

ENTITLEMENT PRINCIPLES AND THE ORIGINAL POSITION: A RAWLSIAN INTERPRETATION OF NOZICK'S APPROACH TO DISTRIBUTIVE JUSTICE

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The concept of a hypothetical original position for deliberating about moral principles, as advanced by John Rawls,¹ is a powerful abstraction of the kind of social setting needed in order to derive normatively compelling moral principles. While this concept plays a crucial role in Rawls' theory of justice, it is also independent of it. It is possible to adopt the original position approach without following Rawls in other respects. In particular, one may disagree with the "difference principle" argued for by Rawls² and still retain the original position as the starting point of alternative theories of justice.

In his recent contribution to the subject of distributive justice, Robert Nozick³ notes: "Political philosophers now must either work within Rawls' theory or explain why not."⁴ Indeed, after presenting convincing arguments for the legitimacy of an entitlement view of justice in his discussion of distributive justice,⁵ Nozick moves to a detailed criticism of Rawls' theory.⁶ Although Nozick's criticism of Rawls covers a number of substantial areas, his most fundamental methodological disagreement with Rawls for present purposes is best explained by the following statement: "Since no glimmer of entitlement principles is built into the structure of the situation of persons in the original position, there is no way these principles could be selected; and

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1. J. RAWLS, *A THEORY OF JUSTICE* (1971).

2. *See id.* at 76-80.

3. R. NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974); Nozick, *Distributive Justice*, 3 *PHILOSOPHY AND PUB. AFF.* 45 (1973).

4. R. NOZICK, *supra* note 3, at 183; Nozick, *supra* note 3, at 79.

5. *See* R. NOZICK, *supra* note 3, at 149-82; Nozick, *supra* note 3, at 46-78.

6. *See* R. NOZICK, *supra* note 3, at 183-231; Nozick, *supra* note 3, at 78-126.

Rawls' construction is incapable in principle of yielding them."⁷ According to Nozick, if any entitlement theory of justice is correct, then Rawls' construction of the original position must be defective since it is unable, *in principle*, to yield such a theory.

I intend to show that this particular criticism by Nozick is incorrect. Indeed, this Article will demonstrate that arguments from the viewpoint of the original position can be of significant help in the formulation of entitlement principles. Moreover, the ambiguities surrounding Nozick's discussion of the principle of acquisition are overcome in a natural manner when this principle is considered in the context of the original position. Thus, far from being inconsistent with the entitlement view, the original position setting seems to have the same crucial importance in formulating entitlement theories as it probably should have in any discussion of distributive justice.

THE PROBLEM OF ORIGINAL APPROPRIATION

According to Nozick's entitlement approach to the theory of justice, a distribution of holdings is just if it satisfies the following inductive definition:

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

The complete principle of distributive justice would say simply that a distribution is just if everyone is entitled to the holdings they possess under the distribution.

A distribution is just if it arises from another (just) distribution by legitimate means. The legitimate means of moving from one distribution to another are specified by the principle of justice in transfer. The legitimate first "moves" are specified by the principle of justice in acquisition. . . . Whatever arises from a just situation by just steps is itself just.⁸

Nozick's aim is *not* to present a specific and fully developed entitlement theory of justice.⁹ Instead, his objective lies in presenting an "histori-

7. Nozick, *supra* note 3, at 99.

8. R. Nozick, *supra* note 3, at 151; Nozick, *supra* note 3, at 47.

9. Nozick's principle of rectification of violations of the first two principles will not be considered here. While rectification of past injustices is probably the single most important item on the agenda of current distributional policy, its inclusion in the present context would tend to confuse the issues. See R. Nozick, *supra* note 3, at 152-53.

cal" approach to the problem of distributive justice which, rather than concentrating on "patterned end-state principles" and "current time-slices" of a distribution, shifts the focus of attention to the question of how this distribution came about. The basic methodology followed by Nozick is to present both general situations and specific examples in which any kind of "patterning" seems to be in conflict with our basic intuitive notions of justice.¹⁰ If the kind of "unjust" situation liable to arise under any end-state criterion cannot arise in an entitlement setting, then this should be enough to convince us that serious attention should be given to the entitlement viewpoint. Nozick thus presents a convincing case for the plausibility of the entitlement view of justice without actually formulating a specific entitlement theory.

