

NOZICK'S ANARCHY, STATE, AND UTOPIA

I. State of Nature Theory

A. Two Purposes:

1. *Normative* (p. 5): Compare the (minimal) state with a reasonably optimistic picture of anarchy (state of nature). If the state is preferable, then there is an argument in its favor. (Of course, we must compare all facets, including the violation of rights. Since Nozick, is a side constraint theorist, he must argue that the minimal state not only is morally preferable overall, but that *it does not violate anyone's rights* [except, possibly, to avoid "catastrophic moral horror"]. Furthermore, to justify creating a state, he must show the *process of creating* the state doesn't violate anyone's rights [again, except, possibly, to avoid "catastrophic moral horror"].)
2. *Explanatory*:
 - a) There are two sorts of explanations Nozick considers:
 - (1) *Causal*: Why some political order or other (a state-like entity) would *inevitably* arise out of anarchy.
 - (2) *Conceptual*: Describe the political situation completely in terms of the non-political. (This is the reductionist project of Thomas Hobbes and John Austin.)
 - b) Nozick will undertake only a causal explanation. Nozick does not argue that the explanation of the state that he gives is the correct causal explanation of the state. It is, he admits a *defective* explanation of the state.
 - c) *Types of "defective" causal explanations*: If we think of explanations along the simple (deductive-nomological) model, they consist of a statement of the initial conditions of a system, and a statement of the laws governing changes in the system. These two are sufficient to "deduce" the statement concerning the situation to be explained.
 - (1) *Fact Defective*: These explanations have false initial conditions.
 - (2) *Law Defective*: These explanations have false law-like statements.
 - (3) *Process Defective*: These explanations "explain" the event by reference to laws that were not, in fact, involved in the production of the event to be explained. If they are neither fact defective nor law defective, they will be cases of causal pre-emption. For example, if a person falls head-first off a ten-story building, statements about this together with various laws of nature may explain his death. However, if he is shot to death on the way down, this process—which *would* have produced his death otherwise—is pre-empted by the fatal gunshot wound.
 - d) Questions for Nozick:
 - (1) In what sense does a defective explanation explain?
 - (2) In what sense is a defective explanation of p an explanation of p?

- e) *Possible Response:* While defective explanations are not in any sense correct explanations of what they purport to explain, they may tell us important things about a “realm” if they are “fundamental explanations”.
- (1) *Example:* Consider an explanation for the diversity of the species in terms of random mutation and natural selection. Suppose that it is neither fact defective nor law defective, but it is process defective. That is, suppose that actual speciation is not the result of random mutation and natural selection but of intelligent interference in the evolutionary process. While the defective explanation doesn’t tell us what caused speciation, it does tell us something important about the biological realm.
- (a) *Comment:* If this analogy is accurate, then Nozick’s process defective and fact defective explanation may explain something about the political realm (and, in particular, the state) but it would not explain the existence or nature of any actual state.
- f) *Another Question for Nozick:* Why are we concerned here with explanation at all? Nozick’s project is neither an historical one nor a sociological one. Nozick is trying to *justify* a moral conclusion: “The minimal state is morally legitimate.”
- (1) Suggestion (hinted at on page 3): Nozick is arguing that the state of nature (anarchy) is unstable.
- (a) Notice that a process defective explanation is appropriate to show this. (Think about the speciation example again. If the intelligent interference had not produced speciation, then the natural process described in the process defective explanation *would* have. Thus, the non-speciated situation is unstable.)
- (b) Nozick is not trying to describe how the state did develop, but neither is he merely trying to show how it *could* have developed. He is trying to argue that: *if the state had not developed in a way that violated rights, it would have developed in a way that violated no rights—the way Nozick describes.*
- (2) It may seem, then, that Nozick seeks to argue that the state is justified in the sense that there can be no justification for dismantling the state beyond the point where it necessarily violates rights. Anarchy is not justified as an end state—it is a fool’s dream. Anarchy can be maintained only by constant interference with people’s rights to engage in permissible actions that will have the result of producing a state.

II. *Nozick’s Explanation of the State:* Nozick claims to give an explanation of the state that is *merely* process defective. (I will argue that it is also fact defective and, quite possibly, law defective.)

