority. The spontaneous order arises from each element balancing all the various factors operating on it and by adjusting all its various actions to each other, a balance which will be destroyed if some of the actions are determined by another agency on the basis of different knowledge and in the service of different ends.

What the general argument against ‘interference’ thus amounts to is that, although we can endeavour to improve a spontaneous order by revising the general rules on which it rests, and can supplement its results by the efforts of various organizations, we cannot improve the results by specific commands

that deprive its members of the possibility of using their knowledge for their purposes. (1973: 51 / 2013: 49)

Hayek here seems to waver between two quite different arguments:

descriptive It is impossible to improve society, which is a cosmos or a spontaneous order, by ‘interfering’ with it, i.e. by trying to re-order or re-organise it by explicit decisions.

evaluative We should not even try to do it, because instead of improving society, such an attempt will ‘disrupt’ it.

In support of both arguments, Hayek claims that there is an asymmetry in knowledge (or rather: information, as he says in the 1982 preface) between government, a taxis-order, and society, a cosmos-order. This asymmetry concerns both the form and the extent of information ‘available to’ the different orders:¹

- Information available to the government consists in abstracted, codified, explicit and imperfect generalisations of sociological theories, which only imperfectly match their intended object of description.
- Information stored in society is distributed, available to its individual members, not necessarily in explicit or codified form, but realised in their actions that are motivated by certain desires and certain beliefs about available means in concrete situations.

This informational asymmetry has two consequences, according to Hayek:

- Government cannot know what people want and how they want to bring it about that they have what they want; it therefore cannot help them in this endeavour.
- Government, if it interferes, will act on false beliefs about what people want, and thus worsen their situation by its interference.

Both arguments are weak: the first is too general to have bite – government may know (e.g. by being told) some things, without knowing everything; the second is too general to be true: even if its beliefs are false, its actions may still be beneficial.

The empirical argument neglects the fact that government, at least in many of its actions, if not in all, is itself one of the actors creating and sustaining the spontaneous order. Concretely, it is itself a buyer and seller of good and services, itself a participant in discussions and deliberations, itself in competition with other actors (such as lobbies, firms, parties) pursuing divergent interests. If it is strength, its position of power or its ubiquity that accounts for its actions being disruptive, then this is merely a matter of degree.

The normative argument is problematic, as it appears to derive an evaluative conclusion from empirical, fact-stating premisses.²

The unavoidable ignorance and lack of information of any central social institution is thus the main reason why it should not interfere with the spontaneous order:

...in the modern welfare societies the great majority and the most important of the daily needs of the great masses are met as a result of processes whose particulars government does not and cannot know. The most important of the public goods for which government is required is thus not the direct satisfaction of any particular needs, but the securing of conditions in which the individuals and smaller groups will have favourable opportunities of mutually providing for their respective needs. (1976: 2 / 2013: 170)

1. Like ‘interfere’, ‘disrupt’, ‘available to’ is put into scare quotes because it needs much more explicit discussion than Hayek provides. “Interference” and “disruption” are valenced nouns, and their application needs to be justified – why cannot government, or the state, behave as any actor in the social realm would? why are its actions any more objectionable as those of other groups and institutions, such as the bankers’ lobby or political parties? “Available to” is problematic in a different way: even if it does not mean “had by” but rather “stored in”, it is not clear how the informational asymmetry is broken down to individual actors, which are after all the only thing(s) that matters.

2. Inferring an “ought” from an “is” is an instance of the so-called “naturalistic fallacy”, criticised notably by Hume and explicitly acknowledged by Hayek: “...our language is so made that no valid inference can lead from a statement containing only a description of facts to a statement of what ought to be” (1973: 79 / 2013: 76).

While Hayek defends this interesting general claim mostly with respect to a rather clear-cut special case (the inefficiencies of central state planning as in really existing socialist states), most of the time he focusses on the less interesting, quasi-utilitarian normative argument, that leaving the social organism to its own leads to overall better results:

The thesis of this book is that a condition of liberty in which all are allowed to use their knowledge for their purposes, restrained only by rules of just conduct of universal application, is likely to produce for them the best conditions for achieving their aims; and that such a system is likely to be achieved and maintained only if all authority, including that of the majority of the people, is limited in the exercise of coercive power by general principles to which the community has committed itself. (1973: 55 / 2013: 53)

The unavoidable informational restriction of any central authority does not apply just to individual interests, but also to interests of groups and even universal or collective interests:

Though the desire for a particular collective good will be a common desire of those who benefit from it, it will rarely be general for the whole of the society which determines the law, and it becomes a general interest only in so far as the mutual and reciprocal advantages of the individuals balance. But as soon as government is expected to satisfy such particular collective, though not truly general, interests, the danger arises that this method will be used in the service of particular interests. It is often erroneously suggested that all collective interests are general interests of the society; but in many instances the satisfaction of collective interests of certain groups may be decidedly contrary to the general interests of society. (1976: 6 / 2013: 174)