It is not my purpose to pass judgment upon whether or not each and every argument in Nozick's essay inevitably implies that one should exclusively rely on entitlement principles when formulating any theory of justice. Even the more interesting question concerning whether entitlement systems are necessarily in conflict with *any* patterned conception of justice will only briefly be considered here. It suffices for present purposes to agree that Nozick has indeed presented convincing arguments for the potential relevance of entitlement considerations. The question that suggests itself then is: How would one go about actually incorporating entitlement notions into any specific theory of justice or formulating any specific entitlement theory of justice?

Following Nozick, this question reduces to formulating two independent basic entitlement principles: (1) a principle of just acquisition, and (2) a principle of just transfer. The first principle most logically precedes the second, since there can be no just transfer of a holding that was not at some point justly acquired. Actually, even from a purely intuitive viewpoint, it seems clear that once a principle of just acquisition is adopted, the problem of designing a principle of just transfer becomes relatively easy. For example, Nozick formulates the second principle in terms of repeated voluntary departures from an initial holding that was justly acquired.¹¹ The first problem that one is thus confronted with has to do with the proper criterion for selecting a principle of just acquisition. It might be noted that recourse to some end-state-like criterion seems rather difficult to avoid at this point. But the fundamental question here is where should one be looking for guidance, or what considerations should one appeal to, when attempting to advance a "just" principle of "appropriation of unheld things."

10. See *id.* at 155-74.

11. *Id.* at 151; Nozick, *supra* note 3, at 47.

Nozick's approach to the formulation of a principle of just acquisition¹² is probably the least convincing part of his thesis. In defending his Lockean-like principle of acquisition, he has to make recourse to the principle of just transfer implied by the market mechanism in a private ownership (property) economy. A valid objection may be raised that this confuses the issue of permanent property rights with that of the efficiency of private market institutions.¹³ However, a more fundamental, methodological criticism would seem to be that if the principle of justice in acquisition stated by Nozick can only be justified in terms of a principle of justice in transfer, then only the latter is a bona fide, independent principle. While it is clear that any theory of justice relying exclusively on a principle of justice in transfer can only be a very partial theory at best, the basic criticism here is that it is also inconsistent with Nozick's own system since he correctly insists on two distinct principles.

ENTITLEMENT PRINCIPLES AND THE ORIGINAL POSITION

An appealing principle of acquisition—compatible with a number of plausible principles of transfer—can be derived with the help of the original position setting advocated by Rawls. While it is interesting in itself that entitlement theories of justice are compatible with¹⁴ the original position approach, the special importance of this result in terms of Nozick's approach can best be appreciated by quoting his viewpoint on the matter directly:

A procedure that founds principles of distributive justice on what rational persons who know nothing about themselves or their histories would agree to *guarantees that end-state principles of justice will be taken as fundamental*. . . . For people meeting together behind a veil of ignorance to decide who gets what, knowing nothing about any special entitlements people may have, will treat anything to be distributed as manna from heaven.¹⁵

Nozick further clarifies this position:

People in the original position either directly agree to an end-state distribution or they agree to a principle; if they agree to a principle,

12. See R. NOZICK, *supra* note 3, at 174-82; Nozick, *supra* note 3, at 70-78. In this section, Nozick argues for a principle of just acquisition derived from John Locke's *Second Treatise of Government*. See J. LOCKE, *TWO TREATISES OF GOVERNMENT* 327-44 (Laslett ed. 1963).

13. See Varian, *Distributive Justice, Welfare Economics, and the Theory of Fairness*, 4 *PHILOSOPHY & PUB. AFF.* 223 (1975).