A. Invisible Hand Explanations (p. 18)

B. The Invisible Hand Explanation for the State:

1. *Protective Associations*: People band together into mutual aid organizations to protect their rights more effectively.
2. *Protective Agencies*: Mutual aid organizations develop into protective agencies because of the efficiencies of specialization and for other reasons.
3. *Dominant Protective Agencies*: It will develop, through an invisible hand process, that there will be dominant protective agency in each geographical area. Nozick argues for the natural development of local monopolies with respect to protective services. This raised a difficulty for a free-market theorist like Nozick because he is committed to the view that, typically, free markets do not produce monopolies. He has to tell us “what is special” about protective agencies.

a) *The Argument for Monopoly*:

- (1) Consider an area where there are two protective agencies: Atlas and Brutus. There are three possible outcomes when the claimed rights of their clients conflict:

- (a) *Atlas beats Brutus most of the time (or vice versa)*. In this case, Brutus will lose customers to Atlas (or vice versa) because it is advantageous to be a member of the agency that wins most of the time.
- (b) *Atlas beats Brutus in Atlas’s home territory and Brutus beats Atlas in Brutus’s home territory*. In this case, Atlas will get Brutus’s clients in Atlas’s home territory and Brutus will get Atlas’s clients in Brutus’s home territory.
- (c) *Atlas and Brutus are about tied*. In this case, it is in Atlas’s and Brutus’s interest to accept some sort of binding arbitration of their differences which will result in them function like a single protective agency.

- (2) Reasons for Development of Monopoly:

- (a) Worth of the product is *relative* to competing products.
- (b) Maximal competing services cannot co-exist. This is because they will not only compete but will be drawn into open battle.
- (b) There is declining value of less than maximal service. (This seems to be merely an expansion on point (a) above.)
 - (i) This is not clearly true. If the weaker agency is cheaper and if inter-agency conflicts are rare, then the downward spiral in the value of the less than maximal service may be stopped.

- (3) We won’t evaluate Nozick’s argument but it is worth saying that his arguments, while suggestive, are far from conclusive. What we need is a rigorous analysis in terms of a psychologically sensitive game theory. *Notice that if Nozick’s argument is defective, then his explanation of the development of the state is not only process defective, but law defective.*

b) Why the Dominant Protective Agency is Not a State:

(1) It allows independents to protect themselves. Therefore, it doesn't claim a monopoly on the (determination of the) use of coercive force. While Nozick raises problems with this as a defining element of a state (p. 23), he accepts a version of it (p. 23, also). Though he raises problems even with this formulation, he "glides over" these problems.

(2) It does not protect all individuals within its borders.

4. Dominant Protective Agencies, Ultraminimal States and Minimal States

a) Dominant Protective Agencies:

(1) claim no monopoly on the (determination of) use of coercion, and

(2) protect only paying clients (except for spillover effects).

b) Ultraminimal States:

(1) claim a monopoly on the (determination of) use of coercion, and

(2) protect only paying clients (except for spillover effects).

c) Minimal States:

(1) claim a monopoly on the (determination of) use of coercion, and

(2) protect all within their territory.

	Dominant Protective Agency	Ultraminimal State	Minimal State
Claims a monopoly on determination of the use of coercion	✗	✓	✓
Protects everyone in its "territory"	✗	✗	✓

5. Summary overview of the "process defective" explanation of the move from individualist anarchy to the minimal state.

a) Individualist Anarchy → Dominant Protective Agency (DPA)

(1) invisible hand explanation (as detailed above)

(2) no rights violated.

b) DPA → Ultraminimal State

(1) invisible hand explanation

(2) rights violated if the state is *merely* an ultraminimal state.