It follows that the very idea of social justice is *empirically* unrealisable in a free society:

...I perceived that the Emperor had no clothes on, that is, that the term 'social justice' was entirely empty and meaningless. (1976: xi / 2013: xix)

It is because the circumstances in which the different individuals find themselves at a given moment are different, and because many of these particular circumstances are known only to them, that there arises the opportunity for the utilization of so much diverse knowledge – a function which the spontaneous order of the market performs. The idea that government can determine the opportunities for all, and especially that it can ensure that they are the same for all, is therefore in conflict with the whole *rationale* of a free society. (1976: 9 / 2013: 177)

Hayek even generalises this to an even more general moral relativism:

...all moral (and legal) rules serve an existing factual order which no individual has the power to change fundamentally; because such change would require changes in the rules which other members of the society obey, in part unconsciously or out of sheer habit, and which, if a viable society of a different type were to be created, would have to be replaced by other rules which nobody has the power to make effective. There can, therefore, be no absolute system of morals independent of the kind of social order in which a person lives, and the obligation incumbent upon us, to follow certain rules derives from the benefits we owe to the order in which we live. (1976: 26–27 / 2013: 193)

Hayek's basic point is thus not that non-interference of the state in the market is *better*, or produces better results, but that it is unavoidable and necessary. This is easily misunderstood. Such a fundamental misunderstanding is in evidence in Paul Kelly's foreword to the Routledge Classic edition of "Law, Legislation and Liberty":

...it is precisely the arguments of Hayek against regulation that underpinned the Faustian pact with the financial services industry and global banks that some argue led to housing and credit bubbles and the consequent spiralling out of control of sovereign debt. Unregulated markets are blind and self-serving and not the source of the great civilization of liberty that Hayek claims. (2013: xvi)

8.2 Social justice

As for Nozick, “social justice” is for Hayek strictly speaking an oxymoron. Under the label “Justice is an attribute of human conduct” (1976: 31 / 2013: 197), he writes

Strictly speaking, only human conduct can be called just or unjust. If we apply the terms to a state of affairs, they have meaning only in so far as we hold someone responsible for bringing it about or allowing it to come about. A bare fact, or a state of affairs which nobody can change, may be good or bad, but not just or unjust. (1976: 31 / 2013: 198)

He then uses the distinction between *cosmos* and *taxis* to exclude society from what can be just or unjust:

Evidently, not only the actions of individuals but also the concerted actions of many individuals, or the actions of organizations, may be just or unjust. Government is such an organization, but society is not. And, though the order of society will be affected by actions of government, so long as it remains a spontaneous order, the particular results of the social process cannot be just or unjust. This means that the justice or injustice of the demands which government makes on the individual must be decided in the light of rules of just conduct and not by the particular results which will follow from their application to an individual case. [...] Since only situations which have been created by human will can be called just or unjust, the particulars of a spontaneous order cannot be just or unjust: if it is not the intended or foreseen result of somebody’s action that A should have much and B little, this cannot be called just or unjust. We shall see that what called ‘social’ or ‘distributive’ justice is indeed meaningless within a spontaneous order and has meaning only within an organization. (1976: 32-33, 33 / 2013: 198-199, 199-200)

While laws, which can be just or unjust, do only negatively, protectively, apply to society, moral and custom may provide positive guidance:

...whether the existence of strongly and widely held moral convictions in any matter is by itself a justification for their enforcement. The answer seems to be that within a spontaneous order the use of coercion can be justified only where this is necessary to secure the private domain of the individual against interference by others, but that coercion should not be used to interfere in that private sphere where this is not necessary to protect others. Law serves a social order, i.e. the relations between individuals, and actions which affect nobody but the individuals who perform them ought not to be subject to the control of law, however strongly they may be regulated by custom and morals. The importance of this freedom of the individual within his protected domain, and everywhere where his actions do not conflict with the aims of the actions of others, rests mainly on the fact that the development of custom and morals is an experimental process, in a sense in which the enforcement of uniform rules of law cannot be – a process in which alternative rules compete and the more effective are selected by the success of the group obeying them, and may ultimately provide the model for appropriate legislation. (1976: 57 / 2013: 221)

To extend the question of justice from government to society is to personalise the state, which then itself becomes of dubious legitimacy:

...the demand for ‘social justice’ is addressed not to the individual but to society – yet society, in the strict sense in which it must be distinguished from the apparatus of government, is incapable of acting for a specific purpose, and the demand for ‘social justice’ therefore becomes a demand that the members of society should organize themselves in a manner which makes it possible to assign particular shares of the product of society to the different individuals or groups. The primary question then becomes whether there exists a moral duty to submit to a power which can co-ordinate the efforts of the members of society with the aim of achieving a particular pattern of distribution regarded as just. (1976: 64 / 2013: 228)

This is followed by a surprising concession:

It has of course to be admitted that the manner in which the benefits and burdens are apportioned by the market mechanism would in many instances have to be regarded as very unjust if it were the result of a deliberate allocation to particular people. But this is not the case. Those shares are the outcome of a process the effect of which on particular people was neither intended nor foreseen by anyone when the institutions first appeared – institutions which were then permitted to continue because it was found that they improve for all or most the prospects of having their needs satisfied. To demand justice from such a process is clearly absurd, and to single out some people in such a society as entitled to a particular share evidently unjust. (1976: 64-65 / 2013: 228-229)

The “neither intended nor foreseen” proviso (also present in the passage pp. 1976: 33 / 2013: 199 quoted above) is of the utmost importance: unjust distributions have to be accepted because they are not the result of an identifiable action by an identifiable agent who foresaw and intended the distribution. This claim can only partially justified by the empirical claim that society is a spontaneous order the functioning of which is not explicitly and generally understood. From this it only follows that we cannot ascribe foreknowledge and intention to *society*, because that would mean personalising it. It does not mean that *no one* may be said to intend or foresee the injustice, and that no one may be blamed for it. We do blame people for things for which they are only partially or indirectly responsible, and we do blame them for things they omitted to do. That some order is spontaneous just means that it is not itself an agent, and hence that it cannot *itself* be blamed, not that there are no agents within it.

Hayek needs a subsidiary argument: that redistributive measures are not ‘legal’, because they are not sufficiently general and abstract to be rules of just conduct:

The chief function of rules of just conduct is thus to tell each what he can count upon, what material objects or services he can use for his purposes, and what is the range of actions open to him. They cannot, if they are to secure to all the same freedom of decision, give similar assurance of what others will do, unless these others have voluntarily and for their own purposes consented to act in a particular manner.

The rules of just conduct thus delimit protected domains not by directly assigning particular things to particular persons, but by making it possible to derive from ascertainable facts to whom particular things belong. [...]

Since the consequences of applying rules of just conduct will always depend on factual circumstances which are not determined by these rules, we cannot measure the justice of the application of a rule by the result it will produce in a particular case. [...]

That it is possible for one through a single just transaction to gain much and for another through an equally just transaction to lose all,18 in no way disproves the justice of these transactions. Justice is not concerned with those unintended consequences of a spontaneous order which have not been deliberately brought about by anybody. (1976: 37, 38 / 2013: 203, 204)

In the immediately following fn. 19 (1976: 165 / 2013: 321), , Hayek quotes Rawls:

Put another way, the principles of justice do not select specific distributions of desired things as just, given the wants of particular persons. This task is abandoned as mistaken in principle, and it is, in any case, not capable of a definite answer. Rather, the principles of justice define the constraints which institutions and joint activities must satisfy if persons engaging in them are to have no complaints against them. If these constraints are satisfied, the resulting distribution, whatever it is, may be accepted as just (or at least not unjust). (Rawls 1963a: 102) (reprint: Rawls (1999a: 76–77))

Hayek is wrong, however, to summon Rawls as an ally – even in his early work, Rawls was explicit that justice concerns the “establishment within its structure [of a system of institutions] of a proper balance or equilibrium between competing claims” (1963a: 98 / 1999a: 73). The generality requirement is put to the exactly opposite

purpose than in Hayek, i.e. used to forestall the objection (Nozick's) that singular redistributive measures will give rise to legitimate claims of unjust treatment:

It is a mistake to focus attention on the varying relative positions and well-being of particular persons, who may be known to us by their proper names, and to require that every change of position and well-being, as a once-for-all transaction viewed in isolation, be in itself just. It is the system of institutions which is to be judged, and judged from a general point of view. (1963a: 102 / 1999a: 76)

Rawls is quite clear that only a specific distribution, albeit abstractly characterised, will qualify as just.

8.3 Negative Rights and Private Property

Hayek's argument against state interference in society presupposes a strict separation of two different roles the state may play, whereof the first is legitimate and the second is not:

- The state should play the role of arbiter, impartial referee, setting formal and fair boundary conditions and guaranteeing the rule of law.
- The state should not be an agent, imposing material aims or purposes, 'shape' society or interfere with the organic interaction of its elements.