14. By "compatible with" it is meant that entitlement theories of justice can be derived from the original position approach.

15. R. NOZICK, *supra* note 3, at 198-99; Nozick, *supra* note 3, at 95 (emphasis in original).

they do it solely on the basis of considerations about end-state distributions. The *fundamental* principles they agree to, the ones they can all converge in agreeing upon, *must* be end-state principles.

Rawls' construction is incapable of yielding an entitlement or historical conception of distributive justice The whole procedure of persons choosing principles in Rawls' original position presupposes that no historical-entitlement conception of justice is correct. . . .

. . . [W]e do not need any *particular* developed historical-entitlement theory as a basis from which to criticize Rawls' construction. If *any* such fundamental historical-entitlement view is correct, then Rawls' theory is not.¹⁶

Nozick's view is that Rawls' original position is absolutely incompatible with any entitlement theory of justice; this leads him to the conclusion that if *any* such theory is correct, then Rawls' is not. It will be argued, however, that not only is there no incompatibility, but that the original position setting can be used in a natural way to overcome the shortcomings of Nozick's own discussion of the principle of acquisition.

The reasoning that led Nozick to the conclusion that entitlement theories of justice are inconsistent with Rawls' theory of justice is again best illustrated by the following quote from Nozick:

Imagine a social pie somehow appearing so that *no one* has any claim at all on any portion of it, no one has any more of a claim than any other person; yet there must be unanimous agreement on how it is to be divided. Undoubtedly, apart from threats or hold-outs in bargaining, an equal distribution would be suggested and found plausible as a solution. . . .

If things fell from heaven like manna, and no one had any special entitlement to any portion of it, and no manna would fall unless all agreed to a particular distribution, and somehow the quantity varied depending on the distribution, then it is plausible to claim that persons placed so that they couldn't make threats or hold out for specially large shares, would agree to the difference principle rule of distribution. But is *this* the appropriate model for thinking about how the things people produce are to be distributed? Why think the same results should obtain for situations where there *are* differential entitlements as for situations where there are not?¹⁷

Note that regarding the last sentence quoted, there almost is an explicit

16. R. NOZICK, *supra* note 3, at 202; Nozick, *supra* note 3, at 98-99 (emphasis in original).

17. R. NOZICK, *supra* note 3, at 198; Nozick, *supra* note 3, at 94-95 (emphasis in original).

axiom regarding differential entitlements according to productivity. Whether or not such entitlements would be agreed upon in the original position is not even considered. The crucial distinction, however, is not between "manna from heaven" situations and situations in which it is possible to impute, productivity-wise, parts of the social output to specific individuals. Actually, the significant fact is not even related to the question of whether the total social output is fixed or variable, that is, whether or not production is taking place. Rather, the important distinction should focus on the question whether the "pie" to be divided is one-dimensional or multidimensional.

In the one-dimensional case, where one commodity is divided among several parties, any agreement in the original position must be one based on end-state principles as claimed by Nozick. However, in the more realistic multidimensional case, where more than one commodity has to be divided among the parties, this implication no longer holds true. To be specific, in the multidimensional case the adoption of non-end-state entitlement principles is perfectly consistent with agreements concluded in the original position. Since the analysis will not be affected by explicit consideration of the special problems arising in production economies, attention will be confined here to the "manna from heaven" case. First, the one-dimensional situation will be briefly examined. The remainder of the discussion will be devoted to the multicommodity case.

Consider a one-dimensional "manna from heaven" situation: suppose that a fixed aggregate income is to be distributed among n people in the original position.¹⁸ As asserted by Nozick, the egalitarian distribution will unanimously be agreed upon by the n parties.¹⁹ Since utility is implicitly assumed to depend solely on income, any distribution of income (and in particular, the egalitarian one) is Pareto-

18. The discussion here will be confined to the case where the parties in the original position know that they all will be contemporaries. The intergenerational problem presents special conceptual difficulties which have yet to be solved. It should be pointed out that the very important problem of the choice of principles regulating inherited wealth (bequests) is therefore not covered by the present analysis. Voluntary "contemporary gifts," however, are included.