c) Ultraminimal State → Minimal State

- (1) moral obligation to compensate independents
 - (2) no violation of rights.
6. From the Dominant Protective Agency to the Minimal State
- a) *Motivation for Monopoly*: Nozick argues that, in order to protect its clients adequately, the DPA would prohibit the use of force by independents until they had satisfied the agency that their use was justified. This constitutes a claimed monopoly on the use of force in the sense defined on p. 23.
 - b) *Restricting Independents Without Violating their Rights*: Nozick must argue not only that the state-creating process he identifies would take place, producing a state if one weren't produced by any other mechanism, but that it doesn't involve the violation of rights. He does this by appeal to the following considerations:
 - (1) *Boundary Crossings*: Nozick introduces the concept of a moral "boundary crossing". While he isn't very clear on the concept of a moral boundary (resorting to metaphors about "hyper-planes"), it seems clear that he can't, as Locke does, treat this moral boundary as being defined simply by one's rights. That is, he can't just mean that a boundary crossing *is* a rights violation. This is because Nozick wants rights to express the inviolability of individuals and he wants in this section to show how boundary crossings can be justified (without an individual's consent). If we understand boundary crossings to be rights violations, this hardly expresses the "inviolability of persons". I think it is useful to think of moral boundary crossings as actions that would be rights violations provided compensation were not paid. Then, the subsequent sections discussing why ever prohibit boundary crossings and why not always prohibit boundary crossings are attempts to say why we sometimes see, and should see, (nonconsensual) boundary crossings as rights violations regardless of the payment of compensation and sometimes see, and should see, them as not being rights violations provided compensation is paid.
 - (2) Prohibition and Compensation:
 - (a) *Prohibition*: One prohibits a boundary crossing when one imposes a penalty (cost) on the trespasser in addition to what might be necessary to compensate the victim.
 - (b) *Compensation*: One is fully compensated for a loss if, and only if, one is made no worse off than one would have been had the loss not been sustained.
 - (c) There are many difficulties here—ones which Nozick "shamelessly ignores".
 - (3) Why prohibit any boundary crossings provided compensation is paid?
 - (a) *"Necessity" of Prohibitions*: Nozick claims that the question is too broad since it is obvious that one *must* prohibit some actions—at least the joint action of crossing a boundary and *not* paying compensation.

- (i) *Criticism*: This doesn't seem to be true given his account of prohibition. No penalty need be extracted over and above that required for compensation even if a moral trespasser fails to pay compensation. The forcible extraction of compensation will have its own costs, and these may be extracted from the trespasser as compensation. Thus, there will be greater costs imposed on a trespasser who does not identify himself than on one who does in order to compensate for the costs of identification and extraction.
 - (b) *Deterrence*: Still, as Nozick points out, it might be wise to prohibit the joint act of crossing a boundary and not paying compensation.
 - (c) *Dividing the Benefits of Exchange*: Requiring merely full compensation gives all the benefits of exchange to the "buyer" (the boundary crosser).
 - (d) *Fear and Prohibition*: Some boundary crossings cause fear in potential victims. Merely requiring compensation for actual victims leaves those victimized only by the *fear* of violation uncompensated.
 - (i) *Objection #1*: If people knew that they would be fully compensated for any injury, why would they feel fear?
 - (a) *Nozick's Reply*: Fear is a "local" emotion, focusing on the negative aspects regardless of the "global" balancing that might take place.
 - (ii) *Objection #2*: How does this show that some actions must be prohibited. If a person is able and willing to compensate *all* victims of his activities (including those merely caused fear), then this gives no reason to prohibit.
- (4) Why not prohibit all boundary crossings?
- (a) *Irrelevance of the Question*: Though Nozick apparently doesn't realize it, he has thrown up a smoke screen here. The issue he needs to address doesn't have to do with why we shouldn't prohibit all boundary crossings. It is with whether some boundary crossings are permissible and non-rights-violating (given that compensation is paid). Remember the role this plays in Nozick's overall argument. He wants to show that the state would develop by a process that violates no one's rights (if it didn't develop by a rights-violating process). Prohibition is irrelevant to this question.
 - (i) Suppose the real issue were why we shouldn't prohibit, in his sense, all boundary crossings. The answer would be easy. Because we have no obligation to impose a penalty in excess of compensation for all boundary crossings and it is sometimes in our interest not to do so.
 - (b) *Risk and Insecurity*: "The penalization of all impingements not consented to, including accidental ones and those done unintentionally, would incorporate large amounts of risk and insecurity into people's lives" (p. 71).
 - (c) *Efficiency*: Sometimes it is too difficult (or even impossible as a practical matter) to get consent to what would otherwise be a boundary crossing.

(You may even be in a position of knowing that you *would* get consent if you could only ask the person.)