Hayek's argument for this has many interlocked parts, and is in the whole quite indirect:

- What is properly meant by "law" (e.g. in "the rule of law") is common law, or something closely resembling it, i.e. law that predates organised society and is 'discovered' by judges and only then 'legislated' (i.e.: codified) by some competent authority.
- The *raison d'être* of such law is to protect legitimate expectations, in particular expectations that drive the organic development of the spontaneous order that is society.
- Judges, and also legislators, have a duty to be as conservative as they can be, only gradually and incrementally changing the law, in order to 'disturb' the natural order as little as possible.

From this conception of law follows a preference against legal activism (the naturalistic fallacy again?):

The important insight to which an understanding of the process of evolution of law leads is that the rules which will emerge from it will of necessity possess certain attributes which laws invented or designed by a ruler may but need not possess, and are likely to possess only if they are modelled after the kind of rules which spring from the articulation of previously existing practices. (1973: 85 / 2013: 81)

The protective function of the law, rightly understood, is mostly, even fundamentally, geared at private property:

The understanding that 'good fences make good neighbours', [fn. omitted] that is, that men can use their own knowledge in the pursuit of their own ends without colliding with each other only if clear boundaries can be drawn between their respective domains of free action, is the basis on which all known civilization has grown. Property, in the wide sense in which it is used to include not only material things, but (as John Locke defined it) the 'life, liberty and estates' of every individual, is the only solution men have yet discovered to the problem of reconciling individual freedom with the absence of conflict. Law, liberty, and property are an inseparable trinity. There can be no law in the sense of universal rules of conduct which does not determine boundaries of the domains of freedom by laying down rules that enable each to ascertain where he is free to act. (1973: 107 / 2013: 102)

It is in upholding private property right that the judge preserves the social order, which *as a whole* is said to benefit everyone:

The socialist attacks on the system of private property have created a widespread belief that the order the judges are required to uphold under that system is an order which serves particular interests. But

the justification of the system of several property is not the interest of the property holders. It serves as much the interest of those who at the moment own no property as that of those who do, since the development of the whole order of actions on which modern civilization depends was made possible only by the institution of property. (1973: 121 / 2013: 115)

It is thus the *institution* of private property from which does who only have very little of it are said to derive their benefit.

To the two functions of the state correspond two types of law: *nomos*, the rules of just conduct, discovered by common law judges and binding for everyone, and *thesis*, the rules of organisation, materially legislated by government and governing the enforcement of the rules of just conduct. The first comprises private law (including penal law), the latter public law.

The “principle that in a free society coercion is permissible only to secure obedience to universal rules of just conduct” (1973: 141 / 2013: 133), i.e. that only private law is really binding, is then used to criticise ‘social’ legislation (the scare quotes are Hayek’s):

The aim of [the third kind of social legislation] is to direct private activity towards particular ends and to the benefit of particular groups. It was as the result of such endeavours, inspired by the will-o-the-wisp of ‘social justice’, that the gradual transformation of the purpose-independent rules of just conduct (or the rules of private law) into purpose-dependent rules of organization (or rules of public law) has taken place. This pursuit of ‘social justice’ made it necessary for governments to treat the citizen and his property as an object of administration with the aim of securing particular results for particular groups. When the aim of legislation is higher wages for particular groups of workers, or higher incomes for small farmers, or better housing for the urban poor, it cannot be achieved by improving the general rules of conduct. (1973: 142 / 2013: 134–135)

The justification of private property (or rather: the claim that the institution of private property needs no justification) depends on the claim that property is prior, and antecedent to, property rights. In fn. 14 (1976: 165 / 2013: 320), Hayek approvingly quotes Kant:

Bürgerliche Verfassung ist hier allein der rechtliche Zustand, durch welchen jedem das Seine nur gesichert, eigentlich aber nicht ausgemacht oder bestimmt wird. – Alle Garantie setzt also das Seine von jedem (dem es gesichert wird) schon voraus. (Metaphysik der Sitten, Rechtslehre, I,2, para. 9)³

It is only this prior state of common law rights which makes society possible:

It would indeed seem that wherever a Great Society has arisen, it has been made possible by a system of rules of just conduct which included what David Hume called ‘the three fundamental laws of nature, *that of stability of possession, of its transference by consent, and of the performance of promises*’, or, as a modern author sums up the essential content of all contemporary systems of private law, ‘freedom of contract, the inviolability of property, and the duty to compensate another for damage due to his fault.’ (1976: 40 / 2013: 206, the references are to “D. Hume, *Treatise*, Works II, p. 293” and to “Leon Duguit as described by J. Walter Jones, *Historical Introduction to the Theory of Law* (Oxford, 1940), p. 114” respectively)

3. “For a civil constitution is just the rightful condition, by which what belongs to each is only secured, but not actually settled and determined. Any guarantee, then, already presupposes what belongs to someone (to whom it secures it).” (Kant 1991: 78)

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