The specific setting of the original position that we have in mind here is considered in Pazner & Schmeidler, *Social Contract Theory and Ordinal Distributive Equity*, 5 J. PUB. ECON. 261 (1976). Specifically, imagine n people who have to agree on a distribution of economic resources. The suggested distributions are not named, in the sense that all that the individuals know is the distribution of commodities, but not what any particular individual will obtain under it. While, following Rawls, it is also assumed that the individuals do not know their utility functions, the first feature of "ignorance" turns out to be the crucial one.

19. R. NOZICK, *supra* note 3, at 199-200; Nozick, *supra* note 3, at 96. See A. LERNER, *THE ECONOMICS OF CONTROL* 30 (1944); Samuelson, *A. P. Lerner at Sixty*, 87 REV. ECON. STUD. 169 (1964); Vickrey, *Measuring Marginal Utility by Reactions to Risk*, 13 ECONOMETRICA 319 (1945).

optimal.²⁰ It is impossible to reshuffle income among the n people and make somebody better off without making anybody worse off. This is because if more income is given to any individual, increasing his utility, this incremental income must be taken away from some other individual(s), decreasing his (their) utility(ies), since the aggregate income is assumed to be fixed. There is no room for any further "procedural" step agreement among the parties. The "end-state" egalitarian distribution of income is final, substantiating the earlier quotes from Nozick.²¹

Suppose now that the "manna from heaven" consists of a "basket" of commodities, for example, bread, butter, apples, and other goods, and that the aggregate amount of each item is fixed. The unanimous agreement in the original position will accordingly assign to each person the egalitarian basket of commodities—each person getting a fraction of one n th of the total amount of each commodity.²² Thus, Nozick's result seems to apply again. However, there is one important difference in the two cases. While the egalitarian distribution was necessarily Pareto-optimal in the previous case, it generally will not be so in the present case. For, even though this is a "manna from heaven" situation in the sense that the aggregate amount of each commodity is fixed, the society is still what economists call "utility productive," even though it is not "commodity productive." There are so-called "gains from trade" to be reaped by voluntary or involuntary reshuffling of commodities between individuals, if the preferences of individuals for commodities differ enough.

To exemplify this argument, assume that you and I each have two apples and two pears, and that I prefer (in a sense that can be precise) apples to pears and you prefer pears to apples. We both can be made better off utility-wise by transferring some or all of your apples to me in exchange for some or all of my pears. But if both of us can be made better off (with a fixed aggregate amount of apples and pears) by "trading" away from the egalitarian distribution, this distribution is not likely to be stable. And if we follow Rawls' postulate that the parties in the original position have general knowledge of social theory,²³ then these individuals will not fail to note that the egalitarian distribution of resources will not be stable in the multicommodity case.

20. An allocation (distribution) is said to be Pareto-optimal (Pareto-efficient) if and only if there is no way to make some individual(s) better off without making some other individual(s) worse off.

21. See text & notes 15-16 *supra*.

22. See Pazner & Schmeidler, *supra* note 18, at 261-68.

23. "It is to be taken for granted, however, that they (the parties) know the general facts about human society. They understand political affairs and the principles of economic theory . . ." J. RAWLS, *supra* note 1, at 137.

It follows that the agreement on the egalitarian distribution of resources cannot be final. The parties will not sign the social contract (and, consequently, the veil of ignorance will not be lifted) so long as they have not somehow decided, via unanimous consent, what kind of recontracting out of the egalitarian initial endowments is admissible.