- (d) *Justifiable Boundary Crossings*: A boundary crossing will be justifiable *only if* (N.B., this gives only necessary conditions, not necessary and sufficient ones.):
 - (i) compensation is paid;
 - (ii) prior consent is impossible or difficult to negotiate (not because people are unwilling to consent); and,
 - (iii) the act doesn't cause *general fear*.
- (e) Criticisms:
 - (i) *The Nozickean Categorical Imperative*: Kant says that we are never to use others as a mere means. Nozick's version seems to be, "Never use others as a mere means unless it is difficult or costly to avoid doing so and by doing so you don't cause general fear or leave them worse off than they would be had you not done so." Though *rights* may function as moral side-constraints, if we understand these as uncompensated boundary crossings, our *moral boundaries* certainly do not protect the inviolability of the individual.
 - (ii) *General Fear*: Nozick's argument concerning general fear can, in principle, apply to *any* boundary crossing. It depends on a contingent fact about what people fear.
 - (iii) *Closet Liberalism*: Nozick's final argument (p. 73) appears to be the standard appeal of liberals (for example, social contractarians like Rawls) that everyone can expect to benefit from a system allowing everyone to intentionally cross boundaries provided compensation is paid.
- (5) *Risks of Boundary Crossings*: Nozick is going to argue that we may perform an action that we know will cross a boundary to reduce the *risk* of others crossing the boundary.
 - (a) *Prohibiting Risky Activities*: Nozick argues that activities that present a significant risk of crossing boundaries may be prohibited provided compensation is paid to the person whose boundaries are crossed by the prohibition.
 - (i) Nozick's Epileptic Example.
 - (ii) Hubin's Warped Example of the Afternoon Archer.
 - (b) *Criticism: Ambiguity in the "Risk Requirement"*. It is unclear whether Nozick intends to justify the claim that one may justifiably prohibit activities that are genuinely risky, those that are reasonably believed to be risky, or those that are genuinely (though perhaps not reasonably) believed to be risky. The examples are cases in which all three claims are true. One might plausibly argue that even if it is permissible for us to prohibit actions

that actually impose an unreasonable risk to us, providing compensation is paid, it is not permissible for us to prohibit actions that we believe are risky if, in fact, they are not and there is no good evidence to believe that they are.

- c) *The Immaculate Conception of the State*: DPA's would prohibit (or oversee) rights-protecting activities by independents (claim a monopoly on the use of coercion) and this is morally permissible (and violates no one's rights) provided compensation is paid.

(2) Assumptions and Objections:

- (a) The DPA *would* compensate independents with protection. (We are here setting aside the question of whether the DPA would compensate the independents *at all*. The issue here, is, if it did so, would it do so with protection?)
- (i) One might argue this is the only way the DPA can compensate independents for denying them the right to protect themselves. The idea might be that individuals cannot be compensated for the loss of their right to protect themselves unless they are protected. One might appeal to Mill's point about the value of security (*Utilitarianism*, chap. 5).
- (a) This is not a very "libertarian" thought, though. Libertarians, and certainly Nozick, tend to hold a philosophical variant of what economists call 'consumer sovereignty'. The idea is that what is valuable to the individual is just what the individual values (perhaps in a calm and well-informed moment). If someone doesn't value security so much, but does value engaging in self-protection, then it may be possible for the DPA to pay a cash settlement to the independent instead of providing protection. (As we'll see below, it may be necessary for a DPA to provide a cash settlement *in addition* to providing protection, too.)
- (b) Independent activity satisfies the disambiguated "risk requirement". If the requirement is understood to be concerned with objective risk, then he must argue that the activity of independents is objectively risky (and, presumably, riskier than that of the DPA). Nozick doesn't even try to argue this. Rather, he argues that the DPA would be likely to *deem* independent activity to be risky. This suggests that the standard is a completely subjective one. But that standard is harder to justify than is an objective one.
- (i) It isn't even clear that the DPA would deem individual protective activities risky. It may be that a given individual employs a method for determining guilt and the appropriate level of guilt that the DPA views as more reliable than its own.
- (c) The boundary crossings the DPA commits in prohibiting actions that risk boundary crossings are compensable.
- (i) *Locke's Point*: As a result of Locke's consideration (see Nozick's footnote #1, p. 341), people may fear the creation of the state.

Therefore, the compensation required may be more than just providing protection.

- (ii) *Philosophical Anarchists*: If the induction into the state violates a person's most deeply held philosophical commitments, then it is arguable that such a boundary crossing is not compensable.
- (iii) *Amount of Compensation*: Nozick proposes mere "full compensation" on p. 111. However, this runs afoul of the argument he has given about dividing the benefits of exchange.
- (d) The DPA's boundary crossings are compensable by providing free or reduced-rate protection.
- (e) *Closet Liberalism (Again)*: On p. 95, Nozick criticizes those who appeal to a principle of fairness on the grounds that "One cannot, whatever one's purposes, just act so as to give people benefits and then demand (or seize) payment". Doesn't Nozick's theory allow "seizing payment (in the form of depriving people of their right to protect themselves) and then giving people benefits (in the form of protection)"?