At this stage a number of possible unanimously agreed upon "compromises" suggest themselves. Lest the multiplicity of possible ways out of this problem suggested below be misunderstood as "leaving things up in the air" from the viewpoint of a theory of justice, we again turn to Rawls:

The problem of the choice of principles (of justice) however, is extremely difficult. I do not expect the answer I shall suggest to be convincing to everyone. It is, therefore, worth noting from the outset that justice as fairness, like other contract views, consists of two parts: (1) an interpretation of the initial situation and of the problem of choice there, and (2) a set of principles which, it is argued, would be agreed to. One may accept the first part of the theory (or some variant thereof), but not the other, and conversely.²⁴

Since the main purpose of this Article is to illustrate that entitlement theories are consistent with the idea of the original position, it would suffice to present and analyze one reasonable entitlement principle of justice adopted in the original position in order to substantiate this contention. However, because I also happen to believe it impossible to advance a unique set of principles of justice and "prove" that it would be the one adopted in the original position, it seems a good idea to illustrate this basic intuition in a concrete manner.

Turning to plausible principles (from the viewpoint of the original position) consistent with both the initial egalitarian agreement and the Pareto-optimality criterion, consider the following:

(i) An egalitarian distribution of initial endowments is agreed upon; everyone is assigned and entitled to an egalitarian bundle.

(ii) Any voluntary recontracting ("trade") by the parties out of the egalitarian distribution is acceptable.

In Nozick's terminology, (i) defines a principle of just acquisition, and (ii) defines a principle of just transfer. In other words, an entitlement theory of justice emerges from the agreement in the original position, provided no good reason can be found against (i) and (ii). I therefore shall briefly state the reasons I have to believe that (i) and

24. *Id.* at 15.

(ii) are a possible contract solution to the problem in the original position.

Since individuals do not know who and what they are in the original position, the only contract in which each can be sure of what he gets is the egalitarian one, since it gives the same to everybody. Therefore (i) is a reasonable candidate, provided individuals in the original position are not gamblers. Regarding (ii), observe that the parties are assumed to realize that potential "gains from trade" are likely to arise upon removal of the "veil of ignorance," after every individual has been assigned a specific bundle and a well-defined utility function. Hence, one should not expect them to preclude this possibility by signing a contract ruling out such beneficial gains. As a consequence, there seems to be no good reason for excluding the contract characterized by (i) and (ii). But if so, one must then conclude that, contrary to Nozick, entitlement theories of justice are consistent with the original position.

It should be noted here that whether or not the above contract is consistent with Rawls' difference principle is essentially a matter of interpretation. For, since according to (i) every individual will initially be assigned an equal bundle of resources, it is impossible at this stage to identify the least well-off member of society; everyone is both the least well-off and the best-off member of society, since all have equal endowments. In this sense, principle (i) has a built-in maximin property.²⁵ Also, given that, by (ii), trade may benefit every member of the society, if and only if voluntary departures from the egalitarian endowment are undertaken, no one can find himself in the post recontracting situation worse off than he was with the egalitarian bundle. Thus, (i) and (ii) together guarantee a minimum consumption (welfare) level to every member of the society. On the other hand, the final outcome need not be Pareto-optimal, since voluntary trades, in small societies for instance, can be "imperfectly competitive" and, thus, not conducive to economic efficiency (Pareto-optimality). But then the final outcome cannot be of the pure maximin variety, since maximin in this kind of problem implies Pareto-optimality. In terms of initial endowments there is maximin, but in terms of final (posttrade) allocations of bundles, there need not be.

Be that as it may, let us now consider the following suggested contract, which is intended to illustrate that the distinction between end-state principles of justice and entitlement theories is not always all that clear:

25. See *id.* at 152-55. The "maximin rule" directs attention to the worst that can happen under any proposed course of action. *Id.* at 154.

- (i') An egalitarian bundle is assigned to everyone as before.
- (ii') Voluntary recontracting is permitted only if it is performed under perfectly competitive conditions.

Is this an end-state theory or an entitlement one? It may be claimed that it is both. If perfectly competitive markets are assumed to arise or are instituted and enforced after the egalitarian assignment by (i'), then the final outcome (the competitive equilibrium) will lie in the core.²⁶ Thus, perfectly competitive trading ("just transfers") away from the egalitarian ("justly acquired") starting point is conducive to the end-state goal specified by "an allocation is just if and only if it belongs to the core arising from egalitarian endowments."

Although Nozick could rightly object that perfectly competitive markets need not arise voluntarily, the counterobjection that voluntary behavior will not generally be conducive to Pareto-optimality presents a strong case for some kind of agreed upon institutions designed to regulate or supplement the performance of "free" markets. Indeed, the vast economic literature on "market failure" presents many a good argument for the role of government in promoting efficiency in a private ownership economy without the need of making appeal to any kind of notion of distributive or redistributive justice. If it is agreed that the efficient provision of public goods—a "collective" economic entity which is best, but not exclusively, exemplified by "defense," which Nozick agrees should be provided by the minimal nightwatchman state—had best be the responsibility of government, then it may be understood to include the regulation of the private markets institution, since the market in itself possesses many of the features which serve to put public goods in a special economic category. In other words, if we presume that Nozick himself would accept the principle of Pareto-optimality,²⁷ then his "minimal state" would have to add to its list of duties the enforcement of this principle in the likely event of "imperfect" behavior under unrestricted voluntary trading.

CONCLUSION

Numerous other examples of principles consistent with the notion of their being adopted in the original position could be suggested.²⁸

26. An allocation is said to be in the core if, and only if, given the initial endowments of the individuals, there exists no group ("coalition") of individuals that can, by reshuffling the initial endowments of its members among themselves, secure for each of its members a bundle that is preferred to the one he gets under the allocation; an allocation in the core is, in particular, Pareto-optimal. Thus, if an allocation in the core is reached, social stability in a sense prevails.

27. See R. NOZICK, *supra* note 3, at 164-65; Nozick, *supra* note 3, at 60 n.10.

28. For alternative possible approaches to the definition of equal initial endowments in a world in which production is possible and individuals have different (innate or ac-

What they all would have in common is a specification of fair initial conditions ("fair equality of opportunity"); a property which can always be interpreted as defining a principle of acquisition. Whatever else is specified, one would expect that the full set of "entitlement" principles can be related to so-called "solution concepts" of modern bargaining theory, concepts about which reasonable people can honestly disagree in terms of either or both their normative or descriptive significance (in the sense of their being a "fair" or realistic outcome of the given bargaining situation). Such solution concepts will include Rawls' maximin principle, for instance, but would also include others.

What all these proposed solution concepts would have in common, however, is their specification of a "fair" starting point of the bargaining problem, the "status quo" situation of game theory. It is in the determination of this fair starting position that I see the major role and justification for the concept of the original position. And whether or not the "complete agreement" is consistent with the entitlement view, or for this matter with the full Rawlsian scheme, seems to me to be of secondary importance. It is important to note, however, that the entitlement view is consistent with the notion of the original position, so that even if it can be justified on other grounds, it does not conflict with this basic notion.

The central contribution of Rawls, and one that I would expect to be of lasting value, is in the notion that in the original position any agreement (if such is reached) will be "fair" due to the very nature of the symmetric situation in which the parties are being placed prior to deliberation. As is to be expected, due to the usual indeterminacies of n person game theory, a precise solution is difficult, perhaps impossible, to advance. Rawls' difference principle itself should be considered as one out of many reasonable or plausible solutions to the bargaining problem in the original position. But what the Rawlsian construct does always ensure is that the question of distributive shares is being dealt with as a matter of pure procedural justice.²⁹ Since Nozick's basic methodology is also that of pure procedural justice, the fact that his analysis can be assigned a Rawlsian interpretation is, after all, not all that surprising.

quired) productive skills and abilities, see Pazner, *Recent Thinking on Economic Justice*, 2 J. OF PEACE SCI. 143 (1976).

29. See J. RAWLS, *supra* note 1, at 83-90, for an enlightening discussion of alternative concepts of procedural justice. Pure procedural justice refers to an approach similar to Nozick's, where there is no independent criterion for a just result, but rather there is a just procedure whose outcomes are by definition deemed just.