7. Review and Criticism of Nozick's Refutation of Anarchism

a) Justification and Hypothetical Processes

- (1) *Hypothetical Process Arguments*: Nozick seems to attempt to justify the state by an appeal to a hypothetical process (a non-rights-violating, state-forming process that would have taken place if not preempted by some rights-violating, state-forming process). It is initially puzzling what moral force such an argument should have. In particular, it is unclear what moral force Nozick can grant such an argument.
 - (a) *Nozick on Hypothetical Process Arguments and the Justification of the Distribution of Wealth*: Nozick says "[t]hat from a just situation a situation *could* have arisen via justice-preserving means does *not* suffice to show its justice. The fact that a thief's victims *could* have presented him with gifts does not entitle the thief to his ill-gotten gains. Justice in holdings is historical; it depends on what actually has happened" (p. 151-2).
 - (i) Nozick here requires that the justification of a distribution of wealth depends on what *actually* happened—not just what *could* or *would* have happened. (He doesn't explicitly consider the justice of a distribution that *would* have resulted via justice-preserving procedures from an initially just situation, but his final, positive assertion about his theory of justice denies "would-have" justifications as much as "could-have" justifications.)
 - (ii) This means that unless Nozick can show a relevant dissimilarity, there appears to be a methodological inconsistency between Part I of the book and Part II. To be consistent with Part II, he should say that you cannot justify a state by showing that it could *or would* result from a

just situation via justice-preserving procedures. The justification should be *historical*—depending on what *actually* happened.

- (b) *Avoiding the Inconsistency*: I have interpreted Nozick so as to avoid this inconsistency. I have interpreted him as attempting to refute the “end-state” anarchist by showing that his end-state is unstable—that it cannot be maintained in a morally acceptable way. However, there is a cost to this interpretation.
- (2) *The Refutation of Anarchism without the Justification of a State*: If I am right, then Nozick has refuted a certain sort of anarchist, without justifying *any* state. This is because the justification of a state requires an actual historical process that is justifiable. Thus, Nozick’s critic should say that, if Nozick is correct, then we should expect a justified state to develop from a situation of anarchy, but that doesn’t justify any actual state. No state has legitimacy because no state *has* developed in the way Nozick suggests.
- (a) We cannot achieve a justified state by simply dismantling current states to be minimal states.
 - (i) This would not satisfy an actual historical theory of justification.
 - (ii) There would be no way to determine which justified minimal state would result from the procedure Nozick describes. (In brief, the problem is which protective agency would become dominant and who would remain independents before the creation of the minimal state.)
- b) *Nozick’s Argument Fails Even to Show the Instability of “End-Result Anarchism”*: It appears that the “explanation” Nozick gives in Part I is not only process defective but also fact and (arguably) law defective.
- (1) *Defects of Fact*: Nozick admits that his description of the individualist state of nature is optimistic. He thinks this grants more than he must to his anarchist opponent.
- (a) This is true if one considers only the direct normative purpose of state of nature theory: to compare anarchy with the state. For this purpose, if you grant the anarchist a rosy conception of anarchy and show that the state is preferable to this, your argument is only strengthened by your optimistic assumption.
 - (b) However, for the purpose of showing that anarchy is unstable, the assumption of unrealistically optimistic conditions of anarchy may undermine the argument. It is possible, for example, for people in Nozick’s optimistic anarchy to cooperate in producing protective associations and agencies but not for real people deprived of a state to do so if Nozick’s assumptions really are contrary to fact.
 - (c) Fact-defective explanations for how a system would develop from one state to another do *not* show the instability of the first state of the system.

- (2) *Defects of Law*: There are several respects in which Nozick's explanation might be law defective. If it is defective with respect to any of these, it will fail to serve his purposes.
- (a) *Monopoly of Protective Services*: Nozick's argument depends on a sketchily defended claim that there would develop local monopolies with respect to protective services. This claim needs to be developed.
 - (b) *Moral Motivation of DPA*: Nozick assumes that the DPA would handle the perceive a problem with independents and would handle this problem by prohibiting independent activity and extending protection to all within its territory. If this is wrong, then the state may never develop. We may stay at the stage of a DPA or an ultra-minimal state.
- (3) *Consequences for Nozick's Argument*: While explanations that are *merely* "process defective" may tell us something very important about "a realm," explanations that are, in addition, "fact defective" (in the sense of getting the initial conditions wrong) and "law defective" are just fables.

III. Nozick's Rejection of the "More than Minimal State"

A. *Distributive Justice and the Role of the State*: Nozick considers only one argument for the more than minimal state—the argument from distributive justice. Some have argued that it is a proper function of the state to ensure distributive justice and that this requires a redistribution of wealth. On the contrary, Nozick claims, while the state's role as a protector of rights includes protecting people's property rights, the state has no legitimate role to play in the redistribution of wealth.

B. Justice in Holdings:

1. A Typology of Theories

a) Historical v. Nonhistorical Principles

- (1) *Historical Principles*: Nozick describes historical principles as those that hold "that past circumstances or actions of people can create differential entitlements or differential deserts to things" (*Anarchy, State and Utopia*, p. 155). This is too weak. Even utilitarianism, a paradigm of a nonhistorical theory, will hold that past circumstances or actions of people *can* create differential entitlements. Nozick must mean that historical theories hold that these things, in and of themselves, constitute a *prima facie* justification of differential holdings. An extreme form of an historical principle would hold that only such historical considerations can count in determining the justification of holdings.
- (2) *Nonhistorical Principles*: [NOTE: For convenience, Nozick uses the terms 'end-result principle' and 'end-state principle' to refer both to current time slice principles and end-result (end-state) principles in the stricter sense defined below.]
- (a) *Current Time Slice Principles (CTS Principles)*: CTS principles determine the justification of holdings by "how things are distributed . . . as judged by

some structural principle(s) of just distribution” (*ASU*, p. 153). An example would be a principle that held that distributions are just if, and only if, they give equal shares to each person. Call such a view, ‘momentary egalitarianism’.

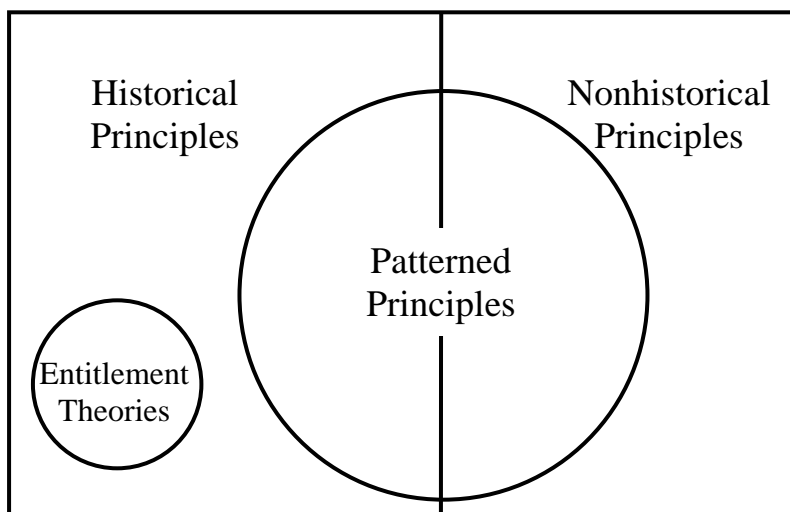
- (b) *End-Result Principles (End-State Principles)*: Current time slice principles are not very popular. However, many hold that distributions are to be justified by structural principles of just distribution applied *in the long run*. Nozick calls these principles end-result (or end-state) principles. Typically, egalitarianism is understood not as a current time slice principle but as an end-result principle—holding that distributions are justified to the degree that they promote equality.

(It is odd to construe utilitarianism, which is a paradigm of an end-result principle to hold that distributions are justified by *structural* principles—since the structure of a distribution is of no intrinsic importance to the utilitarian.)

b) Patterned v. Unpatterned Principles

- (1) *Patterned Principles*: A patterned principle of justice calls for distributive shares to be in proportion to some “natural dimension, weighted sum of natural dimensions, or lexicographical ordering of natural dimensions” of individuals. For example, a principle that justified distributive shares based a person’s intelligence, effort, need, productivity, etc. would be a patterned principle.
- (2) *Unpatterned Principles*: Unpatterned principles do not call for distribution in accordance with some natural dimension, etc. of individuals. Utilitarianism is an unpatterned principle; so is an entitlement theory (see below).

c) A Pictorial Representation:



- d) The above distinctions are independent, giving the following four categories:

	Patterned	Unpatterned
Historical Theories	e.g. Meritocracy	e.g. Entitlement
End-Result (includes Current Time-Slice)	e.g. Egalitarianism	e.g. Utilitarianism & Rawlsianism

e) An Improved Classificatory Schema:

- (1) It may be cleaner to replace Nozick's distinction between historical principles and non-historical principles with one between purely procedural principles versus other principles. While meritocracy is an historical principle by Nozick's definition it is also an end-result principle (or a current time-slice principle). It is historical only because the natural dimension of persons (or weighted sum of such dimensions) on which the justice of a distribution is based is intrinsically historical in nature. The theory is not a pure procedural theory of justice. (See Rawls, *A Theory of Justice*, p. 74ff r.e., for a discussion of pure v. impure v. perfect procedural justice.)

2. The Entitlement Theory of Justice in Holdings

- a) *General Characterization:* Entitlement theories of justice in holdings are unpatterned, historical principles of justice. Indeed, they are the extreme form of historical principles according to which *only* historical facts are intrinsically relevant to the justice of a distribution.
- b) *The Recursive Account of Entitlement Theories:* As ideal theories of justice, entitlement theories can be defined recursively as follows. (An ideal theory of justice is a theory of what justice would require provided no one acted unjustly. Thus, an ideal theory of justice won't include a theory of punishment, because it assumes there will be no injustices for which to punish.)
- (1) *Basis:* Just Acquisition. Holdings are just if they are acquired in accordance with a correct principle of justice in acquisition.
- (2) *Recursion:* Just Transfer. Holdings are just if they are acquired in accordance with a correct principle of justice in transfer from someone who held them justly.
- (3) *Limit:* Closure. No holdings are just unless justified under 1 and 2, above.
- c) The Non-ideal Entitlement Theory:
- (1) *Rectification:* Holdings are just if they are acquired in accordance with a correct principle of justice in rectification.
- (a) The problem of how to rectify past injustices is a hard problem for any theory. Nozick mentions many of the standard problems that arise for a theory of justice in rectification (p. 152). As we'll see, though, he doesn't even begin to realize how serious the problem of rectification is for *his* theory, in particular. There are features of Nozick's entitlement theory that, I believe, render the problem insoluble.

- b) *The Content of the Entitlement Schema:* While the above schema of a theory of justice in holdings may seem vacuous so long as the various principles are not specified, Nozick believes that even this skeletal schema is substantive enough that, if it can be defended, it would rule out many popular theories of distributive justice. In particular, he thinks it is incompatible with utilitarianism, Rawlsianism egalitarianism, *etc.*
- (1) *Hints of Flesh on the Bones:* While Nozick does not develop a “fleshed out” entitlement theory, he hints at some lines of doing so that he finds attractive.
- (a) *Justice in Acquisition:* Though Nozick finds fault with Locke’s labor theory of acquisition, he stops short of an outright rejection of any sort of labor theory of acquisition. Whatever is the basis of the right of acquisition, it is clear that Nozick adopts a generalized version of the Lockean Proviso as an inherent (ongoing) constraint on property acquisition.
- (i) *Question:* If this proviso is really met, does it matter by what process (laboring on it, first occupying it, simply claiming it) one can come to acquire property rights in a given thing?
- (b) *Justice in Transfer:* Nozick probably adopts the standard libertarian account of just transfers: a transfer is just if it is free of force and fraud.
- (c) *Justice in Rectification:* Nozick admits (p. 153, note) that the sorts of principles of distributive justice he attacks *might* play an important role in the theory of rectification. It is hard to see how this could be true given the general conception of justice in holdings that Nozick adopts.

C. Arguing for the Schema

1. Liberty and Patterning

- a) End-Result and patterned principles are incompatible with liberty. “[N]o end-state principle or distributional patterned principle of justice can be continuously realized without continuous interference with people’s lives” (p. 163). Liberty upsets distributions that are based on patterned and end-result principles of justice. To realize such distributions, we must “forbid capitalist acts between consenting adults”.
- (1) Wilt Chamberlin Example
- (2) Taxation of earnings from labor (to maintain a distributive pattern or a distribution that will achieve some end result) is on a par with forced labor.
- (a) *Criticisms:*
- (i) The same can be said for taxation to protect rights. The charge of “forced labor,” while inflammatory, is compelling only if we think that there isn’t a legitimate state interest involved that justifies the taxation.
- (ii) *In praise of “forced labor”:* Consider the spaceship analogy used to illustrate the duty of fairplay. Wouldn’t “forced” labor be justified

there is the force involved were limited to denial of the benefits that are made possible by the cooperative scheme?

b) Rawlsian Responses:

(1) If the above were true, then Rawls' theory would result in a libertarian state. This is because the equal liberty principle is ranked lexically prior to the difference principle.

(a) This response would be an empty victory for Rawls.

(2) Rawls's theory is not a patterned principle, in Nozick's sense. Nozick's argument is not as compelling against end-result principles. This is obscured by Nozick's strategy of lumping them together to make this criticism and using the label 'patterned' to apply to both patterned principles and end-result principles. (See p. 163, where Nozick declares that "no end-state principle or distributional patterned principle of justice can be continuously realized without continuous interference with people's lives," for the indication that he means this objection to apply to both types of principles. See the bottom of p. 160 through 161 for evidence that Nozick is thinking in terms of patterned principles and does not establish the conclusion for end-result principles.)

(3) Rawls's end-result is not "fine grained." As a result, it may well not take *continuous* interference to maintain the distribution.

(4) Rawls is concerned with the right to use income and wealth—not with the maintenance of any given pattern.

c) See also G.A. Cohen's "Robert Nozick and Wilt Chamberlain: How Patterns Preserve Liberty," *Erkenntnis* 11(1977), 5-23.

D. Some Criticisms of Nozick's Entitlement Theory

1. *Existence Problem*: Nozick must show that there is a correct principle of justice in acquisition—that the class of entitlement theories is not empty. The possibility of doing this is hindered by the fact that entitlements are *very* strong. Can we really acquire such rights over external objects? Do we have such rights over even our own bodies?

a) Two Examples: Paving the Grand Canyon, The Bigoted Mutant

2. *Simplistic Moral Ontology*: The Problem of Children and (Nonhuman) Animals. Nozick's moral theory seems explicitly to recognize only things that can be owned and things that are owners. Things that can be owned have no rights and, once acquired, may be disposed of at the whim of the owner(s) provided that doesn't violate the property rights of others. Owners, have virtually absolute rights over their property. There is no satisfactory answer to the question of where children and animals fit into this schema. We have certain rights to control these entities contrary to their choices, but they are not our property in the Nozickean sense. But once we recognize that property rights are an extremely strong *bundle* of rights, we see that it is possible to have limited rights over things and to have a fiduciary relationship to those things we have a right to control. That is, we may have a right to control something provided we are putting it to good use, or exercising our control in the best interest of the thing we control, *etc.* Once this is

admitted, we realize the possibility that even our rights over inanimate external objects might be somewhat weaker than the sort of entitlements Nozick imagines. Like Locke, Nozick needs to meet Proudhon's Challenge.

3. *Problem of Rectification:* Even if it were true that Nozick's theory gives us a correct theory of ideal justice, it wouldn't tell us anything about what we should do given that an injustice has been done in the past. To do this, he needs to specify a principle of justice in rectification. But in light of some of the features of Nozick's theory, this may be impossible. Solutions to past injustices must not violate rights. (Nozick says rights may be violated only to avoid "catastrophic moral horror".) Therefore, it may be impossible to set up any program to rectify broad-scale injustices in the more remote past. Programs we could set up would surely confer benefits on some people who have not been victims of injustice and burdens on some who have not benefited from injustice. But to do nothing, would be to enforce current holdings, some of which are known to be the product of injustice. This is to violate the rights of those who are entitled to rectification. Even in the case of a localized injustice in the very recent past, there seems to be no determinate answer to what is required by justice in rectification.

E. Collective Assets

1. *Nozick's Assertion:* End-result principles and most patterned principles of distributive justice institute partial ownership by others of one's actions, talents and abilities.
 - a) *Example:* Rawls, p. 101.
2. Rawls's Apparent Justification for treating talents and abilities as collective assets.
 - a) Talents and abilities are not deserved. (They are, rather, the result of "luck on the natural lottery".)
 - b) Undeserved attributes cannot serve as the basis of a just distribution.
 - c) Therefore, talents and abilities cannot serve as the basis of a just distribution.
3. Nozick's Criticisms:
 - a) This does not show that a just distribution cannot be correlated with talents and abilities, or any other undeserved attribute.
 - b) It doesn't show that talents and abilities must be viewed as collective assets.